BEFORE THE
RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: BARTON WAYNE HINESLY Crescent City, California Respiratory Care Practitioner License No. 12244 Respondent.	Case No. R -2086 OAH No. 2007080606

DECISION AFTER NONADOPTION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Oakland, California, on October 15, 2007.

Complaint Stephanie Nunez, Executive Officer of the Respiratory Care Board of California, was represented by David Carr, Deputy Attorney General.

Respondent represented himself.

The matter was submitted for decision on October 15, 2007.

The Respiratory Care Board (hereinafter "board") received the proposed decision of the administrative law judge on November 9, 2007. On December 7, 2007, the board issued its Notice of Nonadoption of the Proposed Decision. After review of the entire administrative record including the transcript and written argument from each party, the board hereby renders its decision in this matter.

FACTUAL FINDINGS

1. On October 15, 1988, the Respiratory Care Board issued Respiratory Care Practitioner License No. 12244 to respondent Barton Wayne Hinesly. Respondent's license has been renewed through August 31, 2008.

2. On January 24, 2007, respondent was convicted after a jury trial of misdemeanor violations of Vehicle Code section 23152, subdivisions (a), driving under the influence of alcohol or drugs, and (b), driving with a blood alcohol level of 0.08 percent or above, crimes that are substantially

related to the qualifications, functions and duties of a respiratory care practitioner pursuant to title 16, California Code of Regulations, section 1399.370, subdivision (c) (conviction of a crime involving driving under the influence.)

3. Following the conviction, on February 2, 2007, imposition of sentence was suspended and respondent was placed on three years summary probation on conditions that included 48 hours in jail, payment of a $1,570 fine (payable at a rate of $50 per month), and completion of a three-month First Offender program.

4. The incident that resulted in respondent's conviction occurred on April 18, 2006. At about 7:00 p.m., respondent, who was on his way to work as a respiratory therapist at Sutter Coast Hospital, was involved in a single-vehicle accident in a rural area of Del Norte County. Respondent ran the stop sign at a tee-intersection. His pick-up truck crossed the road and became lodged in thick brush on the other side. Respondent admits he was "extremely intoxicated."

5. Respondent has worked at Sutter Coast Hospital since 2002. He began working two graveyard shifts (7:00 p.m. to 7:00 a.m.) per week in 2003. Between November 2003 and the date of his arrest in April 2006, respondent had a set routine he used to get ready for his first graveyard shift of each week. This routine involved medicating himself with alcohol and a sleeping pill so that he would sleep during the day preceding that shift. Beginning in the summer of 2005, the sleeping pill respondent used was Ambien. He argued that his extreme intoxication on April 18, 2006, was due to an unanticipated side effect of Ambien.

In a letter to his criminal attorney written in May 2006, and in his testimony at the hearing, respondent described the routine he had followed on the day of his arrest: Between 9:30 and 10:30 a.m., he drank two 2.5 ounce glasses of bourbon, ate a sandwich, took Famvir (an anti-viral drug), 1mg of Xanax, and 10mg of Ambien. He set his alarm clock for 5:15 p.m., turned on the television and went to bed.

On this day, respondent awoke at around 2:45 p.m. He was oriented, awake, and conscious, and there seemed nothing amiss. He found his second glass of bourbon was still almost full. He threw it out, poured another, went to the bathroom and, at around 3:00 p.m. returned to bed. Respondent remembers nothing more until he woke in his truck in the bushes after running the stop sign.

Returning home after his arrest, based in part upon an examination of their home, respondent and his wife reconstructed what they believe respondent did between 3:00 p.m. and 7:00 p.m. on April 18, 2006. He drank six to ten more ounces of bourbon. He ate half a double-layered chocolate cake (something he rarely eats at all.) He drank a pint of orange juice and probably some milk. He dressed appropriately for work. He broke both the glass he had been drinking from and a sealed 1.75 liter bottle of bourbon. He picked up the glass, mopped up the liquid with a bath towel, and put it all in the kitchen garbage can. He cut his hand, leaving blood on his pants, on his bed, on the garbage can, on the kitchen floor and other places in the house, and in his truck. He walked around 200 yards to where his truck was parked, got in, and drove about one-third of a mile to the point he ran the stop sign. Respondent does not remember doing any of this.

6. Respondent believes an unexpected side effect of Ambien caused him to unwittingly drink to excess and drive under the influence. Respondent believes the Ambien caused him to be in an "amnestic" state, in which he did acts he does not remember. Respondent provided a number of news

articles dated March 2006 reporting unusual behavior in people taking Ambien. A Fox News.com report stated:

> New reports appear to confirm weird behavior in patients taking Ambien, ... Perhaps the strangest of these behaviors is sleep eating. . . . "What happens is the patients get out of bed, walk to the kitchen, prepare food - often sloppily, and often with strange high-calorie ingredients, [said the director of the Mayo Clinic Sleep Disorder Center.] They have microwave food sometimes. They eat in a very sloppy way, either in the kitchen or after taking the food back to bed. And they have no memory of it. They wake to find a mess in the kitchen or crumbs in the bed."

A New York Times article reported:

> With a tendency to stare zombie-like and run into stationary objects, a new species of impaired motorist is hitting the roads: the Ambien driver. Ambien, the nation's best-selling prescription sleeping pill, is showing up with regularity as a factor in traffic arrests, sometimes involving drivers who later say they were sleep-driving and have no memory of taking the wheel after taking the drug.

A year later, in March 2007, the U.S. Food and Drug Administration issued a press release stating it had requested all manufacturers of sedative-hypnotic drugs (including Ambien) to:

> [S]trengthen their product labeling to include stronger language concerning potential risks. These risks include . . . complex sleep-related behaviors, which may include sleep-driving. Sleep driving is defined as driving while not fully awake after ingestion of a sedative-hypnotic product, with no memory of the event.

As a result, Ambien's product information sheets now contain these statements:

> Complex behaviors such as "sleep-driving" (i.e., driving while not fully awake after ingesting a sedative-hypnotic, with amnesia for the event) have been reported. . . . [T]he use of alcohol and other CNS depressants with [Ambien] appears to increase the risk of such behaviors. . . . Other complex behaviors (e.g., preparing and eating food, making phone calls, or having sex) have been reported in patients who are not fully awake after taking a sedative-hypnotic. As with 'sleep-driving,' patients usually do not remember these events.

7. Respondent asserts he attempted to introduce evidence of these unusual side effects of Ambien at his criminal trial but was barred from doing so by the judge on motion of the prosecutor. He maintains that had this motion been made earlier in the proceeding, he probably would have entered a plea and not gone to trial.

8. Sutter Coast Hospital did not discipline respondent in any way after his arrest or conviction; he was not terminated or suspended and no restrictions were placed upon his work. In fact, his work assignment remained completely unchanged. Respondent continued to work two 12-hour

graveyard shifts per week at the hospital between his arrest in April 2006 and his conviction 10 months later. And he has continued with this work schedule since his conviction. In addition, respondent occasionally works fill-in shifts as needed. On his regular 12-hour shift, respondent typically sees about 15 patients in all four of the hospital's departments - emergency, intensive care, medical/surgical, and obstetrics.

9. Respondent has complied with all terms of his criminal conviction. He served two days in jail, paid his fine, and completed the First Offender program. He remains on criminal probation. He has no restrictions on his driver's license.

10. Respondent states he has stopped taking Ambien. He took it on two occasions after his arrest but has since discontinued its use. He still takes Xanax (for anxiety) and the anti-viral drug Famvir. Respondent continues to use alcohol to help him sleep prior to working his first graveyard shift of a week. He drinks two to four ounces of alcohol sometime prior to 10:00 a.m. on days when he will be working his first graveyard shift of a week. He leaves for work at 6:30 p.m. and starts work at 7:00 p.m.

11. Respondent married in February 2006. His wife, who has known respondent since around 2004, testified that respondent used to drink quite a bit, but that he reduced his drinking when they started dating. (She rarely drinks at all.) She stated respondent has worked very hard at reducing his drinking and now drinks "very little." Respondent testified that he currently drinks about a pint of bourbon a week - two to four ounces on the morning before his first graveyard shift of a week and the remaining twelve to fourteen ounces primarily on the weekend.

13. The board has incurred attorney fees of $1,785.25 in connection with the enforcement of this matter. These costs are found to be reasonable. No investigation costs were documented.

LEGAL CONCLUSIONS

1. Business and Professions Code sections 3750, subdivision (d), and 3752 both provide that cause for disciplinary action exists against a licensee who has been convicted of a crime that is substantially related to the qualifications, functions and duties of a respiratory care practitioner. Respondent is subject to discipline under these sections by reason of the matters set forth in Finding 2.

2. On the day in question, Respondent acknowledges his conscious drinking at approximately 3:00 P.M. when he is scheduled to provide respiratory care in a critical care setting at 7:00 P.M. Additionally, Respondent's theory ascribing his blood alcohol level of .13 % at the time of the accident to unconscious ingestion of additional alcohol because of a toxic reaction to the prescribed Ambien is questionable given his statement that he took the Ambien between 9:30 and 10:30 A.M. and when he awoke at about 3:00 P.M. he was "oriented" and "awake and conscious, there seemed nothing amiss".

3. Respondent does not deny that he was "extremely intoxicated" at the time of his accident and arrest. Although the circumstances under which respondent states he drove while under the influence of alcohol do not negate either the fact or the legal consequences of his conviction, those circumstances may be considered as mitigating factors in determining what discipline, if any, should be imposed in this proceeding.

4. While respondent has apparently had times in his life when his alcohol consumption was greater than it is now, he never suffered any previous DUI's and there was no evidence presented that his drinking directly affected his work as a respiratory care practitioner. That Sutter Coast Hospital continued to employ respondent, and imposed no work restrictions or other discipline on him, either after his arrest or after his conviction 10 months later, is an indication that respondent's behavior on April 18, 2006 did not negatively impact his job performance. These facts too must be considered when determining discipline.

5. The board's "highest priority" is protection of the public. (Bus. & Prof. Code, § 3710.1.) Respondent's conviction was very recent. He remains on criminal probation and will likely continue to be in that status for another two years or longer. In consideration of the foregoing, the Board issues the following Disciplinary Order:

ORDER

Respiratory Care Practitioner License No. 12244 issued to respondent Barton Wayne Hinesly is revoked pursuant to Legal Conclusion 1; provided, however, that the revocation is stayed and respondent's license is placed on probation for three years on the following terms and conditions:

STANDARD TERMS OF PROBATION

1. OBEY ALL LAWS -- Respondent shall obey all laws, whether federal, state, or local. Respondent shall also obey all regulations governing the practice of respiratory care in California.

   Respondent shall notify the Board in writing within 14 days of any incident resulting in his arrest, or charges filed against, or a citation issued against, him.

2. QUARTERLY REPORTS -- Respondent shall file quarterly reports of compliance under penalty of perjury, on forms to be provided, to the probation monitor assigned by the board. Omission or falsification in any manner of any information on these reports shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license.

   Quarterly report forms will be provided by the board. Respondent is responsible for contacting the board to obtain additional forms if needed. Quarterly reports are due for each year of probation and the entire length of probation as follows:

   For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.

   For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.

   For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.

For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

Failure to submit complete and timely reports shall constitute a violation of probation.

3. PROBATION MONITORING PROGRAM -- Respondent shall comply with requirements of the board-appointed probation monitoring program, and shall, upon reasonable request, report to or appear to a local venue as directed.

   Respondent shall claim all certified mail issued by the board, respond to all notices of reasonable requests timely, and submit Annual Reports, Identification Update reports or other reports similar in nature, as requested and directed by the board or its representative.

   Respondent is encouraged to contact the board's Probation Program at any time he has a question or concern regarding his terms and conditions of probation.

   Failure to appear for any scheduled meeting or examination, or cooperate with the requirements of the program, including timely submission of requested information, shall constitute a violation of probation and will result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license.

4. PROBATION MONITORING COSTS -- All costs incurred for probation monitoring during the entire probation shall be paid by respondent. The monthly cost may be adjusted as expenses are reduced or increased. Respondent's failure to comply with all terms and conditions may also cause this amount to be increased.

   All payments for costs are to be sent directly to the Respiratory Care Board and must be received by the date(s) specified. (Periods of tolling will not toll the probation monitoring costs incurred.)

   If respondent is unable to submit costs for any month, he shall be required, instead to submit an explanation of why he is unable to submit the costs, and the date(s) he will be able to submit the costs including payment amount(s). Supporting documentation and evidence of why respondent is unable to make such payment(s) must accompany this submission.

   Respondent understands that failure to submit costs timely is a violation of probation and submission of evidence demonstrating financial hardship does not preclude the board from pursuing further disciplinary action. However, respondent understands that by providing evidence and supporting documentation of financial hardship it may delay further disciplinary action.

   In addition to any other disciplinary action taken by the board, an unrestricted license will not be issued at the end of the probationary period and the respiratory care practitioner license will not be renewed, until such time as all probation monitoring costs have been paid.

The filing of bankruptcy by respondent shall not relieve respondent of his responsibility to reimburse the board for costs incurred.

5. EMPLOYMENT REQUIREMENT -- Respondent shall be employed a minimum of 24 hours per week as a respiratory care practitioner for a minimum of 2/3 of his probation period.

   Respondent may substitute successful completion of a minimum of 30 additional continuing education hours, beyond that which is required for license renewal, for each eight months of employment required. Respondent shall submit proof to the board of successful completion of all continuing education requirements. Respondent is responsible for paying all costs associated with fulfilling this term and condition of probation.

6. NOTICE TO EMPLOYER -- Respondent shall be required to inform his employer, and each subsequent employer during the probation period, of the discipline imposed by this decision by providing his supervisor and director and all subsequent supervisors and directors with a copy of the decision and order, and the accusation in this matter prior to the beginning of or returning to employment or within 14 days from each change in a supervisor or director.

   If respondent is employed by or through a registry, respondent shall make each hospital or establishment to which he is sent aware of the discipline imposed by this decision by providing his direct supervisor and administrator at each hospital or establishment with a copy of this decision, and the accusation in this matter prior to the beginning of employment. This must be done each time there is a change in supervisors or administrators.

   The employer will then inform the board, in writing, that he/she is aware of the discipline, on forms to be provided to the respondent. Respondent is responsible for contacting the board to obtain additional forms if needed. All reports completed by the employer must be submitted from the employer directly to the board.

   Respondent shall execute a release authorizing the board or any of its representatives to review and obtain copies of all employment records and discuss and inquire of the probationary status with any of respondent's supervisors or directors.

7. CHANGES OF EMPLOYMENT OR RESIDENCE -- Respondent shall notify the board, and the appointed probation monitor, in writing, of any and all changes of employment, location, and address within 14 days of such change. This includes but is not limited to applying for employment, termination or resignation from employment, change in employment status, and change in supervisors, administrators or directors.

   Respondent shall also notify his probation monitor AND the board IN WRITING of any changes of residence or mailing address within 14 days. P.O. boxes are accepted for mailing purposes, however respondent must also provide his physical residence address as well.

8. COST RECOVERY -- Respondent shall pay to the Board a sum not to exceed the costs of the investigation and prosecution of this case. That sum shall be $1,785.25 and shall be paid in full directly to the board, in equal quarterly payments, within 12 months from the effective date of this decision. Cost recovery will not be tolled.

If respondent is unable to submit costs timely, he shall be required, instead to submit an explanation of why he is unable to submit these costs in part or in entirety, and the date(s) he will be able to submit the costs including payment amount(s). Supporting documentation and evidence of why respondent is unable to make such payment(s) must accompany this submission.

Respondent understands that failure to submit costs timely is a violation of probation and submission of evidence demonstrating financial hardship does not preclude the board from pursuing further disciplinary action. However, respondent understands that by providing evidence and supporting documentation of financial hardship may delay further disciplinary action.

Consideration to financial hardship will not be given should respondent violate this term and condition, unless an unexpected AND unavoidable hardship is established from the date of this order to the date payment(s) is due.

The filing of bankruptcy by respondent shall not relieve respondent of his responsibility to reimburse the board for these costs.

9. TOLLING FOR OUT-OF-STATE RESIDENCE OR PRACTICE -- Periods of residency or practice outside California, whether the periods of residency or practice are temporary or permanent, will toll the probation period but will not toll the cost recovery requirement, nor the probation monitoring costs incurred. Travel out of California for more than 30 days must be reported to the board in writing prior to departure. Respondent shall notify the board, in writing, within 14 days, of his return to California and prior to the commencement of any employment where representation as a respiratory care practitioner is/was provided.

10. VALID LICENSE STATUS -- Respondent shall maintain a current, active and valid license for the length of the probation period. Failure to pay all fees and meet CE requirements prior to his license expiration date shall constitute a violation of probation.

11. VIOLATION OF PROBATION -- If respondent violates any term of the probation in any respect, the board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If a petition to revoke probation is filed against respondent during probation, the board shall have continuing jurisdiction and the period of probation shall be extended until the matter is final. No petition for modification of penalty shall be considered while there is an accusation or petition to revoke probation or other penalty pending against respondent.

12. COMPLETION OF PROBATION -- Upon successful completion of probation, respondent's license shall be fully restored.

SPECIALTY CONDITIONS

13. WORK SCHEDULES -- Respondent shall be required to submit to the probation monitor work schedules on a weekly/monthly basis for the length of probation. Respondent shall ensure the board has a copy of his current work schedule at all times for each place of employment.

    Failure to submit current work schedules on a continuous basis shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against respondent's respiratory care practitioner license.

14. SUPERVISOR QUARTERLY REPORTS -- Supervisor Quarterly Reports of Performance are due for each year of probation and the entire length of probation from each employer, as follows:

    For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.

    For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.

    For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.

    For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

    Respondent is ultimately responsible for ensuring his/her employer(s) submits complete and timely reports. Failure to ensure each employer submits complete and timely reports shall constitute a violation of probation.

15. RESTRICTION OF PRACTICE -- Respondent may not be employed or function as a member of a respiratory care management or supervisory staff during the entire length of probation. This includes lead functions.

16. ADDITIONAL CONTINUING EDUCATION -- Respondent shall be required to complete additional Continuing Education beyond that which is required for license renewal. A minimum of 15 additional hours is required for each year of probation. Respondent shall submit proof to the Board of successful completion of all continuing education requirements.

17. BIOLOGICAL FLUID TESTING. Respondent, at her expense, shall participate in random testing, including but not limited to biological fluid testing (i.e. urine, blood, saliva), breathalyzer, hair follicle testing, or any drug screening program approved by the Board. Test costs range from $21 to $200 each. The length of time shall be for the entire probation period. The frequency and location of testing will be determined by the Board.

    At all times Respondent shall fully cooperate with the Board or any of its

representatives, and shall, when directed, appear for testing as requested and submit to such tests and samples for the detection of alcohol, narcotics, hypnotic, dangerous drugs or other controlled substances.

If Respondent is unable to provide a specimen in a reasonable amount of time from the request, while at the work site, Respondent understands that any Board representative may request from the supervisor, manager or director on duty to observe Respondent in a manner that does not interrupt or jeopardize patient care in any manner until such time Respondent provides a specimen acceptable to the Board.

Failure to submit to testing or appear as requested by any Board representative for testing, as directed, shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

18. ABSTENTION FROM USE OF MOOD ALTERING SUBSTANCES.
Respondent shall completely abstain from the possession or use of alcohol, any and all other mood altering drugs, substances and their associated paraphernalia, except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment.

Respondent shall execute a release authorizing the release of pharmacy and prescribing records as well as physical and mental health medical records. Respondent shall also provide information of treatment physicians, counselors or any other treating professional as requested by the Board.

Respondent shall ensure that she is not in the presence of or in the same physical location as individuals who are using illegal substances, even if Respondent is not personally ingesting the drug(s).

Any positive result that registers over the established laboratory cutoff level shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

Respondent also understands and agrees that any positive result that registers over the established laboratory cutoff level shall be reported to each of Respondent's employers.

19. PHYSICAL EXAMINATION -- Within 45 days of the effective date of this decision, respondent, at his expense, shall undergo an assessment of his physical condition by a physician appointed by the board. Respondent shall provide the examining physician with a copy of the board's disciplinary order prior to the examination. The examining physician must submit a written report of his/her findings to the board. If medically determined, a recommended treatment program will be instituted and followed by respondent with the physician providing written reports to the board on forms provided by the board.

If the examining physician finds that respondent is not physically fit to practice or can only practice with restrictions, the examining physician shall notify the board within three working days. The board shall notify respondent in writing of the examining

physician's determination of unfitness to practice and shall order respondent to cease or restrict licensed activities as a condition of probation. Respondent shall comply with this condition until the board is satisfied of respondent's fitness to practice safely and has so notified respondent. Respondent shall document compliance in the manner required by the board.

Respondent shall execute a release authorizing the physician to divulge the aforementioned information to the board.

IT IS SO ORDERED.

This Decision shall become effective on April 28, 2008.

DATED: April 21, 2008

Original signed by:
LARRY L. RENNER, BS, RRT, RCP, RPFT
PRESIDENT, RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA