



MEMORANDUM

DATE	May 2, 2019
TO	Members, Board of Pharmacy
FROM	Kelsey Pruden, Attorney Legal Affairs Division
SUBJECT	Designating all or portions of the decision, <i>In the matter of the Citation Against: ESI Mail Pharmacy, Inc. dba Express Scripts</i> , (Case No. CI 2009 44657; OAH Case No. 2011060384) as Precedential pursuant to Government Code section 11425.60 (Agenda Item XII. (d))

The California State Board of Pharmacy (board) can designate and rely on decisions as precedential. In other words, once the board has publicly selected a decision or parts thereof as precedential, that decision or part of that decision, must be applied and followed. The statute that governs this process states,

- (a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.
- (b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.
- (c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.
- (d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating and indexing as a precedent decision a decision issued before July 1, 1997.
 (Gov. Code, § 11425.60).

Board staff, in consultation with the board's liaisons from the Office of the Attorney General and the Department of Consumer Affairs board counsel, is recommending that a portion of the above-captioned decision be designated as precedential.

CASE SUMMARY

In the matter of the Citation Against: ESI Mail Pharmacy, Inc. dba Express Scripts, Board of Pharmacy Case No. CI 2009 44657; OAH No. 2011060384

PROCEDURAL BACKGROUND

On May 30, 2003, the board issued ESI Mail Pharmacy Services, INC. dba Express Scripts (respondent) nonresident pharmacy permit number NRP 531. Respondent was issued a citation on November 16, 2010. After an office conference, the citation was appealed. The matter was heard before Administrative Law Judge Carla Nasoff and a proposed decision was submitted to the board on June 19, 2012. The board rejected the proposed decision and decided the case upon the record, including the transcript and written arguments submitted by both parties. On November 20, 2012, the board adopted the Decision After Nonadoption in this matter. That decision changed the ruling on the issue of whether or not a delay is considered an obstruction for purposes of Business and Professions Code section 733 (labeled as, "*Issue Number Two (Delay or Obstruction) and Ruling*" in both decisions). The Decision After Nonadoption also changed the Order. However, the Decision After Nonadoption adopted the Proposed Decision of Administrative Law Judge Carla Nasoff on the issue of the board's regulatory authority (labeled as, "*Issue Number One (Regulatory Ruling) and Ruling*" in both decisions).

FACTS/FINDINGS OF THE DECISION

The citation alleged that respondent's procedures for filling mail order prescriptions obstructed a patient from obtaining medication. Specifically, one patient's medication was backordered, which resulted in her not obtaining her prescriptions for an additional five (5) days. Further, because of the respondent's policies and procedures, the patient was not made aware that her medication was on backorder and was not able to speak to a pharmacist to find out exactly what the issue with her prescriptions was or when she would receive her medication. The citation was issued pursuant to Business and Professions Code sections 4005, 4301, and 733(a), and California Code of Regulations, title 16, section 1775 et seq.

Pertinent to this recommendation, the respondent argued that the board did not have the authority to discipline or issue a citation against a nonresident pharmacy because there was no law in the nonresident pharmacy's home state that allowed for discipline based on delay or obstruction of a patient's legally prescribed medication. However, the

Board of Pharmacy: *In the matter of the Citation Against: ESI Mail Pharmacy, Inc. dba Express Scripts*

administrative law judge ruled that the board did have jurisdiction and the authority to bring a citation or disciplinary action against a nonresident pharmacy.

PORTIONS OF THE DECISION TO BE DESIGNATED AS PRECEDENTIAL

1. Factual Finding: 8 (“*Issue Number One (Regulatory Authority) and Ruling*”); and
2. Legal Conclusion: The first sentence of Legal Conclusion 8.

RATIONALE

As cited above, Government Code section 11425.60 authorizes the board to designate part of a decision as precedential when it, “contains a significant legal or policy determination of general application that is likely to recur.”

The board licenses nonresident pharmacies regularly. This precedential decision would clarify that nonresident pharmacies are bound by California laws because of doing business in California pursuant to a California license. The board may issue a citation or discipline a non-resident licensee when the state’s laws, where the licensee is permanently located, allow for administrative action based on a violation of California law pertaining to the practice of pharmacy. This issue is likely to recur frequently, and the portions of the decision to be designated as precedential contain legal determinations that are significant and would clarify the board’s authority as it applies to nonresident pharmacy permit holders. This would provide guidance to nonresident pharmacy permit holders and California consumers who may be patients of a nonresident pharmacy permit holder.



California State Board of Pharmacy

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STATE AND CONSUMER SERVICES AGENCY
DEPARTMENT OF CONSUMER AFFAIRS
GOVERNOR EDMUND G. BROWN JR.

November 20, 2012

CERTIFIED MAIL

ESI Mail Pharmacy Services, Inc.
dba Express Scripts
Attn: Patrick McNamee, President
7909 S. Hardy
Tempe, AZ 85284

RE: In the Matter of the Citation Against:
Express Scripts, NRP 531
Citation Case No. CI 2009 44657
OAH No. 2011060384

Dear Mr. McNamee:

Attached is the Board of Pharmacy's Decision after Nonadoption in the above referenced matter. Your attention is directed to page 16 of the Decision.

Effective December 20, 2012, the citation and fine against Express Scripts, NRP 531, Case No. CI 2009 44657 is sustained. The fine must be paid within 30 days of the effective date, namely January 19, 2013.

If you have any questions concerning this matter, you may contact Lisa Chullino, Enforcement Analyst, at (916) 574-7921.

Sincerely,

VIRGINIA K. HEROLD
Executive Officer

VKH:sec
Enclosure

cc: Nicole R. Trama, DAG
Edward D. Rickert, Esq.
Carla Nasoff, ALJ

DECLARATION OF SERVICE BY CERTIFIED MAIL

RE: In the Matter of the Citation Against:
Express Scripts, NRP 531
Citation Case No. CI 2009 44657
OAH No. 2011060384

I declare:

I am employed in the County of Sacramento, California. I am over 18 years of age and not a party to the within entitled cause. My business address is 1625 N. Market Blvd, Suite N219, Sacramento, California 95834.

On November 20, 2012 I served the attached:

LETTER AND DECISION AFTER NONADOPTION

in said cause, by placing a true copy thereof enclosed with postage thereon fully prepaid by Certified Mail, at Sacramento, California, addresses as follows:

NAME	CERTIFIED MAIL NO.
ESI Mail Pharmacy Services, Inc. dba Express Scripts Attn: Patrick McNamee, President 7909 S. Hardy Tempe, AZ 85284	7004 0750 0000 6656 0145
Edward D. Rickert, Esq. Drieg DeVault, LLP 30 North LaSalle Street, Suite 3516 Chicago, IL 60602-2502	7004 0750 0000 6656 0152

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 20, 2012, at Sacramento, California.



DECLARANT
Susan Cappello
Enforcement Manager

**BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Citation Against:

**ESI MAIL PHARMACY SERVICES, INC.
dba EXPRESS SCRIPTS**

Respondent.

Case No. CI 2009 44657

OAH No. 2011060384

DECISION AFTER NONADOPTION

Carla Nasoff, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 18, 2012, in San Diego, California.

Nicole R. Trama, Deputy Attorney General, Department of Justice, State of California, represented complainant Virginia Herold, Executive Officer of the Board of Pharmacy.

Edward D. Rickert, Attorney at Law, who is licensed to practice law in Illinois, appeared as counsel pro hac vice for the respondent along with Marty O'Toole, Attorney At Law, from Los Angeles, California. Christopher Meilinger, Senior Director and Pharmacist-in-Charge for Express Script, was present throughout the hearing.

The matter was submitted on May 18, 2012.

The proposed decision of the Administrative Law Judge was submitted to the Board on June 19, 2012. After due consideration thereof, the Board declined to adopt said proposed decision and thereafter on July 23, 2012 issued an Order of Non-adoption and subsequently on August 20, 2012, issued an Order Fixing Date for Submission of Argument. Written argument having been received from complainant and respondent and the time for filing written argument in this matter having expired, and the entire record, including the transcript of said hearing having been read and considered, the Board, pursuant to Section 11517 of the Government Code, hereby makes the following decision:

FACTUAL FINDINGS

Jurisdictional Matters

1. On November 16, 2010, complainant, Virginia Herold, the Executive Officer of the Board of Pharmacy, issued Citation Number CI 2009 44657 to Express Scripts, attention Patrick McNamee, President. The Citation was issued pursuant to Business and Professions Code sections 4005 and 4301 and California Code of Regulations, title 16, section 1775 et seq., for violations of the laws and regulations that govern the practice of pharmacy in California. Specifically, the Citation alleged a violation in Business and Professions Code section 733 subdivision (a), (obstructing a patient in obtaining a prescription.) The Citation imposed a \$250 fine.

2. On November 29, 2010, Edward D. Rickert, as counsel for Express Scripts, contested the Citation, filed an appeal, and requested an office conference.

3. On February 24, 2011, the Board of Pharmacy Committee determined that no new information was presented at the office conference and affirmed the Citation and Fine as originally issued. The matter was then forwarded to the Office of the Attorney General.

4. On June 9, 2011, required jurisdictional documents, including a notice of hearing setting the matter for hearing, were served by certified mail upon respondent.

5. On May 18, 2012, the record was opened, jurisdictional documents were received, sworn testimony was given, documentary evidence was introduced, closing arguments were presented, and the matter was submitted.

Licensure History

6. On May 30, 2003, the Board of Pharmacy, State of California (Board) issued Permit Number NRP 531 to ESI Mail Pharmacy Service, Inc., authorizing respondent to do business as Express Scripts (ES or respondent). Respondent's address of record is in Tempe, Arizona. The permit expires on May 1, 2013, unless renewed.

Summary of Citation and Fine

7. On November 16, 2010, a Citation and Fine was issued that alleged Express Scripts (ES) obstructed a patient in obtaining legally prescribed prescription drugs. Pursuant to Business and Professions Code section 733, subdivision (a), "[n]o licentiate shall obstruct a patient in obtaining a prescription drug or device that has been legally prescribed or ordered for that patient. A violation of this section

constitutes unprofessional conduct by the licentiate and shall subject the licentiate to disciplinary or administrative action by his or her licensing agency.”¹

Specifically, the Citation alleged that on May 7, 2010, Express Scripts Pharmacy obstructed the furnishing of the prescriptions of patient (SB²) because of the Express Scripts procedures in filling prescriptions. The Citation alleged that respondent's procedures for filling mail order prescriptions obstructed patient SB in obtaining her medications. According to the Citation, the medications Levorphanol 2 mg and Oxycontin were not available and were backordered. The situation resulted in the patient not obtaining her prescriptions for Oxycontin 10 mg and Oxycontin 20 mg for an additional five (5) days.

The Citation further alleged that from May 18, 2010 to May 24, 2010, SB's prescriptions for Oxycontin 10 mg and Oxycontin 20 mg were stuck in an “electronic queue” that caused a further delay in furnishing the prescriptions. As a result, 18 days after Express Scripts received the prescriptions for Oxycontin 10 mg, and Oxycontin 20 mg, SB canceled her prescriptions.

Motion to Dismiss

A request for dismissal was addressed by the Administrative Law Judge before the commencement of the taking of evidence based on two issues. These jurisdictional challenges were also raised again by respondent in written arguments submitted to the Board after the non-adoption order issued.

Issue Number One (Regulatory Authority) and Ruling

8. The first issue raised by respondent was whether the Board possessed authority to discipline or issue a citation against a non-resident pharmacy where the pharmacy's home state did not have the same grounds for discipline. Respondent requested a motion to dismiss be granted on this basis.

Respondent argued that there was no Arizona law that provided for discipline based on a delay or obstruction in dispensing a legally prescribed medication.

Complainant argued that Business and Professions Code section 4303, subdivision (b), provided, in part, that “[t]he Board may deny, revoke, or suspend a nonresident pharmacy registration, issue a citation or letter of admonishment to a nonresident pharmacy, or take any other action against a nonresident pharmacy that the board may take against a resident pharmacy license, on any of the same grounds upon which such action might be taken against a resident pharmacy, provided that the

¹ Business and Professions Code section 23.8 defines “licentiate” as follows:

“Licentiate” means any person authorized by a license, certificate, registration, or other means to engage in a business or profession regulated by this code or referred to in Sections 1000 and 3600.

² Initials are used throughout this decision to protect the patient's privacy

grounds for the action are also grounds for action in the state in which the nonresident pharmacy is permanently located.” Arizona pharmacy laws provided that it was unethical to violate a state law relating to the sale or distribution of drugs (A.R.S. § 32-1901.01(A)(5)). In addition, Arizona pharmacy laws provided that it was unethical to violate any law, including California’s laws, that relate to dangerous drugs. (A.R.S. § 32-1901.01(A)(6)). Complainant argued there was no basis to dismiss the citation as a result of these statutes.

Ruling: The Board has the authority to discipline or issue a citation against a nonresident pharmacy because respondent, Express Scripts, was issued a non-resident pharmacy permit number NRP 531 to ESI Mail Pharmacy Services Inc., to do business as Express Scripts in California. Therefore, ES was bound by California law; it performed business in California and was considered a non-resident licensee under California Business and Professions Code, section 4303 subdivision (b). Also, Arizona’s pharmacy laws would permit administrative action based on violation of California’s laws relating to prescription drugs,³ including, in this case, obstructing a patient from obtaining a prescription drug pursuant to Business and Professions Code section 733. The Board has the authority to issue a citation for the violation of Business and Professions Code section 733 to a non-resident pharmacy permit holder. The request for dismissal is denied.

Issue Number Two (Delay or Obstruction) and Ruling

9. The second issue raised by respondent as a basis for dismissal before the Administrative Law Judge was whether Business and Professions Code section 733 authorized discipline based on inadvertent delays in filling a prescription.

Respondent alleged that Business and Professions Code section 733 does not provide a basis for citing or disciplining a pharmacy based on a “delay” in filling a prescription. A licentiate, according to the statute, shall not “obstruct” a patient in obtaining a prescription, but the statute does not reference the issue of delay. Respondent requested a dismissal of the citation.

Complainant argued that the motion for dismissal was premature and not within the authority of the administrative hearing process.

The Administrative Law Judge Ruled that the question of delay or obstruction depends on factual determinations that must be made after testimony and evidence are received. The request for dismissal was denied. However, respondent’s arguments are further addressed below.

³ “Dangerous drugs” for the purposes of the Pharmacy Law include any “drug or device that by federal or state law can be lawfully dispensed only on prescription...” Business and Professions Code section 4022.

Patient SB's Testimony

10. SB, a patient and former nurse, suffered a fracture at the second lumbar vertebra (L2) that required surgical fusion from L1 to L3. As a result of lumbar fusion, she suffered from neuropathy and was treated at the University of California, Los Angeles (UCLA) for pain management. From 2002 to the present, SB suffered pain and was treated with Oxycontin⁴.

From 2007 to the present, SB was a client of respondent's prescription mail order company, Express Scripts. Prior to 2010, SB obtained her narcotic prescriptions from the local CVS pharmacy and filled her non-narcotic prescriptions through ES.

On May 4, 2010, SB sent her prescription for Levorphanol (2 mg, one to two tablets, three times a day for pain, as needed); Oxycontin (20 mg, one to two tablets, three times a day for pain, as needed); and Oxycontin (10 mg one to two tablets, three times a day for pain as needed). ES was based in Arizona and the prescriptions were sent to ES by mail. SB testified that she was fully aware and consented to the additional time required to process and receive her medications. SB testified, "I knew that if ES could fill the prescription within 14 days, that would be sufficient time... I have an earthquake backup supply of narcotics." SB testified that she did not recall receiving information at the outset that said that there could be up to a ten to fourteen day delay in processing prescription orders through mail service. However, she did acknowledge knowing that there was "some delay" in processing prescriptions through mail service. (RT 51:25; 52:5-8.) SB also understood that prescriptions for controlled substances (Oxycontin) may involve extra steps in processing and could take longer to fill when using a home delivery mail order option versus her local pharmacist. From May 4, 2010 to May 25, 2010, SB testified she called ES customer service "more than 20 times" to determine when she would receive her medications.

On May 13, 2010, SB testified that she telephoned ES's customer service number and was told that the prescriptions were "lost in limbo, but had been found and would ship within 24 to 48 hours." SB did not receive the drugs within the 24 to 48 hours as promised, and she again called customer service.

On May 18, 2010, SB testified that she called ES's customer service number and was told that, "Levorphanol was on backorder." ES testified that she was not previously told that Levorphanol was out of stock and was on back order. SB testified that she used the Levorphanol drug prescribed as needed, however, Oxycontin she took as a "routine medication" (RT 45:1-2). The need for the Oxycontin to be dispensed timely or "out of the prescription" (as she described it), was therefore greater from her perspective. However, SB testified that she was never informed by anyone from Express Scripts that they were holding onto her entire prescription order

⁴ Oxycontin is the brand name for oxycodone, a controlled substance pursuant to Health and Safety Code section 11055 subdivision (b)(1)(N) and a dangerous drug pursuant to Business and Professions Code section 4022 used as a Schedule II narcotic analgesic.

due to the backordered Levorphanol. Had she been so informed, she testified that she would have "canceled the order immediately." (RT 44:14-24.)

On May 19, 2010, twelve (12) days after submitting her prescriptions to ES, SB drove from her home in Palm Springs to her UCLA physician's office to obtain a "bridge one-week supply of Oxycontin." SB testified that she was aware that she could not obtain a second narcotic prescription when there is an outstanding pending prescription order with another pharmacy. SB received the one-week bridge supply after her physician was able to confirm with respondent that her medication would be sent out in 24 to 48 hours as promised (RT 45:24-25; 46:1-10). Due to SB's efforts, including resorting to using her "earthquake supply" of stored drugs, she was never without a supply of her medications. (RT 42:1-8.) However, after the May 19th phone call by her physician, SB did not receive the promised medications. (RT 46:11-23.) SB testified that she called ES twice a day from May 19, 2010 to May 25, 2010, to determine the status of her prescriptions. ES's telephone customer service repeatedly told her that the drugs would be delivered "within 24 to 48 hours."

On May 25, 2010, eighteen (18) days after submitting her prescriptions to ES, SB cancelled her prescription order with ES. SB testified that, "I was assured that the medication was going to be sent out overnighted and that it was due to go out for sure. And I was sitting there thinking ... you know, you hear it for so long, and by that time I was desperate, and I canceled the prescription completely. Had I known I could have done that, I would have done it a lot earlier." (RT 47:7-17.) SB was neither told nor did she tell anyone that she understood that there would be over a two week delay in getting her prescriptions. (RT 50:1-4.) ES returned the original prescription to SB as requested. SB returned to her previous practice of obtaining all her narcotic prescriptions through her local pharmacy and all other drugs were obtained through ES. (RT 170:7-11.)

On cross-examination, SB testified that she was aware that the delivery of her medication would take longer through a mail order delivery system. "I do know there is some delay [with mail delivery]." (RT 52:5-8.) She testified that a turnaround time of even 14-days would have been "sufficient" from the date her prescriptions were submitted to ES until mail receipt of the medications. (RT 39:1-5.) There was a difference of four (4) days between when respondent submitted her prescriptions to ES and the date she deemed "sufficient" to receive her medications (14 days) and her cancellation date (18) days. SB used ES for cost saving measures and never had a problem before this incident or since. She testified that it was possible that around May 18th, she was informed that her prescriptions were "lost in limbo" or "some queue" (RT 52:19-25; 53:5-8.) She was shown a customer service call log that demonstrated she called ES 11 times before cancelling her prescription. She does not dispute that she may have only called 11 times instead of her previous testimony that she stated she called 20 times.

SB testified that all three drugs were written by her physician as "PRN" which referred to "as needed." If she were using her medications according to her usual

regiment, SB agreed that her narcotic drug supply on hand "would have lasted 60 days" and she was never without a supply of her drugs. (RT 58:9-13.) She utilized the ES mail pharmacy before without any difficulties or problems. She continues to utilize the ES mail pharmacy services. SB testified that had ES customer service department told her earlier that there was a drug backorder, a computer problem and a utilization review that would have resulted in a delay, then she would have cancelled her prescription sooner.

The Administrative Law Judge in this matter found SB was sincere, not overreaching, and understood the limitations of a mail order pharmacy business. Her telephone contacts with ES's customer service department were mainly the basis of her complaints since she was not initially told the reasons for the delay in filling her prescription order and incorrectly informed that they would ship in 24 to 48 hours. Furthermore, she was never advised of the consequences the backordered drug had on her other prescription drug orders or her options such that she was able to seek delivery of her Oxycontin prescription drugs in a timely manner. By all accounts, there was a lack of effective communication and delivery of information from Respondent to SB.

Pharmacist in Charge, Christopher Meilinger's Testimony

11. Christopher Meilinger was the Pharmacist-in-Charge (PIC) at Express Scripts (ES) in Tempe, Arizona. He is licensed in eight states (not in California) and is familiar with the home delivery pharmacy business. He has been a pharmacist since 1990. From June 2007 to the present, he was employed at Express Scripts. Mr. Meilinger testified that it was ES's practice when a new client enrolled with ES to obtain their prescriptions, and that they are provided a "Welcome Packet" which informed clients that filling a prescription may take 10 to 14 days. Mr. Meilinger testified that he had no reason to believe that SB did not receive the customary "Welcome Packet" when she enrolled with ES. (RT 152:22-25.)

On May 7, 2010, ES received a prescription sent by SB for Oxycontin 10 mg, Oxycontin 20 mg and Levorphanol 2 mg. SB was a repeat client of ES but had not previously submitted narcotic prescriptions to be filled with ES before May 7, 2010. As a result, the prescription for the Schedule II narcotic, Oxycontin, required a utilization review audit to ensure the proper use for the drug. "Multiple drug utilization review cautions had to be evaluated." One of the steps of utilization review involved calling the physician who prescribed the narcotic.

On May 12, 2010, the utilization review for Oxycontin was completed and Levorphanol 2 mg was on backorder. In Mr. Meilinger's letter to the Board dated July 27, 2010, he states that, "We hold backordered prescriptions for five days if we believe we may obtain the unavailable product within that time. In this case, we were not able to obtain Levorphanol, and therefore on May 17 we removed it from (SB's) order." (State's Ex. 5.) On cross examination, Mr. Meilinger admitted that no one from ES contacted SB to inform her that her Oxycontin was going to be put on hold for five

days. (RT 180:15-18.) Mr. Meilinger explained, however, that instead of filling all the prescriptions at one time, the intent was to separate out the prescriptions based on availability to ensure a timely delivery.

From May 18 to May 24, SB's prescriptions were "stuck in an electronic queue." Mr. Meilinger testified that there was a "glitch with our computer system that orders for controlled substances went into and were not able to be moved along through the normal process because the computer systems weren't communicating correctly together." (RT 167:16-20.) When questioned about what steps respondent would take to prompt investigation into the status of SB's prescriptions after her calls, Mr. Meilinger admitted to the following with regards to information provided to SB:

"[SB] called into the contact center, customer service center. What they can see about an order is limited. They can see where generally it is in the process, but not enough detail to do any further investigation." (RT 184:14-18.)

Despite the foregoing, respondent's call center procedure would be to still provide the customer that "generality" about shipment within 24 to 48 hours if ES's computer system indicated a certain "step" in the process had been obtained, even if there was no way for its employees to investigate its accuracy. (RT 184:14-25; 185:1-5.) On May 24, 2010, the computer issue was identified and resolved. The prescriptions were released from the "queue" on the 24th. (RT 168:16-22.)

On May 25, 2010 SB called and requested a return of her prescription and to cancel the order. ES complied.

Mr. Meilinger testified that he spoke with SB to explain and apologize for the delay in processing her prescriptions. He informed her of the extra steps needed to process a controlled substance. SB realized that her controlled substance prescriptions were written for only 30-day supply and therefore using a home delivery system was not her best option for processing those medications. Mr. Meilinger corroborated SB's testimony regarding her continued use of ES for her non-controlled substance medication needs.

Mr. Meilinger cooperated with all the Board's requests including providing copies of SB's prescriptions, her medication profile, and documentation of conversations or interactions with SB.

From May 13, 2010 to May 25, 2010 a telephone log demonstrated that a total of 11 calls were made by SB's requesting the status of her prescriptions before SB cancelled her order. On July 27, 2010, Mr. Meilinger provided the Board with a written detailed account of the facts that surrounded SB's complaint. On September 7, 2010, Mr. Meilinger provided the Board with additional written documentation.

The Administrative Law Judge in this matter found Mr. Meilinger was straightforward, direct, and answered questions without hesitation, and that he

understood the business, policy and procedures of the mail order pharmacy delivery system. He provided written, detailed and timely responses to the Board's request and was fully cooperative. He personally apologized to SB for the delay in providing her medications. He explained to SB that the delays were a result of a computer glitch, the market unavailability of Levorphanol, and the utilization review needed for her narcotic medications.

Inspector Ben Rustia, Pharm. D. -Complainant's Expert's Testimony

12. Pharmacist and Inspector Ben Rustia was called as an expert on behalf of the complainant. Inspector Rustia was retained to review SB's complaint, investigate ES's procedures, and prepare an investigative report. Inspector Rustia has been a licensed pharmacist since 1980. He has never been disciplined. From 2008 to the present, he has been an inspector for the Board of Pharmacy. He worked in various pharmacy settings including hospitals and retail, but has never worked in the area of mail order pharmacy.

On August 20, 2010, Inspector Rustia prepared a six-page typed report of his findings (State's Exhibit 7, AGO 26-31). Inspector Rustia opined in his investigative report that ES violated Business and Professions Code section 733, subdivision (a) (State's Ex. 7, AGO 29). He wrote, "The investigation substantiated that Express Scripts (ES) due to procedures obstructed and **delayed** SB from obtaining her prescriptions for OxyContin." [Emphasis added] (State's Ex. 7, AGO 27).

Inspector Rustia further opined that there was a violation of Business and Professions Code section 733, subdivision (a), in that:

- A. "ES **obstructed** in furnishing the prescriptions of SB because of Express Scripps [sic] procedures in filling prescriptions." (State's Exhibit 7, AGO 30.)
- B. "Pharmacist Christopher Meilinger as pharmacist-in-charge of Express Scripts Pharmacy failed to comply. Specifically...Express Scripts Pharmacy... **obstructed** in furnishing the prescriptions of SB because of Express Scripps [sic] procedures in filling prescriptions." (State's Exhibit 7, AGO 30.) [Emphasis added.]

On September 20, 2010, Inspector Rustia prepared a supplemental report to the Board and again concluded that ES obstructed and "**delayed**" SB from obtaining her prescriptions for Oxycontin. [Emphasis added]. (State's Exhibit 8, AGO 45.) Inspector Rustia reviewed Christopher Meilinger's September 7, 2010 response to the written notice of noncompliance where Mr. Melinger explained that three issues contributed to the delay in this matter, (1) drug utilization review activities for the narcotic Oxycontin, (2) market availability of Levorphanol, and (3) a computer issue where the prescription became stuck in an "electronic queue". (RT 146:6-10.) However, at hearing, Inspector Rustia raised concerns about respondent's explanations and inferred that respondent's

actions or explanations were not reasonable. For example, in responding to a question about respondent's "stuck in a computer queue" explanation, Inspector Rustia stated:

"[The prescription] was placed in limbo, and nobody – you know, nobody bothered to take a look at that prescription until such time. The other contention is that [SB] had been calling and speaking to customer service. Wouldn't that at least initiate somebody from Express Scripts to take a look at this and possibly refer the call to a pharmacist to have that pharmacist take care of that issue? (RT 134:13-24.)"

On cross-examination at hearing, Inspector Rustia acknowledged that he made no finding that anybody at Express Scripts had made a conscious decision to refuse to fill an Oxycontin prescription for SB. (RT 90:6-11.) He testified that his decision to issue the nonconformance finding was based upon respondent's delay and what he perceived as inactivity on the prescriptions. (RT 90:12-16.) In making that finding, Inspector Rustia acknowledged that he was informed by respondent that the prescriptions were at one point "stuck in an electronic queue." Inspector Rustia agreed that since SB had not previously filled her narcotic prescriptions with ES, it was appropriate the prescriptions were held for a "drug utilization review" (D.U.R.). It was the duty of the pharmacist to exercise a "corresponding responsibility" to determine that narcotics prescriptions were "appropriate," that there was no evidence of abuse or misuse and that the drug was prescribed for a legitimate purpose. (RT 93:17-22; 94:4-20.)

Inspector Rustia testified that once a prescription was given to one pharmacy, a second pharmacy cannot fill the prescription unless the original prescription was returned and sent to the second pharmacy. This process prevents abuse and misuse of the drugs, especially for Schedule II drugs.

Inspector Rustia also opined regarding whether respondent's conduct was reasonable in light of what respondent had communicated to SB. When asked whether a ten (10) to fourteen (14) day turn around for a mail order delivery of medications was reasonable in this case, Inspector Rustia opined that it was reasonable because "that's the expectation that Express Scripts has given the patient." However, respondent would then have to "comply with whatever the expectations are." (RT 102:3-11.) SB's expectations were a 10 to 14 day delivery cycle. Inspector Rustia opined that "if Express Scripts could not fulfill that particular expectation, then they should provide another means" for obtaining the prescription. For example, respondent could have provided SB the option of "mailing that prescription back to [SB] so she can get it filled elsewhere." (RT 103:10-13.) Regardless, at SB's request, the order was cancelled on the 18th day, four (4) days later than the time in which she understood that her prescriptions would be filled.

In both of Inspector Rustia's reports, and in his testimony, the basis of his opinions was specifically focused on Business and Professions Code section 733,

subdivision (a), which refers to the word "obstruct." Inspector Rustia opined and repeatedly used the terms "obstruct" and "delay" at the administrative hearing as though they were interchangeable in his testimony. Respondent took issue with the fact that Inspector Rustia's investigative reports referred to language that respondent "**delayed**" SB from obtaining her medications, even though the word "obstruct" is what is used in the statute. Inspector Rustia did acknowledge knowing at hearing that Section 733 uses the word "obstruct," not delay (RT 130:17-22). However, Inspector Rustia clearly set forth his rationale for using the word "delay" in connection with finding a violation in this case when he testified that:

"A delay can lead to obstruction. . . in this particular case, the delay caused the obstruction for [SB] from obtaining her prescription in a timely manner." (RT 113:19-24.)

Inspector Rustia also opined on how the Board's staff would evaluate whether a violation occurred under Section 733, as follows:

"Again, it is a case-by-case judgement on our part to make sure that, yes, the pharmacist made every effort to try to make sure that ... the prescription is filled for that patient, the pharmacist made every effort to call the patient to give them an option, to say, 'we don't -- we're having problems with the prescription, would you like it transferred or returned back to you, or for us to find a suitable place for you to have that filled?'" (RT 130:8-16.)

According to the Administrative Law Judge, Inspector Rustia presented as a mild mannered witness who had difficulty articulating a basis for a citation or fine. He appeared reserved, reluctant, and nervous. However, Inspector Rustia has a demonstrated knowledge of the Pharmacy Law and the Board's investigations of violations of this section. Further, Inspector Rustia has over 30 years of experience as a **California** pharmacist. In any event, the question of whether a "delay" can cause an obstruction in the patient obtaining her prescription in violation of Section 733 is a question of both law and fact that will be discussed more fully below.

LEGAL CONCLUSIONS

1. The burden of proof is upon the board by a preponderance of the evidence in a citation matter. (Evid. Code, § 115; *Owen v. Sands* (2009) 176 Cal.App.4th 985, 989.)

2 Business and Professions Code section 733 provides:

(a) No licentiate **shall obstruct** a patient in obtaining a prescription drug or device that has been legally prescribed or ordered for that patient. A violation of this section constitutes unprofessional conduct by the licentiate and shall subject the licentiate to disciplinary or administrative action by his or her licensing agency.

(b) Notwithstanding any other provision of law, a licentiate shall dispense drugs and devices, as described in subdivision (a) of Section 4024, pursuant to a lawful order or prescription unless one of the following circumstances exists:

(1) Based solely on the licentiate's professional training and judgment, dispensing pursuant to the order or the prescription is contrary to law, or the licentiate determines that the prescribed drug or device would cause a harmful drug interaction or would otherwise adversely affect the patient's medical condition.

(2) **The prescription drug or device is not in stock.** If an order, other than an order described in Section 4019, or prescription cannot be dispensed because the drug or device is not in stock, the licentiate **shall** take one of the following actions:

(A) **Immediately notify the patient** and arrange for the drug or device to be delivered to the site or directly to the patient in a timely manner.

(B) **Promptly transfer the prescription to another pharmacy** known to stock the prescription drug or device that is near enough to the site from which the prescription or order is transferred, to ensure the patient has timely access to the drug or device.

(C) **Return the prescription to the patient and refer the patient.** The licentiate shall make a reasonable effort to refer the patient to a pharmacy that stocks the prescription drug or device that is near enough to the referring site to ensure that the patient has timely access to the drug or device.

(3) The licentiate refuses on ethical, moral, or religious grounds to dispense a drug or device pursuant to an order or prescription. A licentiate may decline to dispense a prescription drug or device on this basis only if the licentiate has previously notified his or her employer, in writing, of the drug or class of drugs to which he or she objects, and the licentiate's employer can, without creating undue hardship, provide a reasonable accommodation of the licentiate's objection. The licentiate's employer shall establish protocols that ensure that the patient has timely access to the prescribed drug or device despite the licentiate's refusal to dispense the prescription or order. For purposes of this section, "reasonable accommodation" and "undue hardship" shall have the same meaning as applied to those terms pursuant to subdivision (l) of Section 12940 of the Government Code.

(c) For the purposes of this section, "prescription drug or device" has the same meaning as the definition in Section 4022.

(d) The provisions of this section shall apply to the drug therapy described in Section 4052.3.

(e) This section imposes no duty on a licentiate to dispense a drug or device pursuant to a prescription or order without payment for the drug or device, including payment directly by the patient or through a third-party payer accepted by the licentiate or payment of any required copayment by the patient.

(f) The notice to consumers required by Section 4122 shall include a statement that describes patients' rights relative to the requirements of this section. [Emphasis added.]

3. Business and Professions Code section 4005 provides, in part, that the Board of Pharmacy may adopt rules and regulations, not inconsistent with the law of this state as may be necessary for the protection of the public. The Board may adopt regulations permitting the dispensing of drugs or devices in emergency situations.

4. Business and Professions Code section 4301 subdivision (o) provides, in part, that the Board shall take action against any holder of a license who is guilty of unprofessional conduct which includes violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency.

5. California Code of Regulation, title 16, section 1775, provides that the Board's Executive Officer may issue a citation that contains an administrative fine for a violation of Pharmacy Law.

Evaluation

a. Definitional Terms

6. Section 733 prohibits obstructing a patient in obtaining a prescription.

Resolution of this matter rests on what the term "obstruct" means in the statute. Respondent argued that it did not intentionally or purposefully delay the patient's prescription. Is an unintended "delay" considered an "obstruction" under the statute? Is intent or volition an element of obstruction?

Courts interpret statutory language according to its usual and ordinary import, keeping in mind the apparent purpose of the statute as a whole. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387; *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529-530.) "Courts frequently consult dictionaries to determine the usual meaning of words." (*In re Marriage of*

Bonds (2000) 24 Cal.4th 1, 16.). "A court may not read into a statute qualifications or modifications that will materially affect its operation so as to conform to a supposed intention not expressed by the Legislature." (*Hellum v. Breyer* (2011) 194 Cal.App.4th 1300, 1311 citing *Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 203; Code Civ. Proc., § 1858.) When no ambiguity appears, courts give statutory terms their plain meaning. (*People v. Coronado* (1995) 12 Cal.4th 145, 151.)

The usual and ordinary meaning of the term "obstruct" is to "block up, or close up, place an obstacle in or fill with obstacles or impediments to passing; to be or come in the way of; hinder⁵ from passing, action impede." (*Webster's Third New International Dictionary*; see also *The American Heritage College Dictionary*, 4th ed. 2007, defining "obstruct" as "to impede, retard, or interfere with; hinder.")⁶ Black's Law Dictionary defines "obstruction" as "the act of impeding or hindering something, interference." (*Black's Law Dictionary*, 9th ed. 2009.) Courts have similarly defined "obstruct" as meaning "to hinder or prevent from progress; check; stop; also, to retard the progress of; make accomplishment difficult and slow." (*Conley v. United States* (8th Cir. 1932) 59 F.2d 929, 936.)

On its face, Business and Professions Code section 733 does not require that volition or intent be an element of the interpretation of the word "obstruct." Further, the words "intentional" or "knowing" or "willful" do not exist in the text at Business and Professions Code section 733, subdivision (a). Furthermore, it is clear that the plain meaning of the word "obstruct" includes any type of delay, including delays that occur as the result of inadvertence, negligence or error. A review of the history, intent and purpose of Section 733's provisions, as a whole, further supports this reading.

b. *Legislative History -Senate Bill 644 2005 Cal.Legis.Serv.Ch 417*

7. Senate Bill SB 644 was codified to become Business and Professions Code section 733. SB 644 provided, "It is the intent of the Legislature that health care professionals dispense prescription drugs and devices in a **timely way** or provide appropriate referrals for patients to obtain the necessary prescription drugs and devices, despite the health care professional's objection to dispensing the drugs or devices on ethical, moral, or religious grounds." [Emphasis added.] Consequently, the legislative intent behind the statute was to prohibit a health care licentiate from obstructing a patient in obtaining their prescription drugs in a timely manner while balancing a licentiate's rights to object or refuse to fill a prescription in very limited circumstances (see Bus. & Prof. Code, §§ 733, subsections (b)(1)-(2), (e)).

This interpretation is further supported by the plain reading of the statutory section as a whole. Section 733(b)(2) requires a licentiate to take specific actions

⁵ The usual and ordinary meaning of the word "hinder" includes "to prevent, stop or delay action." (*Webster's New World Dictionary* (3rd Coll.Ed. 1988), Simon & Schuster, Inc.)

⁶ The Board takes official notice of the dictionary definitions for the word "obstruct" pursuant to Government Code section 11515.

when a drug is out of stock, including "immediately notifying a patient" to ensure that a patient obtains their medications in a timely manner. There are no exceptions or limitations in Section 733 for taking these actions simply because the licentiate chooses to conduct its business by mail order or use a specific type of computer system to communicate with its customers. It is clear from Section's 733's provisions that accurate, timely and complete communication is an effective element in helping to ensure that patients receive medications in a timely manner as mandated by subdivision (a) of Section 733. That did not occur in this case. (Factual Findings 10 and 12.)

c. *Respondent's conduct in light of Section 733's mandate*

The protection of the public is the Board's highest priority (Bus.&Prof.Code, § 4001.1.) The Board protects the public by enforcing the laws under its jurisdiction in a manner that affords the greatest public protection possible, consistent with the intent and purpose of those laws. Complainant has shown, by a preponderance of the evidence, that SB was "obstructed" in obtaining her legally prescribed medications for at least four days. Although SB canceled her prescription 21 days after mailing them to respondent, both SB and Inspector Rustia testified that 14 days was a reasonable amount of time to fill the mail order prescription in light of: the prior notice provided to SB in this case, the reasonable expectations that SB had based upon the notice and her needs, and SB's understanding that there may be "some delay" in mail delivery. (Factual Findings 10, 12.)

However, the delay became an "obstruction" when respondent repeatedly failed to communicate to SB the true status of her prescription orders and what SB's options were for dealing with the delays, including options for cancelling her order and having the order filled by another pharmacy. This resulted in SB not receiving her Oxycontin medications in a timely manner. The record demonstrates that respondent failed to take steps to notify SB that the part of her order for Levorphanol was out of stock, or inform SB of how that would impact or cause a delay in her obtaining the other part of her prescription orders for Oxycontin.

Respondent's PIC testified that its customer service representatives can only access a "limited" amount of information about a particular prescription from respondent's computer system and are not provided "enough detail to do any further investigation" when communicating with customers. As such, customer service representatives have no ability to conduct any further investigation into when a prescription will actually ship. This results in respondent's customer service agents telling a customer, like SB, inaccurate information regarding the true status of her order. ES's telephone customer service representatives should have known and informed SB early on in the process of filling of her prescriptions of the reasons her order was delayed. Instead, SB was repeatedly told that the order would ship in 24 to 48 hours. Had the telephone customer service department truthfully advised SB early on of the reasons for the delay, SB testified she would have cancelled her prescriptions and probably would not have filed a complaint. Accurate information

would have also allowed SB to make informed decisions and allowed her the option to seek more immediate service from another pharmacy. SB would not have been continually misled into believing that her medications would ship in "24 to 48 hours." (Factual Findings 10-12.)

Respondent is responsible for effectively communicating accurate and complete information to its patients. Respondent is also responsible for putting systems in place that allow inaccurate and incomplete information to be transmitted to patients. The provision of inaccurate and incomplete information from a licentiate to a patient can obstruct or hinder a patient from receiving their medications in a timely manner, as it did in this case. In consideration of all of the foregoing, the citation and fine is sustained.

Conclusion

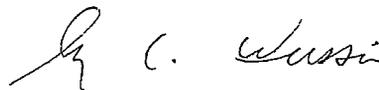
8. The Board has jurisdiction to issue this citation against respondent pursuant to Sections 4303 and 4301(o) of the Business and Professions Code and Title 16, California Code of Regulations section 1775 for violation of Section 733 of the Business and Professions Code. Cause for a citation and fine exists by a preponderance of the evidence pursuant to California Business and Professions Code section 733 subdivision (a), in that Express Scripts did obstruct a patient in obtaining a prescription as set forth in Factual Findings 1, 2, 3, 4, 5, 6, 7, 10, 11, 12 and Legal Conclusions 1, 2, 4, 5 and 6.

ORDER

The Citation and Fine against Express Scripts, NRP 531, Case No. CI 2009 44657 is sustained.

This Decision shall become effective on December 20, 2012.

IT IS SO ORDERED this 20th day of November, 2012.



STAN C. WEISSER
Board President

BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Citation Against:

ESI MAIL PHARMACY SERVICES, INC.
dba Express Scripts

Nonresident Pharmacy Permit No. NRP 531

Respondent.

Case No. CI 2009 44657

OAH No. 2011060384

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

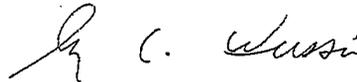
ORDER OF NONADOPTION OF PROPOSED DECISION

YOU ARE HEREBY NOTIFIED pursuant to Section 11517 of the Government Code, the California State Board of Pharmacy hereby non-adopts the proposed decision in Citation Case No. CI 2009 44657. A copy of the proposed decision is attached hereto.

The board will decide the case itself upon the record, including the transcript, exhibits and written argument of the parties, without taking additional evidence. The Board has ordered a transcript and will notify the parties when the transcript has been prepared and of the date set for submission of written argument.

IT IS SO ORDERD this 23rd day of July 2012.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA



By

STANLEY WEISSER
Board President

BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Citation Against:

ESI MAIL PHARMACY SERVICES, INC.
dba EXPRESS SCRIPTS

Respondent.

Case No. CI 2009 44657

OAH No. 2011060384

PROPOSED DECISION

Carla Nasoff, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 18, 2012, in San Diego, California.

Nicole R. Trama, Deputy Attorney General, Department of Justice, State of California, represented complainant Virginia Herold, Executive Officer of the Board of Pharmacy.

Edward D. Rickert, Attorney at Law, who is licensed to practice law in Illinois, appeared as counsel pro hac vice for the respondent along with Marty O'Toole, Attorney At Law, from Los Angeles, California. Christopher Meilinger, Senior Director and Pharmacist-in-Charge for Express Script, was present throughout the hearing.

The matter was submitted on May 18, 2012.

FACTUAL FINDINGS

Jurisdictional Matters

1. On November 16, 2010, complainant, Virginia Herold, the Executive Officer of the Board of Pharmacy, issued Citation Number CI 2009 44657 to Express Scripts, attention Patrick McNamee, President. The Citation was issued pursuant to Business and Professions Code sections 4005 and 4301 and California Code of Regulations, title 16, section 1775 et seq., for violations of the laws and regulations that govern the practice of pharmacy in California. Specifically, the Citation alleged a violation in Business and Professions Code section 733 subdivision (a), (obstructing a patient in obtaining a prescription.) The Citation imposed a \$250 fine.

2. On November 29, 2010, Edward D. Rickert, as counsel for Express Scripts, contested the Citation, filed an appeal, and requested an office conference.

3. On February 24, 2011, the Board of Pharmacy Committee determined that no new information was presented at the office conference and affirmed the Citation and Fine as originally issued. The matter was then forwarded to the Office of the Attorney General.

4. On June 9, 2011, required jurisdictional documents, including a notice of hearing setting the matter for hearing, were served by certified mail upon respondent.

5. On May 18, 2012, the record was opened, jurisdictional documents were received, sworn testimony was given, documentary evidence was introduced, closing arguments were presented, and the matter was submitted.

Licensure History

6. On May 30, 2003, the Board of Pharmacy, State of California (Board) issued Permit Number NRP 531 to ESI Mail Pharmacy Service, Inc., authorizing respondent to do business as Express Scripts (ES or respondent.) Respondent's address of record is in Tempe, Arizona. The permit expires on May 1, 2013, unless renewed.

Summary of Citation and Fine

7. On November 16, 2010, a Citation and Fine was issued that alleged Express Scripts (ES) obstructed a patient in obtaining legally prescribed prescription drugs. Pursuant to Business and Professions Code section 733, subdivision (a), no licentiate shall obstruct a patient in obtaining a prescription drug or device that has been legally prescribed or ordered for that patient. A violation of this section constitutes unprofessional conduct subject the licentiate to disciplinary or administrative action.

Specifically, the Citation alleged that on May 7, 2010, Express Scripts Pharmacy obstructed the furnishing of the prescriptions of patient (SB) because of the Express Scripts procedures in filling prescriptions. The Citation alleged that respondent's procedures for filling mail order prescriptions obstructed patient SB in obtaining her medications. According to the Citation, the medications Levorphanol 2 mg and Oxycontin were not available and were backordered. The situation resulted in the patient not obtaining her prescriptions for Oxycontin 10 mg and Oxycontin 20 mg for an additional five (5) days.

The Citation further alleged that from May 18, 2010 to May 24, 2010, SB's prescriptions for Oxycontin 10 mg and Oxycontin 20 mg were stuck in an "electronic queue" that caused a further delay in furnishing the prescriptions. As a result, 18 days after sending the prescriptions to Express Scripts, SB canceled her prescriptions for Oxycontin 10 mg, Oxycontin 20 mg and Levorphanol.

Motion to Dismiss

A request for dismissal was addressed before the commencement of the taking of evidence based on two issues.

Issue Number One (Regulatory Authority) and Ruling

8. The first issue raised by respondent was whether the Board possessed authority to discipline or issue a citation against a non-resident pharmacy where the pharmacy's home state did not have the same grounds for discipline. Respondent requested a motion to dismiss be granted on this basis.

Respondent argued that there was no Arizona law that provided for discipline based on a delay or obstruction in dispensing a legally prescribed medication.

Complainant argued that Business and Professions Code section 4303, subdivision (b), provided, in part, that the Board may deny, revoke, or suspend a nonresident pharmacy registration; issue a citation or letter of admonishment to a nonresident pharmacy; or take any other action against a nonresident pharmacy that the board may take against a resident pharmacy license, on any of the same grounds upon which such action might be taken against a resident pharmacy, provided that the grounds for the action are also grounds for action in the state in which the nonresident pharmacy is permanently located. Arizona pharmacy laws provided that it was unethical to violate any law, including California laws, that relate to prescription drugs. Complainant argued there was no basis to dismiss the citation as a result of this statute.

Ruling: The Board has the authority to discipline or issue a citation against a non-resident pharmacy because respondent, Express Scripts, was issued a non-resident pharmacy permit number NRP 531 to ESI Mail Pharmacy Services Inc., to do business as Express Scripts in California. Therefore, ES was bound by California law; it performed business in California and was considered a non-resident licensee under California Business and Professions Code, section 4303 subdivision (b). The Board has the authority to issue a citation for the violation of Business and Professions code section 733 to a non-resident pharmacy permit holder. The request for dismissal was denied.

Issue Number Two (Delay or Obstruction) and Ruling

9. The second issue raised by respondent as a basis for dismissal was whether Business and Professions Code section 733 authorized discipline based on inadvertent delays in filling a prescription.

Respondent alleged that Business and Professions Code section 733 does not provide a basis for citing or disciplining a pharmacy based on a "delay" in filling a prescription. A licentiate, according to the statute, shall not "obstruct" a patient in obtaining a prescription, but the statute does not reference the issue of delay. Respondent requested a dismissal of the citation.

Complainant argued that the motion for dismissal was premature and not within the authority of the administrative hearing process.

Ruling: The question of delay or obstruction depends on factual determinations that must be made after testimony and evidence are received. The request for dismissal was denied.

Patient SB's Testimony

10. SB, a patient and former nurse, suffered a fracture at the second lumbar vertebra (L2) that required surgical fusion from L1 to L3. As a result of lumbar fusion, she suffered from neuropathy and was treated at the University of California, Los Angeles (UCLA) for pain management. From 2002 to the present, SB suffered pain and was treated with Oxycontin¹.

From 2007 to the present, SB was a client of respondent's prescription mail order company, Express Scripts. Prior to 2010, SB obtained her narcotic prescription from the local CVS pharmacy and filled her non-narcotic prescriptions through ES.

On May 4, 2010, SB sent her prescription for Levorphanol (2 mg, one to two tablets, three times a day for pain, as needed); Oxycontin (20 mg, one to two tablets, three times a day for pain, as needed); and Oxycontin (10 mg one to two tablets, three times a day for pain as needed). ES was based in Arizona and the prescriptions were sent to ES by mail. SB testified that she was fully aware and consented to the additional time required to process and receive her medications. SB testified, "I knew that if ES could fill the prescription within 14 days, that would be sufficient time...I have an earthquake backup supply of narcotics." SB also understood that prescriptions for controlled substances (Oxycontin) may involve extra steps in processing and could take longer to fill when using a home delivery mail order option versus her local pharmacist. From May 4, 2010 to May 25, 2010, SB testified she called ES customer service "more than 20 times" to determine when she would receive her medications.

On May 13, 2010, SB testified that she telephoned ES's customer service number and was told that the prescriptions were "lost in limbo, but had been found and would ship within 24 to 48 hours." SB did not receive the drugs within the 24 to 48 hours as promised, and she again called customer service.

On May 18, 2010, SB testified that she called ES's customer service number and was told that, "Levorphanol was on backorder." ES testified that she was not previously told that Levorphanol was out of stock and was on back order. SB testified that she only used the drugs prescribed as needed, however, "I would have cancelled the prescription had I known that they were holding up the Oxycontin due to the backorder of Levorphanol."

¹ Oxycontin is the brand name for oxycodone, a controlled substance pursuant to Health and Safety Code section 11055 subdivision (b)(1)(N) and a dangerous drug pursuant to Business and Professions Code section 4022 used as a Schedule II narcotic analgesic.

On May 19, 2010, twelve (12) days after submitting her prescriptions to ES, SB drove to her UCLA physician's office to obtain a "bridge one-week supply of Oxycontin." SB testified that she was aware that she could not obtain a second narcotic prescription when there is an outstanding pending prescription order with another pharmacy. SB received the one-week bridge supply and was never without a supply of her medications. SB testified that she called ES twice a day from May 19, 2010 to May 25, 2010, to determine the status of her prescriptions. ES's telephone customer service repeatedly told her that the drugs would be delivered "within 24 to 48 hours."

On May 25, 2010, eighteen (18) days after submitting her prescriptions to ES, SB cancelled her prescription order with ES. "I was desperate. I did not attempt to cancel the prescription prior to this date, because I was not aware the drugs were on backorder. If I had known it would take over 18 days to fill, I would have cancelled it immediately. I was never told it would be over a two week delay." ES returned the original prescription to SB as requested. SB returned to her previous practice of obtaining all her narcotic prescriptions through her local pharmacy and all other drugs were obtained through ES. She testified that she continues to enjoy the convenience and savings she has with ES.

On cross-examination, SB testified that she was aware that the delivery of her medication would take longer through a mail order delivery system. "I do know that there is a delay with mail delivery." She testified that a 14-day period was reasonable and "sufficient" from the date her prescriptions were submitted to ES until mail receipt of the medications. There was a difference of four (4) day between when respondent submitted her prescriptions to ES and the date she expected to receive her medications (14 days) and her cancellation date (18) days. SB used ES for cost saving measures and never had a problem before this incident or since. She testified that, "It was possible that the drugs were lost in the computer queue." She was shown a customer service call log that demonstrated she called ES 11 times before cancelling her prescription. She does not dispute that she may have only called 11 times instead of her previous testimony that she stated she called 20 times.

SB testified that all three drugs were written as "PRN" which referred to "as needed." Her narcotic drug supply on hand "would have lasted 60 days" and she was never without a supply of her drugs. She utilized the ES mail pharmacy before without any difficulties or problems. She continues to utilize the ES mail pharmacy services. SB testified that had ES customer service department told her earlier that there was a drug backorder, a computer problem and a utilization review that would have resulted in a delay, then she would have cancelled her prescription sooner.

SB was sincere, not overreaching, and understood the limitations of a mail order pharmacy business. Her telephone contacts with ES's customer service department were mainly the basis of her complaints since she was not initially told the reasons for the delay in filling her prescription order and that they would ship in 24 to 48 hours. By all accounts, there was a lack of effective communication between the ES's telephone customer service department and SB.

Pharmacist in Charge, Christopher Meilinger's Testimony

11. Christopher Meilinger was the Pharmacist-in-Charge (PIC) at Express Script (ES) in Tempe, Arizona. He is licensed in eight states (not in California) and is familiar with the home delivery pharmacy business. He has been a pharmacist since 1990. From June 2007 to the present, he was employed at Express Script. When a new client enrolled with ES to obtain their prescriptions, they are provided a "Wellness Packet" which informed clients that filling a prescription may take 10 to 14 days. SB was a long time client of ES and was provided a wellness packet. SB never complained before or subsequent to the May 2010 incident.

On May 7, 2010, ES received a prescription sent by SB for Oxycontin 10 mg, Oxycontin 20 mg and Levorphanol 2 mg. SB was a repeat client of ES but had not previously submitted narcotic prescriptions to be filled with ES before May 7, 2010. As a result, the prescription for the Schedule II narcotic, Oxycontin, required a utilization review audit to ensure the proper use for the drug. "Multiple drug utilization review cautions had to be evaluated." One of the steps of utilization review involved calling the physician who prescribed the narcotic.

On May 12, 2010, the utilization review for Oxycontin was completed and Levorphanol 2 mg was on backorder. Mr. Meilinger testified, "We hold backordered prescriptions for five days if we believe we may obtain the unavailable product within that time. In this case, we were not able to obtain Levorphanol and therefore on May 17, 2010 we removed it from (SB's) order." Instead of filling all the prescriptions at one time, the intent was to separate out the prescriptions based on availability to ensure a timely delivery.

From May 18 to May 24, SB's prescriptions were "stuck in an electronic queue." Mr. Meilinger testified that "There was a glitch in the computer and SB's prescriptions were delayed."

On May 24, 2010, the computer issue was identified and resolved. The prescriptions were ready to be sent to SB.

On May 25, 2010 SB called and requested a return of her prescription and to cancel the order. ES complied.

Mr. Meilinger testified that he spoke with SB to explain and apologize for the delay in processing her prescriptions. He informed her of the extra steps needed to process a controlled substance. SB realized that her controlled substance prescriptions were written for only 30-day supply and therefore using a home delivery system was not her best option for processing those medications. Mr. Meilinger corroborated SB's testimony regarding her continued use and satisfaction with ES for her non-controlled substance medication needs.

Mr. Meilinger cooperated with all the Board's requests including providing copies of SB's prescriptions, her medication profile, and documentation of conversations or interactions with SB.

From May 13, 2010 to May 25, 2010 a telephone log demonstrated that a total of 11 calls were made by SB's requesting the status of her prescriptions before SB cancelled her order.

On July 27, 2010, Mr. Meilinger provided the Board with a written detailed account of the facts that surrounded SB's complaint.

On September 7, 2010, Mr. Meilinger provided the Board with additional written documentation. Mr. Meilinger was cooperative and diligent in providing all the information necessary. He wanted the Board to dismiss the matter because although the citation and fine was a nominal amount (\$250), it would be considered a reported disciplined event that would require disclosure to all states where Mr. Meilinger was licensed.

Mr. Meilinger was straightforward, direct, and answered questions without hesitation. He understood the business, policy and procedures of the mail order pharmacy delivery system. He in good faith complied with all aspects of the investigation. He provided written, detailed and timely responses to the Board's request and was fully cooperative. Mr. Meilinger testified that there was no purposeful delay in the delivery of SB's medications. There was no obstruction in the process of filling SB's prescriptions. There was no intentionally interfering with patient care and there were no ethical, moral or religious objections to providing the prescribed medications to SB. He personally apologized to SB for the delay in providing her medications. He explained to SB that the delays were a result of a computer glitch, the market unavailability of Levorphanol, and the utilization review needed for her narcotic medications. Mr. Meilinger was knowledgeable, believable, credible and reasonable.

Inspector Ben Rustia, Pharm. D. - Complainant's Expert's Testimony

12. Pharmacist and Inspector Ben Rustia was called as an expert on behalf of the complainant. Inspector Rustia was retained to review SB's complaint, investigate ES's procedures, and prepare an investigative report. Inspector Rustia has been a licensed pharmacist since 1980. He has never been disciplined. From 2008 to the present, he has been an inspector for the Board of Pharmacy. He worked in various pharmacy settings including hospitals and retail, but has never worked in the area of mail order pharmacy.

On August 20, 2010, Inspector Rustia prepared a six-page typed report of his findings (Exhibit 9, AGO 43). Although Inspector Rustia referenced multiple exhibits in his report, the mitigation exhibit submitted by Mr. Meilinger was not included or attached to his report.

Inspector Rustia opined in his investigative report that ES violated Business and Professions Code section 733, subdivision (a). He wrote, "Express Scripts (ES) pharmacy procedures obstructed and delayed the furnishing the Oxycontin prescriptions [sic] for (SB) for 17 days." [Emphasis added].

Inspector Rustia further opined in that there was a violation of Business and Professions Code section 733, subdivision (a), in that:

- A. “ES obstructed in furnishing the prescriptions of SB because of Express Scripps [sic] procedures in filling prescriptions.” (Exhibit 7, AGO 30.)
- B. “Pharmacist Christopher Meilinger as pharmacist-in-charge of Express Scripts Pharmacy failed to comply. Specifically...Express Scripts Pharmacy... obstructed in furnishing the prescriptions of SB because of Express Scripps [sic] procedures in filling prescriptions.” (Exhibit 7, AGO 30.)
[Emphasis added]??

On September 20, 2010, Inspector Rustia prepared a supplemental report to the Board and concluded that ES obstructed and “**delayed**” SB from obtaining her prescriptions for Oxycontin. [Emphasis added]. (Exhibit 8, AGO 45.) Inspector Rustia reviewed Christopher Meilinger’s September 7, 2010 response to the written notice of noncompliance where Mr. Melinger explained that three issues contributed to the delay in this matter, (1) drug utilization review activities for the narcotic Oxycontin, (2) market availability of Levorphanol, and (3) a computer issue.

Inspector Rustia testified that, “There was no purposeful delay and no purposeful obstruction by ES in filling SB’s prescriptions and that a delay could lead to an obstruction. Inspector Rustia understood that the prescriptions were at one point “stuck in an electronic queue.” Inspector Rustia opined that since SB had not previously filled her narcotic prescriptions with ES, the prescriptions were held for a “utilization review audit.” Schedule II drugs, such as Oxycontin, require “heightened scrutiny.” It was the duty of the pharmacist to determine that narcotics doses are “appropriate, that there is no evidence of abuse, misuse and that there is no duplicative therapy.” Inspector Rustia opined that ES had the “responsibility to review Oxycontin” since it had not been previously filled by ES and it met that responsibility. A utilization review was required and ES performed the review appropriately.

Inspector Rustia testified that once a prescription was given to one pharmacy, a second pharmacy cannot fill the prescription unless the original prescription was returned and sent to the second pharmacy. This process “prevents abuse and misuse” of the drugs, especially for Schedule II drugs. When SB requested the prescription be returned to her to be filled by a local pharmacy, ES complied.

Inspector Rustia testified that, “A ten (10) to fourteen (14) day turn around for a mail order delivery of medications is not unreasonable.” SB specifically agreed to and consented to the 10 to 14 day delivery cycle. Inspector Rustia opined that, “A computer issue resulting in the prescriptions stuck in a queue resulted in a delay.” Furthermore, Levorphanol was on backorder causing a further delay. At SB’s request, the prescription was returned to her on the 18th day, four (4) days later than the time in which she agreed to have her prescriptions filled.

In both of Inspector Rustia’s reports, and in his testimony, the basis of his opinions was specifically and narrowly focused on Business and Professions Code section 733, subdivision (a), which refers to the word “obstruct.” Inspector Rustia opined and repeatedly

used the terms “obstruct” and “delay” at the administrative hearing as though they were interchangeable in his testimony.

Inspector Rustia presented as a mild mannered witness who had difficulty articulating a basis for a citation or fine. He appeared reserved, reluctant, and nervous, and he had limited knowledge in the area of mail delivery pharmacy. His past experiences were in the area of hospital and retail pharmacy. His investigative reports referred to language that respondent “**delayed**” SB from obtaining her medications, yet the words **delay** or **delayed** are not terms or elements in the statute which he concluded respondent violated.

LEGAL CONCLUSIONS

1. Business and Professions Code section 733 provides:

(a) No licentiate **shall obstruct** a patient in obtaining a prescription drug or device that has been legally prescribed or ordered for that patient. A violation of this section constitutes unprofessional conduct by the licentiate and shall subject the licentiate to disciplinary or administrative action by his or her licensing agency.

(b) Notwithstanding any other provision of law, a licentiate shall dispense drugs and devices, as described in subdivision (a) of Section 4024, pursuant to a lawful order or prescription unless one of the following circumstances exists:

(1) Based solely on the licentiate’s professional training and judgment, dispensing pursuant to the order or the prescription is contrary to law, or the licentiate determines that the prescribed drug or device would cause a harmful drug interaction or would otherwise adversely affect the patient’s medical condition.

(2) The prescription drug or device is not in stock. If an order, other than an order described in Section 4019, or prescription cannot be dispensed because the drug or device is not in stock, the licentiate shall take one of the following actions:

(A) Immediately notify the patient and arrange for the drug or device to be delivered to the site or directly to the patient in a timely manner.

(B) Promptly transfer the prescription to another pharmacy known to stock the prescription drug or device that is near enough to the site from which the prescription or order is transferred, to ensure the patient has timely access to the drug or device.

(C) Return the prescription to the patient and refer the patient. The licentiate shall make a reasonable effort to refer the patient to a pharmacy that stocks the prescription drug or device that is near enough to the referring site to ensure that the patient has timely access to the drug or device.

(3) The licentiate refuses on ethical, moral, or religious grounds to dispense a drug or device pursuant to an order or prescription. A licentiate may decline to dispense a prescription drug or device on this basis only if the licentiate has previously notified his or her employer, in writing, of the drug or class of drugs to which he or she objects, and the licentiate's employer can, without creating undue hardship, provide a reasonable accommodation of the licentiate's objection. The licentiate's employer shall establish protocols that ensure that the patient has timely access to the prescribed drug or device despite the licentiate's refusal to dispense the prescription or order. For purposes of this section, "reasonable accommodation" and "undue hardship" shall have the same meaning as applied to those terms pursuant to subdivision (l) of Section 12940 of the Government Code.

(c) For the purposes of this section, "prescription drug or device" has the same meaning as the definition in Section 4022.

(d) The provisions of this section shall apply to the drug therapy described in Section 4052.3.

(e) This section imposes no duty on a licentiate to dispense a drug or device pursuant to a prescription or order without payment for the drug or device, including payment directly by the patient or through a third-party payer accepted by the licentiate or payment of any required copayment by the patient.

(f) The notice to consumers required by Section 4122 shall include a statement that describes patients' rights relative to the requirements of this section. [Emphasis added]

2. Business and Professions Code section 4005 provides, in part, that the Board of Pharmacy may adopt rules and regulations, not inconsistent with the law of this state as may be necessary for the protection of the public. The Board may adopt regulations permitting the dispensing of drugs or devices in emergency situations.

3. Business and Professions Code section 4301 subdivision (o) provides, in part, that the Board shall take action against any holder of a license who is guilty of unprofessional conduct which includes violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency.

4. California Code of Regulation, title 16, section 1775, provides that the Board's Executive Officer may issue a citation that contains an administrative fine for a violation of Pharmacy Law.

Evaluation

a. Definitional Terms

5. Section 733 prohibits obstructing a patient in obtaining a prescription. It does not prohibit delaying a patient in obtaining a prescription. The inspector used these two terms interchangeably, but they do not have the same meaning. The case rests on the difference in the definitions of “delay” and “obstruct.” If statutory language is clear and unambiguous, words used in a statute should be given the meaning they bear in ordinary use. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 734). But the “plain meaning” rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. (*Id.*; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387).

Resolution of this matter rests on what the term “obstruct” means in the statute. The evidence established that ES did not intentionally or purposefully delay the patient’s prescription. Is an unintended “delay” considered an “obstruction” under the statute? Is intent or volition an element of obstruction?

b. Legislative History - Senate Bill 644 2005 Cal.Legis.Serv.Ch 417

6. Senate Bill SB 644 was codified to become Business and Professions Code section 733. SB 644 provided, “It is the intent of the Legislature that health care professionals dispense prescription drugs and devices in a timely way or provide appropriate referrals for patients to obtain the necessary prescription drugs and devices, despite the health care professional’s objection to dispensing the drugs or devices on ethical, moral, or religious grounds.” [Emphasis added]

The term “timely way” was not further defined. However, both SB and Inspector Rustia testified that 14 days was a reasonable amount of time to fill the mail order prescription. The delay became unreasonable, according to the testimony, on day 15.

The use of term “despite the health care professional’s objection” indicates that the volitional act by a health care professional was considered. A review of the legislative intent demonstrates that the statute was designed to balance the interests of the objecting pharmacist and the patient by requiring the pharmacist not to impede access to prescriptions to which he or she may have ethical, moral or religious objections.

One cannot ignore the language of “despite the health care professional’s objection.” “Obstruct,” in this context, signifies a volitional intentional act with the intent to hinder or prevent a patient from obtaining the medications because of “objections” the health care professional may have. “Obstruct” is utilized in this context as a volitional purposeful act to

achieve a particular outcome. It is significant that Business and Professions Code 733 does not reference the term "delay" anywhere in the statute.

Inspector Rustia did not offer any opinions regarding the legislative intent behind Business and Professions code 733. He testified that a delay could lead to an obstruction, but specifically and repeatedly testified that ES did not engage in any purposeful delay or obstruction.

On August 20 2010, (Exhibit 9 AGO 43) Inspector Rustia opined in his investigative report that ES violated Business and Professions Code section 733. He wrote, "Express Scripts (ES) pharmacy procedures obstructed and delayed the furnishing the Oxcocontin prescriptions [sic] for (SB) for 17 days." [Emphasis added.] Again, the term "delayed" is not a term used by the Legislature in the statute.

On September 20, 2010, (Exhibit 8 AGO 45) inspector Rustia in his supplemental report opined that, "The investigation substantiated Express Scripts obstructed and delayed (SB) from obtaining her prescriptions for Oxycontin." Once again, the term "delayed" is not a term that is used in the statute. Inspector Rustia either ignored or disregarded the specific language in the statute, and he also failed to provide any testimony regarding the legislative intent behind the statute that he opined ES violated.

Based on Inspector Rustia's testimony and patient SB's testimony, 14 days was a reasonable amount of time to process and fill of the prescriptions. Hence a "delay" in filling the prescription would have occurred after 14 days. SB cancelled her order on day 18. Respondent testified that the prescription was ready to be mailed on day 18. Thus, the issue in this case involved a four (4) day delay.

ES provided sufficient evidence that the delay was the result of three factors: a drug utilization review for narcotic Oxycontin; market unavailability for the drug Levorphanol; and computer issues. In fact, it was prudent for ES to conduct a utilization review for Oxycontin given the risk of abuse that may occur when dispensing a Scheduled II narcotic, especially through a mail order delivery service.

SB's prescriptions were returned to her upon her request and she obtained her narcotics through her local pharmacy. SB continues to enjoy the benefits and savings of having her non-narcotic medications filled by ES. She had not had any further complaints other than this one time incident.

By all accounts, there was a lack of effective communication between SB and the ES's telephone customer service department. ES's telephone customer service representatives should have known and informed SB early on in the process of filling of her prescriptions of the reasons her order was delayed. Instead, SB was told that the order would ship in 24 to 48 hours. Had the telephone customer service department truthfully advised SB early on of the reasons for the delay, SB testified she would have cancelled her prescriptions and probably would not have filed a complaint. The lack of effective communication between the patient and the telephone customer service department is not a basis for citation.

fine, or discipline. Although the fine is for a nominal amount, (\$250), it is significant as it would be considered a reportable disciplinary event.

There was no credible evidence to support a finding that a volitional act was undertaken to deprive SB of her medications. There was no credible evidence to establish that a licentiate **obstructed** SB in obtaining prescription drugs. A four (4) day delay in furnishing medications from a mail order delivery system does not give rise to unprofessional conduct, obstruction, or a violation of Business and Professions Code 733, subdivision (a).

Conclusion

7. Cause for a citation and fine does not exist by a preponderance of the evidence pursuant to California Business and Professions Code section 733 subdivision (a), in that Express Scripts did not obstruct a patient in obtaining a prescription as set forth in Factual Findings 1, 2, 3; 4, 5, 6, 7, 10, 11, 12 and Legal Conclusion 1, 5 and 6.

8. Cause for a citation and fine does not exist by a preponderance of the evidence pursuant to California Business and Professions Code sections 733 subdivision (a) and section 4301 subdivision (o) in that Express Scripts, through Pharmacist-in-Charge, Christopher Meilinger, did not engage in unprofessional conduct, did not violate or attempt to violate, directly or indirectly, or assist in or abetting the violation of or conspire to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board or by any other state or federal regulatory agency and further did not obstruct a patient in obtaining a prescription as set forth in Factual Findings 1, 2, 3, 4, 5, 6, 7, 10, 11, 12 and Legal Conclusion 1, 3, 5 and 6.

ORDER

The Citation and Fine against Express Scripts, NRP 531, Case No. CI 2009 44657 is dismissed.

DATED: June 13, 2012



CARLA NASOFF
Administrative Law Judge
Office of Administrative Hearings

**BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

CITATION AND FINE

Citation Number	Name, License No
CI 2009 44657	EXPRESS SCRIPTS, NRP 531

JURISDICTION: Bus. & Prof. Code § 4005; CCR, title 16, § 1775; Bus. & Prof. Code § 4301, subd. (o)

VIOLATION CODE SECTION	OFFENSE	AMT OF FINE
Bus. & Prof. Code § 733 subd. (a)	Dispensing prescription drugs and devices- No licentiate shall obstruct a patient in obtaining a prescription	\$250.00

CONDUCT:

Obstructed patient in obtaining legally prescribed prescription drugs. Business and Professional Code section 733 (a) states no licentiate shall obstruct a patient in obtaining a prescription drug or device that has been legally prescribed or ordered for that patient. A violation of this section constitutes unprofessional conduct by the licentiate and shall subject the licentiate to disciplinary or administrative action by his or her licensing agency. Express Scripts Pharmacy (NRP 531) failed to comply. Specifically on 5/7/2010 Express Scripts Pharmacy, located at 7909 S. Hardy, Tempe, AZ 85284, obstructed in furnishing the prescriptions of SB because of Express Scripps procedures in filling prescriptions. According to PIC Meilinger Express Scripts has a procedure to hold prescription within an order which contained a backordered drug for 5 days. The levorphanol 2 mg in the prescription order along with OxyContin was not available and backordered. The situation resulted in SB from not obtaining her prescriptions for OxyContin 10 mg and OxyContin 20 mg for an additional 5 days. According to PIC Meilinger the prescriptions for OxyContin 10 mg and OxyContin 20 mg were "stuck in electronic queue" from May 18th to May 24th which caused a further delayed in furnishing the prescriptions. Subsequently the prescriptions for OxyContin 10 mg and OxyContin 20 mg which were scheduled to be processed by May 24th was eventually cancelled by SB, 18 days after Express Scripts received the prescription on May 7th. This was a violation of pharmacy law.

CITATION ISSUED ON: November 16, 2010

TOTAL AMOUNT OF FINE(S): \$250.00

PAYMENT OF FINE(S) DUE BY: December 16, 2010

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