

TEXAS BOARD OF  
VETERINARY MEDICAL EXAMINERS,  
Petitioner

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Docket No. 578-03-1557

V.

PENNY KELSO, D.V.M.,  
Respondent

### ORDER OF THE BOARD

Came on for consideration this 29<sup>th</sup> day of April, 2004, the above-styled case.

After proper notice was given, the above-styled case was heard by an Administrative Law Judge of the State Office of Administrative Hearings, who made and filed a proposal for decision containing findings of fact and conclusions of law. The proposal for decision was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the administrative record.

The TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS, after review and due consideration of the proposal for decision, attached as Exhibit A, adopts the findings of fact and conclusions of law of the Administrative Law Judge contained in the proposal for decision and incorporates those findings of fact and conclusions of law into this Order as if such were fully set out and separately stated in this Order. Any proposed findings of fact and conclusions of law submitted by any party that are not specifically adopted in this Order are denied.

IT IS, THEREFORE, ORDERED by the TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS that License No. 8096 issued to Penny Kelso, D.V.M., be SUSPENDED for one year from the date this Order becomes final under Section 2001.144, Government Code, and that such suspension be PROBATED for the entire length of the suspension. If, during the period of probation, Penny Kelso, D.V.M., fails to fully comply with this Order, the Texas Veterinary Licensing Act and/or the Rules of the BOARD, the Board shall take immediate steps to REVOKE the probation and the her license will be suspended for the remaining period of this Order.

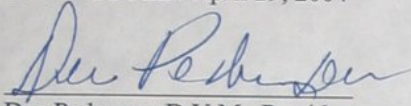
IT IS FURTHER ORDERED that Penny Kelso, D.V.M., be FORMALLY REPRIMANDED.

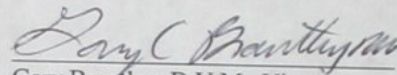
IT IS FURTHER ORDERED that Penny Kelso, D.V.M., pay, within 45 days from the date this Order becomes final under Section 2001.144, Government Code, an ADMINISTRATIVE PENALTY of Two Thousand Dollars (\$2,000), and complete nine hours of CONTINUING EDUCATION in surgical techniques and procedures to be taken within 12 calendar months of the date this Order becomes final under Section 2001.144, Government Code.

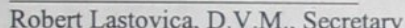
Board Order  
Penny Kelso, D.V.M.  
Page 2

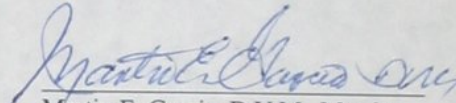
If enforcement of this Order is restrained or enjoined by an order of a court, this Order shall then become effective upon a final determination by said court or appellate court in favor of the TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS.

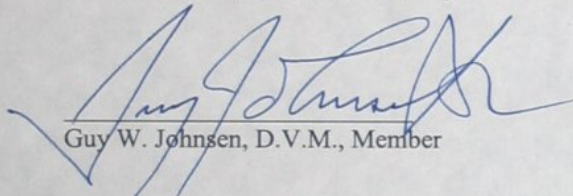
DATE ISSUED: April 29, 2004

  
Dee Pederson, D.V.M., President

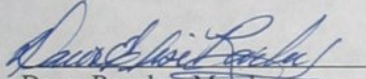
  
Gary Brantley, D.V.M., Vice-  
President

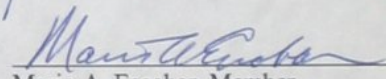
  
Robert Lastovica, D.V.M., Secretary

  
Martin E. Garcia, D.V.M., Member

  
Guy W. Johnsen, D.V.M., Member

  
J. Lynn Lawhon, D.V.M., Member

  
Dawn Reveley, Member

  
Mario A. Escobar, Member

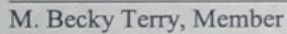
  
M. Becky Terry, Member

EXHIBIT "A"

DOCKET NO. 578-03-1557

IN THE MATTER OF	§	BEFORE THE
THE LICENSE OF	§	STATE OFFICE OF
PENNY KELSO, D.V.M.	§	ADMINISTRATIVE HEARINGS

### PROPOSAL FOR DECISION

The Staff of the Texas State Board of Veterinary Medical Examiners (Board, Staff) brought this disciplinary action against Penny Kelso, D.V.M. (Respondent), alleging that the cesarean section (C-section) she performed on a dog fell below the standard of care, in that she closed the uterus while pups remained inside the dog, necessitating another surgery to deliver the remaining puppies. The Administrative Law Judge (ALJ) finds Staff proved its case and recommends assessment of the following penalties: an administrative penalty of \$2,000; one-year suspension of her license, probated; an official reprimand; and completion of nine hours of continuing education in surgical techniques.

### I. PROCEDURAL HISTORY

On October 27, 2003, a public hearing on this matter was convened before Barbara C. Marquardt, Administrative Law Judge (ALJ), on the 4<sup>th</sup> floor of the William P. Clements Building, 300 West Fifteenth Street, Austin, Texas. Lee H. Mathews, General Counsel, represented Staff. Respondent appeared and was represented by Garry Smith, attorney. The hearing was completed that day, and the record remained open to December 15, 2003, for the filing of legal arguments.

### II. DISCUSSION

#### A. Introduction

Only the facts are in dispute in this case. The parties agreed that if, in fact, Dr. Kelso left

pups inside the dog following the C-section delivery, she violated the standard of care. The standard, which is codified in the Board's Rules of Professional Conduct, 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.<sup>1</sup>

Thus, the issue is whether Staff proved Dr. Kelso left pups inside the dog, or whether Dr. Kelso proved her theory of the case – that the veterinarians and dog owner who testified against her fabricated the allegation in a conspiracy to harm Dr. Kelso's practice. As will be explained further in the discussion of the evidence, the ALJ found Staff's witnesses were credible. Dr. Kelso and her expert witness failed to produce convincing evidence that: (1) the situation described by Staff's witnesses was impossible; and (2) the dog's owner, the veterinarian who was Dr. Kelso's former employer, and the emergency veterinarian who treated the dog four days following the C-section, fabricated the evidence in a conspiracy to harm Dr. Kelso.

#### **B. The Incident**

Ricky England owned the pit bull dog named "Pebbles," whose care is at issue in this case. Mr. England has been breeding dogs at his home (currently in Abernathy, Texas) for about 25 years. In that capacity, he has learned how to detect signs of labor in a dog. Pebbles was two years old at the time of the incident, and she had delivered one prior litter of 13 healthy pups the year before.

On or about Thursday, February 28, or Friday, March 1, 2002, Ricky England noticed that Pebbles was showing intermittent signs of labor. According to Mr. England, it is not uncommon for a dog to show those signs for a number of days before actually delivering puppies. At some point

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<sup>1</sup>22 TEX. ADMIN. CODE §573.22.

thereafter Mr. England called a local veterinarian, who was unavailable to assist with the birth.<sup>2</sup>

#### *Dr. Kelso's Involvement*

On Monday, March 4<sup>th</sup>, Mr. England observed that Pebbles had been in what he felt was active labor for five hours, but she still had not given birth to a pup. Apparently, he called and spoke to Dr. Kelso's telephone receptionist several times that day, and the receptionist told him Dr. Kelso's entire day was "booked," recommending that he telephone another veterinarian. However, Mr. England assured the receptionist he would wait for Dr. Kelso.

Dr. Kelso arrived at Mr. England's home Monday night at about 11:14 p.m. After examining Pebbles, she gave it two shots of a labor induction drug – Oxytocin. When that did not cause the uterus to contract, Dr. Kelso decided to take the dog to her surgical suite at home and perform a C-section delivery. According to Dr. Kelso, she asked Mr. England and his wife for permission to spay the dog at the end of the C-section because of the unhealthy condition of its uterus. While they agreed to the C-section, they refused to let her remove the dog's reproductive organs.

Late that night, and early into the next morning, Dr. Kelso worked on Pebbles and her pups. Dr. Kelso testified that she delivered four pups from the left uterine horn and then delivered one pup from the right uterine horn.<sup>3</sup> According to Dr. Kelso, each pup was in poor condition. In fact, she testified they were in such poor condition, "they should have all died."<sup>4</sup> While she worked on

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<sup>2</sup>The ALJ notes there was testimony that Mr. England tended not to pay his veterinary bills at various points in the hearing. He did not pay Dr. Kelso for her services, and apparently he did not pay the pet emergency clinic for its services either. It is unclear whether the veterinarian he originally called could not help because he was out-of-town, or would not help because Mr. England owed money for prior treatment. Because Mr. England's manner of paying his veterinary bills is not material to the issues in this case, allusions to that problem will not be addressed further in the proposal for decision.

<sup>3</sup>See Attachment A (an excerpt from State's Exhibit 11), which depicts a dog's reproductive organs. Dr. Kelso's seventeen-year-old daughter, Alicia Kelso, testified that she was present during the C-section, and she confirmed that her mother delivered four puppies from the left uterine horn and one from the right uterine horn.

<sup>4</sup>Transcript at 238.

Pebbles, she had her teenage daughter and son work on reviving the pups – drying them off, removing phlegm from their throats, giving them shots of Dopram in the tongue to stimulate breathing, and performing cardio pulmonary resuscitation (CPR) on them. Eventually, four of the pups seemed fine. A fifth pup's umbilical cord would not stop bleeding; thus, Dr. Kelso placed a clamp on it. Because Pebbles had not started producing milk, Dr. Kelso then fed the pups formula every two hours.

Between 8 and 9 a.m. on March 5, Dr. Kelso returned Pebbles and the five pups (one with the clamp on its umbilical cord) to Mr. England. She testified that at that time, Pebbles was bright-eyed, spunky, and paying attention to all of her puppies. Pebbles jumped out of Dr. Kelso's van upon arrival at the Englands' home, yanked the doctor, squatted to pee, ran around wagging her tail, and drank water. After telling Mr. England how to feed the pups until Pebbles began to produce milk, Dr. Kelso left.

For the next few days, Mr. England felt Pebbles was doing well. In fact, his wife sent an e-mail to Dr. Kelso at 1:15 a.m. on Friday, March 8, saying "they are doing good." Attached to the e-mail were pictures of four seemingly healthy, plump, pups. According to Mr. England, the pup with the clamped umbilical cord had died several hours after Dr. Kelso returned it to the Englands.

#### *Treatment at the Emergency Clinic*

At about 3 p.m. on March 8, Mr. England noticed that Pebbles was acting very uneasy – asking to go outside, and roaming around the house. Eventually, she went into the Englands' bedroom, where Mr. England discovered she had given birth vaginally to a sixth pup. He noticed that her incision had opened in two spots, and that a loop of her small intestine was outside the incision. He tried to telephone Dr. Kelso but could only reach her answering service. Eventually, Mr. England called the Small Animal Emergency Clinic in Lubbock, and they said to bring Pebbles to the Clinic.

Mr. England arrived at the Clinic at about 11:15 p.m. The technician on duty, Carrie Davis, had him bring Pebbles into an examining room, and they placed her on an examining table. At that point, Pebbles gave birth to a seventh pup on the table. During the birth of that puppy, Pebbles' small intestines externalized. The technician called out to the veterinarian on duty, Dr. Matias Aramburu. Together, they took Pebbles back to a surgical room.

Once in the surgery, Dr. Aramburu examined Pebbles. He palpated what he thought might be another pup in her uterus, and he found her intestines were externalized, hyperemic (congested with blood), and contaminated. Dr. Aramburu determined that the best course of action, both because of the need for speed and to reduce the chances of Pebbles developing an infection, was to do an exploratory surgery, remove the remaining pups (if any), and remove her reproductive organs (an ovariohysterectomy).

When he opened Pebbles up, Dr. Aramburu found a closed incision on the left uterine horn. Dr. Aramburu did not find evidence of an incision on the right uterine horn. However, he found and delivered two live puppies from the right uterine horn, which Ms. Davis cleaned and placed in a basket. After delivering the puppies, Dr. Aramburu removed Pebbles' reproductive organs as planned. He described the uterus as inflamed, but stated that it was not like Dr. Kelso had described it – "rotten" and "friable." After Pebbles had recovered from the surgery, she and her pups were released to the Englands. Dr. Aramburu explained that his clinic serves an emergency function only, with the goal of handling pet health care emergencies outside of normal working hours. Once the crisis has passed, they refer animals back to their regular veterinarian for next-day care.

Dr. Aramburu concluded that only two plausible reasons could have explained the fact that viable puppies were left in Pebbles' uterus after her C-section. One reason, that surgical complications required the surgery/anesthesia to be discontinued prior to completion of the procedure, is not applicable to this case – Dr. Kelso insists that she completed the C-section. The other reason, which he found did apply to this case, was that Dr. Kelso's C-section was performed at a substandard care level.

On cross examination, Dr. Aramburu was asked to explain why he had first checked the procedure "pyometra," meaning pus in the uterus, on the Englands' bill and then crossed that out and, instead, checked "miscellaneous surgery." He explained sometimes he made mistakes in billing, but he tried to catch them. Apparently, that is why he changed the bill to state "miscellaneous surgery," because he performed exploratory surgery, a C-section, and then removed Pebbles' reproductive organs. In fact, he said he checks pyometra when he only performs an ovariohysterectomy.

### C. Staff's Other Evidence

Staff called Gary Schwede, D.V.M., to testify. Dr. Schwede owns the Acres North Veterinary Hospital and the Animal Hospital of Lubbock, and he is also one of the owners of the Lubbock Small Animal Emergency Clinic, where Dr. Aramburu works. Dr. Schwede hired Dr. Kelso in January 1998, when she moved to the Lubbock area from Missouri. She worked for about six months handling emergency calls with other veterinarians at both of his hospitals, and then she resigned. Generally, Dr. Schwede testified that Dr. Kelso's separate practice has been indirectly good for his hospitals' business, in that it has caused them to see many cases for second opinions.<sup>5</sup>

In addition to Dr. Aramburu's opinion on the standard of care, Staff elicited testimony from Michael McCulloch, D.V.M., who practices small animal medicine in Odessa. Dr. McCulloch testified that the standard of care for veterinary medicine is the same in Midland/Odessa as in Lubbock, because the metroplexes are about the same size; they both have four-year universities; and their economies are very similar. Dr. McCulloch testified that he did not know Dr. Kelso, but he reviewed the paperwork concerning Pebbles' treatment.

Dr. McCulloch explained that when doing a C-section on a dog, it is important that both uterine horns be well-exposed, so that the ovaries can be seen at the ends, and that the uterine body

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<sup>5</sup>The ALJ sustained Respondent's objection, when Staff attempted to elicit evidence from Dr. Schwede about apparent limitations he placed on Dr. Kelso's practice at his hospitals, as violative of TEX. R. EVID. 404(b).

should be exposed. Additionally, the veterinarian should palpate down through the cervix to make sure there is not a puppy in the birth canal. If those standard measures are followed, there is no reason a pup would not be seen and extracted during a C-section. Therefore, he concluded that Dr. Kelso's practice was below the standard of care.

Staff also introduced a transcript from Dr. Kelso's veterinary school. It showed that she received a letter grade "D" in small animal surgery.

**D. Dr. Kelso's Case**

*Dr. Kelso*

Dr. Kelso graduated from veterinary medicine school in 1982, and she has practiced as a veterinarian in Kansas, Missouri, Nevada, and Texas.<sup>6</sup> In addition to earning continuing education credits annually, she started studying acupuncture with the International Veterinary Acupuncture Society five years ago. Dr. Kelso explained that she uses acupuncture for hip dysplasia, ruptured disks, diabetes, liver problems and epilepsy, and the results have been very good. She described her weakest area of practice as large animal work. In her opinion, surgery is one of her strengths. She explained the low grade she received in veterinary school in surgery as resulting from not taking the test well.

Dr. Kelso testified that she has had diabetes for 20 years. She has it under control and has never been hospitalized for it. She said she has good vision, and the diabetes has not interfered with her ability to do surgery properly.

For the past five years, Dr. Kelso has had a solo, mobile practice handling small animals and exotics in Lubbock. Prior to that, she practiced briefly in Amarillo and then at the Animal Hospital

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<sup>6</sup>She is still licensed in Kansas, Missouri, and Texas. She practiced in Las Vegas for over four years but has allowed her Nevada license to lapse, because she does not intend to return to that state.

of Lubbock. She testified that until the incidents surrounding this case, she had never had a complaint or lawsuit filed against her. The complaints and lawsuits started about one and one-half years ago. Dr. Kelso practiced at the south location of Dr. Schwede's veterinary business, while Dr. Schwede practiced at Acres North location. They had very little contact. Instead, she worked with Drs. Jay Jones and Laura Lynn. Dr. Kelso testified that she did not feel comfortable at Dr. Swede's business because of office politics. She was not terminated or asked to leave; instead, she quit. She implied that other veterinarians were jealous of her practice, because she charges fees that are between half or a third as much as the stationary clinics charge.

In her mobile practice, Dr. Kelso travels anywhere within a two-hour radius of Lubbock. When she started that practice, she worked alone. Now she has seven employees; she hired another vet, Dr. Horn, to work with her after the complaint in this case was filed. When animals need hospitalization and IVS, she takes them to the surgery room at her home. That is where she performs all of her surgeries, and she also does dog boarding, training, and acupuncture.

Currently, Dr. Kelso sees her first appointment at 9 a.m., and she has hourly appointments scheduled through 6 or 7 p.m. When there are add-on calls, she now has two veterinary technicians out in the field to assist her. They drop off medications and also pick up animals for boarding, surgery, or training. Except for emergency surgeries that she may handle, Dr. Horn does all of the scheduled surgeries, and Dr. Kelso spends her days doing house calls. Typically, she does not do surgery late at night, and she has more time off in the evenings than she did at the time of Pebbles' surgery. Dr. Kelso has done many C-sections in her mobile practice, because that is an emergency need that causes people to seek a mobile vet. Other types of surgeries she performs include spays, neuters, declaws, setting broken legs, and removing stones from bladders.

Dr. Kelso's testimony about the incident at issue in this case did not differ much from the description above. She emphasized the fact that on the day Mr. England called to ask her to come

see Pebbles, she had a very full day. She told her office staff to encourage him to take the dog to an emergency veterinary practice, but he did not. She implied that she was exhausted by the time she arrived at the Englands' home to examine Pebbles.

Dr. Kelso described Pebbles as not in very bad condition when she arrived, but beginning to become dehydrated – with slightly sunken eyes, pale pink gums, and loss of elasticity in the skin on her neck. The dog was very sluggish, and Dr. Kelso could not feel any contractions. She felt the dog was beginning to “go downhill,” in that she appeared very weak and had an elevated temperature of 104.1. She used Oxytocin to encourage contractions, because the Englands wanted to avoid the expense of a C-section.

When she viewed the uterus, Dr. Kelso felt it was in terrible shape – friable (tearing very easily when manipulated) and discolored (purple and red), which she stated meant that it was rotting. She opened the left uterine horn first, because she could tell there were more puppies in it, removing four puppies from it. However, she testified she also opened the right uterine horn and removed one puppy from it.

Dr. Kelso denied the allegation that she left four live puppies in the dog. She felt the Englands were wrong when they refused to let her spay Pebbles, because they wanted to breed her again. She felt Dr. Aramburu “was in a terrible spot” when he encountered Pebbles, because the Englands wanted to maintain her reproductive organs and did not want to spend much money on her treatment. She explained the dehiscence (opening) of Pebble's abdominal wound several days after the C-section she performed as having been caused by the rotten uterus.

In Dr. Kelso's opinion, if she had left four puppies in the uterus after delivering the first five, they would have died. In fact, the puppies would have “mummified,” or become blobs of dead tissue. She testified that labor is controlled by hormones, and once it starts it goes to completion. In her opinion, the uterus simply would not start contracting again four or five days later. She also testified that there is no precedent for the story as related by Staff's witnesses in this case reported

anywhere in veterinary literature. Additionally, Dr. Kelso felt that given the terrible shape Pebbles' uterus was in, it could not have supported four live puppies for more than a few hours, if at all, following the C-section she performed.

Dr. Kelso was upset that Dr. Aramburu never contacted her. If he had, she would have had an opportunity to see whether the allegations against her were true. In her opinion, the Englands were very difficult to work with, and Dr. Aramburu concocted the story because he had to spay Pebbles, or face the fact that her wound would reopen.<sup>7</sup>

Shortly before March 15, when Dr. Kelso was scheduled to return to the Englands' home and remove Pebble's stitches and collect her fee, Mrs. England called and canceled the appointment. Dr. Kelso went to the Englands' home anyway, but she did not testify about what happened at that visit.

Dr. Kelso concluded that the Englands lied about the incident to avoid paying her. As to Dr. Aramburu, whom she described as a young veterinarian, she felt he lied because he wanted to take care of the dog. He knew the only way Pebbles' uterus could heal was for him to spay the dog. Because the Englands had already claimed a pup was born at their home, she felt Dr. Aramburu just continued that theme, claiming that there were more puppies, so that the Englands would agree to let him spay Pebbles. Finally, she assumed that Ms. Davis, the veterinary technician, lied because she is an employee of Dr. Schwede just like Dr. Aramburu. She testified that Gary Schwede was very jealous of other vets he felt might take business away from his offices, and she concluded that he was behind most of the complaints made against her in Lubbock. In her opinion, Dr. Schwede has convinced customers to file complaints against her.

*Dr. R. L. Robbins*

In addition to herself and her daughter, Dr. Kelso called Dr. R. L. Robbins as an expert witness on her behalf. Dr. Robbins graduated from veterinary school in Kansas in 1986, and he has

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<sup>7</sup>Transcript at 243.

a masters in veterinary science surgery from Auburn University. He emphasized that the Auburn program was very strong in theriogenology, or veterinary obstetrics and animal reproduction. In 1995, Dr. Robbins became board-certified in equine practice. He has had a mixed clinical practice, dealing with both large and small animals. Currently, he does extensive reproductive surgery at an animal shelter in Kansas City, Missouri.

Dr. Robbins testified based on a review of the documents in the case, as well as the testimony he heard during the hearing. In essence, he testified that a dog the size of Pebbles that was not pregnant would have had a uterine body only about one inch or less wide. However, if one of her uterine horns contained four live puppies, it would have been as large as the midsection of his forearm (perhaps six inches wide), which is a size that could not have been missed. He stated that once Dr. Kelso interrupted blood flow to the uterine wall, he believed that trauma would have caused any other puppies to be expelled by the uterus within a few more hours. Dr. Robbins agreed with Dr. Kelso that the reopening of the dog's incision (dehiscence) could have been caused by the Englands' refusal to let her spay the animal at the time of the C-section.

The other point Dr. Robbins made was that the bill from Dr. Aramburu's clinic regarding Pebbles' procedure said "pyometra" (meaning an accumulation of pus in the uterine cavity), but that term was crossed out and, instead, "misc. surgery" was checked.<sup>8</sup> Dr. Robbins felt changing that item in the records was somehow wrong.

Finally, Dr. Robbins testified that if, as Dr. Aramburu testified, Pebbles' uterus was inflamed but not in terrible shape, it did not make sense that Dr. Aramburu would have removed it and Pebbles' other reproductive organs. That, in Dr. Robbins' opinion, would have opened three or four more fresh wounds to become infected in the already contaminated abdomen. Additionally, Dr. Robbins felt it would have been less traumatic to the dog if Dr. Aramburu had "milked" the puppies

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<sup>8</sup>The doctor's notes indicated that he found dehiscence, with the small intestine externalized; that she gave birth to a puppy in the examination room; and that he removed two live puppies. The handwritten notes do not use the term "pyometra." State's Ex. 10.

down the uterine horn and out the vagina, instead of cutting into the right uterine horn and removing them.

#### E. Dr. Kelso's Arguments

Within three weeks of March 8, Pebbles and all but one of her puppies had died. This fact apparently only emerged at the hearing, and it did not form part of Staff's complaint against Dr. Kelso. In Dr. Kelso's opinion, Staff's ignorance of this fact (and failure to include it as an aggravating factor in the complaint) supports conclusions that the investigation was not thorough, and the testimony was inconsistent. Other inconsistencies in Staff's case that Dr. Kelso focused on include the following:

- Mr. England testified he never spoke to Dr. Kelso after March 5, but Dr. Kelso's records indicate she and her assistant spoke to him numerous times between then and March 8.
- Dr. Kelso's counsel argues the picture of the pups are inconsistent with their alleged dates of birth and the claim that Pebbles delivered eight pups that lived for some time.
- Similarly, Dr. Kelso's counsel argues the dog treated by Dr. Aramburu may not have been the same dog as the dog "Pebbles" Dr. Kelso operated on, because Dr. Kelso's records state she worked on a brown and white pit bull, and Ricky England and Dr. Aramburu's records describe the dog as a blue fawn. According to counsel, the dog pictured in the exhibit has no white on it.
- The March 8 e-mail from Connie England stated the puppies were doing well, and it did not mention the one that had died. The e-mail did not mention the problems discussed in the numerous telephone calls Ricky England made to Dr. Kelso and her assistant about the puppies.

Dr. Kelso implied that the Englands may have brought another dog to Dr. Aramburu for treatment instead of Pebbles. Additionally, she implied, but did not fully explain, a theory that

Pebbles was pictured in a State's exhibit "wet nursing" another dog's puppies instead of her own puppies.

One additional point Dr. Kelso made was that, in her opinion, Dr. Aramburu had an ethical duty to telephone her and tell her about the "mistake" he thought she had made when she performed the C-section on Pebbles.

Given the conflicts in the evidence, Dr. Kelso asked that a finding be made that she used proper professional judgment in her treatment of Pebbles.

#### **F. Staff's Arguments**

Staff argued that the testimony by its witnesses was clear and convincing. On the other hand, Dr. Kelso's testimony and that of her witnesses was not. Her teenage daughter could not be expected to testify against her mother. The conspiracy theory was not proved, and Dr. Kelso's arguments about another dog having been substituted for Pebbles and treated by Dr. Aramburu was not believable.

#### **G. Conclusion & Disciplinary Recommendations**

As indicated at the outset, Staff proved its case. The defense by Respondent was not at all convincing.

It is not logical that the Englands would carry out a conspiracy to harm Dr. Kelso's reputation. Something other than alleged discrepancies in the pictures of the dog and the puppies would be necessary to establish that point. The ALJ found State's Exhibit 8 convincing, and it showed Pebbles with eight puppies. It appeared to the ALJ that Mr. England was upset that Pebbles and her offspring had suffered, and also that he had lost a valuable asset. The ALJ notes that there were many allusions to phone calls made by the Englands to Dr. Kelso after she performed the C-

section, but there was no clear evidence about what was said in the conversations. Therefore, that testimony was irrelevant.

While Dr. Kelso may not have gotten along with Dr. Schwede and his employees, there is no proof that Dr. Aramburu and his technician would have lied about the condition of Pebbles and her puppies. The ALJ did not find Dr. Kelso's claim that Dr. Aramburu lied about the situation in order to justify removing Pebbles' reproductive organs to be logical. Given his role as an emergency veterinarian, the ALJ did not find his failure to call Dr. Kelso unusual. It appears that Dr. Aramburu did not lodge the complaint against Dr. Kelso with the Board. The Englands did, and Dr. Aramburu only became involved when Staff conducted its investigation.

While the incident is apparently unusual, Dr. McCulloch, Staff's expert witness, certainly did not testify that it was impossible. Furthermore, Dr. Kelso's purported expert might have established that fact, except that his testimony was merely confusing. In fact, Dr. Robbins' testimony about Dr. Aramburu's billing charge for "pyometra," was absolutely disingenuous.<sup>9</sup> He seemed to imply that the billing mistake was unconscionable, whereas the ALJ finds it quite logical that an error in checking off billing items could be made by a veterinarian at three a.m. after performing emergency surgery for over three hours. Furthermore, Dr. Aramburu's actual treatment notes were detailed and reasonable. They explained all of the procedures he carried out, and the word "pyometra" is not used in them at all.

As stated at the outset, Dr. Kelso agreed that if Staff's allegations were true, she was guilty of having administered substandard care to Pebbles. Staff argued that the proper sanction in this case is a one-year license suspension, fully probated; an official reprimand; a civil penalty of \$2,000; and nine hours of continuing education in surgical techniques and procedures to be taken during the next licensing year.

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<sup>9</sup>It should be noted that the difference in cost for the two procedures, pyometra versus miscellaneous surgery, was only \$5.00.

The ALJ notes that the Board's sanctions rule, §575.25(2), requires consideration of the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts, and the potential hazard created to the health, safety, or economic welfare of the public; the economic harm to property or the environment caused by the violation; the history of previous violations; what is necessary to deter future violations; and any other matters that justice may require. It appears to the ALJ that Staff's recommended sanctions meet this standard, but recognize that Dr. Kelso has taken significant measures to avoid giving substandard care in the future; *i.e.*, she has increased her staff size, added another veterinarian to handle the majority of the surgery cases, and made an effort to limit the number of hours per day that she works. Furthermore, Dr. Kelso has practiced for many years, and this is the first complaint filed against her. The civil penalty, probated suspension, and public reprimand, coupled with the continuing education recommendation, should help avoid future violations.

### III. FINDINGS OF FACT

1. On Monday, March 4 2002, Ricky England observed that Pebbles, his two-year-old pit bull dog, had been in active labor for five hours, but she still had not given birth to a pup. He called Dr. Penny Kelso's office, and despite the fact that she was busy all day, he asked that she come to his home when she could.
2. Dr. Kelso arrived at Mr. England's home Monday night at about 11:14 p.m. After determining that an induction drug had not caused the uterus to contract, Dr. Kelso decided to take the dog to her surgical suite at home and perform a C-section delivery.
3. Late that night, and early into the next morning, Dr. Kelso worked on Pebbles and her pups. Eventually, she delivered five pups.
  - a. Dr. Kelso failed to open and carefully examine Pebbles' right uterine horn, and she closed Pebbles' abdomen having left four viable pups inside it.

- b. The five puppies Dr. Kelso delivered were in poor condition, but, with the help of her teenage children, she was able to revive them. One puppy's umbilical cord would not stop bleeding; thus, Dr. Kelso placed a clamp on it.
  - c. Between 8 and 9 a.m. on March 5, Dr. Kelso returned Pebbles and the five pups (one with the clamp on its umbilical cord) to Mr. England.
  - d. Although the pup with the clamped umbilical cord died several hours after Dr. Kelso returned it, for the next few days Pebbles and the other four puppies appeared to be doing well.
4. At about 3 p.m. on March 8, Mr. England noticed that Pebbles was acting very uneasy – asking to go outside, and roaming around the house.
  - a. Eventually, Pebbles went into the Englands' bedroom and gave birth vaginally to a sixth pup. During the birth, her incision opened in two spots, and a loop of her small intestine came outside the incision.
  - b. Because Dr. Kelso was unavailable, Mr. England took Pebbles to the Small Animal Emergency Clinic in Lubbock at about 11:15 p.m.
  - c. The technician on duty placed Pebbles onto an examining table, and there Pebbles gave birth to a seventh pup, and externalized her small intestines.
  - d. Pebbles was immediately taken to the surgery, where the veterinarian on duty palpated what he thought might be another pup in her uterus and determined that her intestines were hyperemic (congested with blood) and contaminated.

- e. Therefore, the veterinarian did an exploratory surgery, finding that there had never been an incision in Pebbles' right uterine horn. He removed two healthy puppies from the horn and then removed Pebbles' reproductive organs.
  
5. When doing a C-section on a dog, it is important that both uterine horns be well-exposed, so that the ovaries can be seen at the ends, and the uterine body should be exposed.
  
6. The care given by Dr. Kelso was substandard, because she should have exposed the uterine body and both of the uterine horns and found and delivered the four additional puppies referenced in Finding 4, when she performed the C-section on Pebbles.
  
7. Dr. Kelso received a letter grade "D" in small animal surgery when she was in veterinary school.
  
8. Dr. Kelso graduated from veterinary medicine school in 1982, and she has practiced as a veterinarian in Kansas, Missouri, Nevada, and Texas.
  - a. For the past five years, Dr. Kelso has had a solo, mobile practice handling small animals and exotics in Lubbock.
  - b. Until the incidents surrounding this case, she had never had a complaint or lawsuit filed against her.
  
9. In her mobile practice, Dr. Kelso travels anywhere within a two-hour radius of Lubbock. When she started the mobile practice, she worked alone.
  - a. Now Dr. Kelso has seven employees, including another veterinarian who does all of the regularly scheduled surgeries.

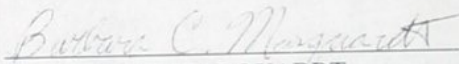
- b. Dr. Kelso rarely works the long hours that she was working at the time of the incident referenced in Finding 3.
- (1) When there are add-on calls, she now has two veterinary technicians out in the field to assist her.
  - (2) Currently, she only handles emergency surgeries.

#### IV. CONCLUSIONS OF LAW

1. The Texas State Board of Veterinary Medical Examiners (Board) has jurisdiction over this matter pursuant to TEX. OCC. CODE ANN., Chapter 801 (Act).
2. The State Office of Administrative Hearings has authority to hear this matter and issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. § 2003.
3. Service of proper and timely notice of the hearing and of the complaint was effected upon Penny Kelso, D.V.M., pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. As referenced in Findings 3 – 7, Dr. Kelso violated one of the Board's Rules of Professional Conduct, because her care of Pebbles did not amount to the degree of skill and diligence in treating patients that would ordinarily be used by average members of the veterinary medical profession under similar circumstances in a comparable location. 22 TEX. ADMIN. CODE §573.22.
5. Based on Conclusion 4, Dr. Kelso violated §801.402(6) of the Act by violating one of the Board's Rules of Professional Conduct.

6. Based on Findings 8 and 9 and Conclusion 5, the Board should assess the following sanctions against Dr. Kelso's license: a one-year license suspension, fully probated; an official reprimand; an administrative penalty of \$2,000; and nine hours of continuing education in surgical techniques and procedures to be taken during the next licensing year. Act §801.401; 22 TEX. ADMIN. CODE §575.25.

SIGNED February 4, 2004.

  
BARBARA C. MARQUARDT  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS