

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

In the Matter of the First Amended
Accusation Against:

MICHAEL A. BRANLY
3017 Dovehouse Court
Modesto, CA 95355

Respiratory Care Practitioner License No.
4833

Respondent.

Case No. 1H 2009 094

OAH No. 2011070627

DECISION AFTER NONADOPTION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on November 1, 2011. Catherine E. Santillan, Senior Legal Analyst, represented Complainant. Attorney Edgardo Gonzalez represented Respondent Michael A. Branly, who was present. The matter was submitted for decision on November 1, 2011. After due consideration thereof, the Respiratory Care Board (Board) declined to adopt said Proposed decision, and on or about February 16, 2012 issued an Order of Non-Adoption. The Board requested written arguments due on April 13, 2012. Written arguments having been received from Complainant and Respondent, and the time for filing written arguments in this matter having expired, the entire record, including the transcript of said hearing, having been read and considered pursuant to Government Code section 11517, the Board hereby makes the following decision:

FACTUAL FINDINGS

1. On October 28, 2011, Stephanie Nunez made the amended accusation in her official capacity as the Executive Officer of the Respiratory Care Board of California (Board).
2. On June 21, 1985, the Board issued Respiratory Care Practitioner license number 4833 to Michael A. Branly (Respondent). Respondent's license was in full force and effect at all times relevant and will expire on June 30, 2013, unless renewed.
3. On January 30, and 31, 2009, Respondent worked as a respiratory care practitioner at Memorial Medical Center in Modesto, California. During his 12-hour shift

Respondent was assigned to provide treatment to a two-month old infant (Patient J)¹ who had been admitted that day with the respiratory syncytial virus (RSV) bronchiolitis, a potentially serious illness in infants under twelve months. On January 30, 2009, the emergency room doctor ordered inhaled Albuterol and Atrovent treatments every four hours, and every two hours, as necessary. In addition, the physician ordered that the oxygen saturation level was to be kept over 92 percent. Later that afternoon, inhaled racemic epinephrine treatment was ordered every four hours, as needed.

4. Respondent first visited Patient J on January 30, 2009 at 8:00 p.m. Respondent did not provide the aerosolized medications to the patient as ordered by the treating physician. Respondent charted "PRN"² in the medications column, noted the vital signs, wrote "course rhonchi" (loose rattles) in the respiratory therapy record, and documented that he had adjusted the supplemental oxygen level. When he entered the room, Respondent did not don personal protective equipment (PPE) consisting of a mask, gloves and gown.

5. On January 31, 2009, at 12:50 a.m., Respondent again visited Patient J. He documented the patient's vital signs and adjusted the supplemental oxygen level. Respondent noted that he did a PRN check, but did not provide the aerosolized medications to the patient as ordered by the treating physician. Respondent did not chart any entries for the patient's breath sounds, and did not put on PPE before entering the room.

6. Respondent visited Patient J for the last time on January 31, 2009 at 3:40 a.m. He documented the patient's vital signs and oxygen level, and noted that a registered nurse was in the room suctioning the child's nasal cavity. Respondent did not provide the treatments ordered by the physician or wear PPE while in the room.

7. A review of Respondent's charting during the same shift, revealed that Respondent failed to document physician-ordered PRN treatments for seven other patients.

8. An expert provided an opinion of this matter for the Board. The expert has been a licensed respiratory care practitioner in California since 1983. He has worked as a respiratory care practitioner at Mercy General Hospital in Sacramento since 1986; his current position is the director of cardiopulmonary and neurodiagnostic departments. By his education, training and experience, he was shown to be competent to render expert opinions in this matter.

9. The expert provided testimony on the standard of care for respiratory care practitioners. His testimony established the following concerning Respondent's conduct on January 30 to 31, 2009.

¹ Initials are used to protect patient privacy.

² PRN stands for the Latin term pro re nata and means the medication should be given as needed.

- a) Respondent's failure to deliver medications ordered by a physician to Patient J during his three visits, constituted a departure from the standard of care;³
- b) Respondent's failure to properly perform a pulmonary assessment of Patient J, by failing to note breath sounds on two visits, and by failing to perform a full assessment on the third visit when nurse was suctioning the child, constitutes a departure from the standard of care;
- c) Respondent's failure to exercise adequate infection control practices (wearing PPE) with a patient with RSV infection constitutes a departure from the standard of care; and
- d) Respondent's failure to chart seven patients during his shift of January 30 to 31, 2009, constitutes a departure from the standard of care.

10. Complainant established by clear and convincing evidence that Respondent committed acts of negligence as outlined in Finding 9 a through d.

11. Complainant established by clear and convincing evidence that Respondent's actions as outlined in Finding 9 a through d constitute unprofessional conduct.

12. The Board certified that the Department of Justice has billed it \$7,410 in fees from the Office of Attorney General in handling the investigation and prosecution of the accusation. The Board also spent \$1,625 in expert witness costs. The total in fees expended by the Board was \$9,035. The Board filed a first amended accusation four days before the hearing wherein one factual statement was struck and which changed other statements from allegations to facts. However, no causes of discipline were struck.

13. Respondent is 60 years old and is married to a registered nurse; he has two children, aged 29 and 23 years old. His youngest daughter is living at home while attending college.

14. Respondent graduated from high school in 1969 and went to respiratory therapy college in Florida. He earned a degree in inhalation therapy in 1974. He worked for two years at William Shands teaching hospital at the University of Florida. Respondent moved to Tennessee, where he was registered as a respiratory therapist and sat on the state board. He worked at Erlanger Hospital in Chattanooga, Tennessee, as a critical care supervisor and put together a program to teach staff the techniques developed at the University of Florida. He also set up and ran a program at Redbank Community Hospital in Tennessee, before moving to California in 1979 to care for his father.

15. Respondent became a staff respiratory therapist at Valley Presbyterian Hospital in Van Nuys in 1979. He left Valley Presbyterian in 1981 and moved to Modesto. He worked at Doctor's Medical Center in Modesto for eight years, where he served as the night shift supervisor. In March 1989, Respondent was hired by St. Joseph's Medical

³ The distinctions between gross and simple negligence are irrelevant in this case since Respondent is charged with violations of Business and Professions Code section 3750, subdivision (f) which reads, "Negligence in his or her practice as a respiratory care practitioner."

Center in Stockton, while working part-time at an affiliated facility, St. Dominic's Hospital in Manteca. Respondent stopped working at St. Joseph's in 1998 after nine years; he worked at St. Dominic's until 2000. From 2000 to 2009, Respondent worked part-time at Memorial Medical Center in Modesto. Beginning in 2006, he also worked full-time at St. Dominic's which is now a Kaiser facility.

16. In January 2009, Respondent testified he was working three 12-hour night shifts each two weeks at Memorial Medical Center. The workload varied due to many factors, including the number of patients and the level of acuity. The night duty therapists covered a large area of the hospital. He would be the only respiratory therapist assigned to his patients during his shift. Respondent often performed 20 to 30 procedures per shift. When Respondent arrived for work, he would go to the report room, receive his assignment and meet with the therapist going off duty who would give a verbal report on each patient.

17. On January 30, 2009, Respondent testified the hospital was "chaotic" and he was faced with more demands than usual. Respondent understood the therapist going off duty to state that the physician had ordered that Patient J be given Albuterol and Atrovent treatments every four hours, PRN. Because things were so busy that night, he failed to confirm the verbal report by checking the doctor's order. Respondent is usually a stickler for following a physician's orders. He has refused to give treatments to patients without a doctor's order. Respondent agrees that he should have verified the physician's orders before entering the room before each visit.

18. Respondent believes his assessments of Patient J were within the standard of care. During the first visit at 8:00 p.m., he assessed Patient J and determined that a treatment was not necessary. He charted the breath sounds as "course rhonchi" (or loose rattles) and adjusted the supplemental oxygen level. Respondent returned to check on the patient at 12:50 a.m. He again performed a PRN check and adjusted the oxygen level, but did not give a treatment. At the time, Patient J was asleep or resting comfortably and Respondent did not want to disturb the child to give the treatment unless it was necessary. Respondent next saw Patient J at 3:40 a.m. When he visited, the registered nurse on duty was suctioning the infant's nose and he was crying. Respondent performed a PRN check and checked the oxygen level, which was his main concern. During each visit, he charted patient J's vital signs. The infant's mother was in the room each time Respondent visited and he spoke to her extensively. Had Respondent realized that the physician had ordered the treatment to be given every four hours he would have done so. Patient J was discharged the following day without any adverse effects.

19. When Respondent entered Patient J's room, he did not put on a gown, gloves or mask. Respondent agrees that the better practice would be to wear the protective equipment when entering the room. Because he did not give treatments, was not in close proximity to the infant, and there was a plexi-glass cover over the baby's crib, he did not wear PPE; however he did wash his hands thoroughly before and after entering the room. In Respondent's opinion, he did not violate the hospital policy for RSV cases which is to avoid contact with bodily fluids, wash hands before and after seeing the patient, and to wear gloves and a gown if the therapist is within three feet of the patient to ensure the virus is not spread to another patient. Because Respondent was within three feet of Patient J when he listened to breath sounds and adjusted the oxygen level, he should have worn PPE.

20. Respondent has found charting on the computer cumbersome and he takes a long time to complete it because he refuses to use canned comments. He is bewildered by his lack of charting for seven patients on this shift. Respondent wonders if another nurse closed his charts and he thought he had finished the charting. He cannot explain why the charting is not there for those seven patients, but feels sure he performed the PRN checks and administered appropriate treatments. He agrees that the computerized charting is required and he accepts responsibility for the omission.

21. Since June 2008, Respondent has been working full-time at the Stockton Kaiser sleep laboratory. At the sleep laboratory, he works as a respiratory care practitioner and a sleep technician. Respondent is not in a supervisory position, but runs the nighttime duty. He attaches the wires for the poly-sonograms and records sleeping habits. Respondent does not administer medication in this position. Respondent's annual performance evaluation in 2009 demonstrates that he met expectations in every category. In Respondent's April 2010 job performance evaluation at Stockton Kaiser, he received "commendable" or "outstanding" ratings in all categories. On his April 2011 evaluation, he met expectations in every category.

22. Since January 2009, Respondent has completed continuing education courses entitled "Preventing RSV Infection in At-Risk Infants," "Sleeping Disorders," "Pediatric RSV: A Focus on Risk Assessment and Prophylaxis," "Law and Professional Ethics for RCPs," "Sleep Technology Essentials," "Kaiser Sleep Medicine and Technology Course," "S2-Racepinephrine and Albuterol 0.5%," and "Sleep Medicine Update for RCP."

23. In January 2008, Respondent received a certificate of recognition from Kaiser for his contribution in providing quality care and outstanding customer service. Respondent received three PACE star nominations in 2005 for good teamwork.

24. The clinical pulmonary services manager for Kaiser Modesto and Kaiser Manteca, testified on behalf of Respondent. She has been a licensed respiratory therapist since 1991 and has known Respondent since 1999, when she became his supervisor. She supervised Respondent for a couple of years at St. Dominic's and hired Respondent in 2006 as a staff therapist at Kaiser Manteca where she supervised him until he transferred to the sleep lab. In all, she supervised Respondent for four to five years in total.

25. The witness observed Respondent take the utmost care for his patients. If she were in need of a respiratory therapist, she would want Respondent to take care of her. Respondent never failed to chart his treatments or follow a doctor's orders while he worked for her. She never had a disciplinary problem with him. The only issue she had with Respondent was that he took too long to chart because he was so exacting in his charting. The witness considers these allegations to be very unlike Respondent's usual conduct. While she supervised him, Respondent always received above average evaluations.

26. An emergency room physician submitted a letter of support for Respondent. He has known Respondent since 2005, when they worked together at Kaiser Manteca. Respondent stands out for his commitment to patients, knowledge base, attention to detail and professionalism. He has recently been treated by Respondent at the Kaiser Stockton sleep laboratory. He is impressed by Respondent's passion for patient education, and

broad base of knowledge in polysomnography, obstructive sleep apnea and CPAP/CiPAP⁴ therapy.

27. Respondent and his wife are struggling financially to meet their monthly expenses and put their daughter through college. They have no savings and own no property.

LEGAL CONCLUSIONS

1. The standard of proof in an administrative disciplinary action that seeks the suspension or revocation of a respiratory care practitioner license is “clear and convincing evidence to a reasonable certainty.” (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.)

2. Business and Professions Code sections 3718 and 3750, subdivision (f), authorize the Board to suspend, revoke or impose probationary conditions on a respiratory care practitioner’s license for negligence in his practice. Cause for discipline exists pursuant to these code sections as set forth in Factual Findings 3 through 10.

3. Business and Professions Code sections 3718 and 3755, authorize the board to take action against a respiratory care practitioner’s license for unprofessional conduct in administering respiratory care. Unprofessional conduct includes a violation of any provision of section 3750. Cause for discipline exists pursuant to these code sections as a result of Factual Findings 3 through 11. Cause also exists to discipline Respondent’s license pursuant to Business and Professions Code section 3755 for unprofessional conduct.

4. The Board has adopted guidelines for use in considering appropriate degree of discipline. The recommended penalty for violations of Business and Professions Code sections 3750, subdivision (f) and 3755 ranges from license revocation stayed for three years with standard probationary conditions, to license revocation. Aggravating and mitigating circumstances are provided for consideration in penalty determinations. No aggravating circumstances exist here. No patient was harmed, no violence or dishonesty was involved, the violations occurred during a single night shift when Respondent was the only therapist on duty. Respondent has provided evidence in mitigation: 1) he has taken full responsibility for his error in failing to confirm the doctor’s order and for failing to transfer his notes to the charts of seven patients; 2) nearly three years has passed since the incident; 3) there is no prior disciplinary history in over 40 years of practice; and through live testimony and letters of recommendations, three medical professionals who have previously worked with Respondent attest to his high level of skill in caring for his patients, his commitment to patients, his broad knowledge base, and his long history of competent care of patients. (Factual Findings 13 to 26.)

5. Given the extensive mitigating evidence and the lack of evidence in aggravation, a deviation from the disciplinary guidelines is warranted and would not be contrary to consumer protection. The Board therefore finds that a public reprimand is the appropriate level of discipline.

⁴ CPAP stands for continuous positive airway pressure; BiPAP stands for Bilevel positive airway pressure.

6. Complainant requested that Respondent be ordered to reimburse the Board for the cost of investigating and enforcing the accusation. Business and Professions Code section 3753.5, subdivision (a) provides that Respondent may be ordered to pay to the Board a sum not to exceed the costs of investigating and prosecution of the case. The Board incurred costs of investigation and enforcement in the amount of \$9,035. (Factual Finding 12.) The case of *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 sets forth the factors to be considered in determining the amount of costs. Those factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits in his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct. Respondent here has raised a colorable challenge to the proposed discipline in that his evidence of mitigation warrants reduction of the discipline from possible revocation to a public reprimand. Additionally, Respondent demonstrated that he is undergoing financial hardship. (Factual Finding 27.) Therefore, in light of these considerations, the amount of the reimbursement will be reduced to \$4,800. This amount to be paid in forty-eight (48) monthly payments.

ORDER

IT IS HEREBY ORDERED that Respiratory Care Practitioner License Number 4833 issued to Respondent Michael A. Branly is hereby subject to an immediate public reprimand which shall take the form of the Respiratory Care Board of California's Decision in Case No. 1H 2009 094.

Respondent shall pay to the Board a sum not to exceed the cost of investigation and prosecution of this case. That sum shall be \$4,800 and shall be paid directly to the Board in equal monthly payments, within 48 months from the effective date of the decision.

This Decision shall become effective on: June 14, 2012

It is so ORDERED: June 7, 2012

Original Signed by: _____
MURRAY OLSON, RCP, RRT-NPS, RPFT
PRESIDENT, RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA