BEFORE THE
BOARD OF CHIROPRACTIC EXAMINERS

In the Matter of the License of)
Donald L. Apple, D.C.) Hearings Case No. 93-CEB-003
)

FINAL ORDER

History of the Case: The licensee was served with a Notice of Proposed Revocation on April 5, 1993. An Answer, which included some denials was submitted August 3, 1993. The parties had been involved in informal discussions in regard to the Notice prior to that time. By that Answer, the licensee requested a hearing and asserted affirmative defenses.

A hearing was held in Salem, Oregon on September 20, 1993. The licensee did not appear at the hearing, but he was represented by Emily Simon, attorney at law. Kevin Shuba appeared of the Attorney General's office. No witnesses appeared. Both parties submitted evidence and made oral arguments.

At the hearing, the Notice of Proposed Revocation was amended to delete any allegations of conspiracy in paragraph 2 and to change the second and third sentences of paragraph 2 to read, "Between January 1, 1992 and February 25, 1993, Apple submitted false or fraudulent claims to insurance companies for non-existent or exaggerated injuries. In the process, Apple treated patients unnecessarily. In addition, the Notice was amended to change paragraph 15(e) to read, "Apple was convicted of four counts of mail fraud in U.S. District Court". Finally, the Notice was amended to strike references to ORS 684.100(1)(g) and OAR 811-35-005, and to replace those with a reference to ORS 684.100(1)(d). There were no objections to these amendments.

The Board received objections to the Proposed Order. The Board deliberated in executive session on October 21, 1993, and determined that the Proposed Order should be adopted with the addition of a discussion in regard to the affirmative defenses asserted.

Legal Issue: Should the licensee be subject to discipline because of a violation of ORS 684.100(1)(d) and/or ORS 684.100(1)(a)? If so, what is the appropriate sanction?

Findings of Fact: (1) Licensee is licensed to practice chiropractic in the State of Oregon. He has an office in Oregon. (2) An F.B.I. agent posing as a patient consulted with the licensee on thirteen separate occasions in the fall of 1992. The agent was involved in an investigation regarding falsification of automobile accidents and claims against insurance companies. (3) Two other individuals _____ _____ consulted with the licensee during the same time frame. Those individuals claimed to have been involved in an accident with the agent. (4) On his third visit to the licensee, the agent informed the licensee that he had not been injured in an accident and was seeking treatment only to increase an insurance company recovery. (5) Licensee continued to treat all three patients. (6) On October 26, 1992, the agent told the licensee that there had been no accident. He also indicated that _____ were falsifying claims of an accident and claims of injury. (7) The licensee treated _____ October 5,7, 9, 14, 19, 21, 28 and 30, and November 2 and 4, 1992. (8) The licensee treated _____ September 28 and 30, 1992, October 7, 9, 12, 16, 19, 21, 23, 26, 28, and 30, 1992. (9) Licensee treated the agent October 28, 1992, November 9, 11, and 13, 1992. (10) Licensee submitted bills to the insurance company for the treatments, knowing that the

individuals had not been injured in an automobile accident. He deposited the bills in the mails. (11) Allstate Insurance paid the licensee on December 14, and 21, 1992, and January 6 and 7, 1993, as a result of the billings. These payments were mailed to the licensee. (12) In March, 1993, the licensee was indicted for several counts of mail fraud in the U.S. District Court for the District of Oregon. (13) On March 15, 1993, the licensee tendered three checks to his attorney to hold in trust. Those checks were to repay Allstate Insurance. (14) On May 28, 1993, the licensee entered a plea of guilty on four counts of mail fraud. (15) On September 8, 1993, the licensee was sentenced. He was placed on three years of probation and was ordered to provide 200 hours of community service work attending to persons in nursing homes in his community. He was fined $10,000 and was ordered to surrender his chiropractic license within 60 days of sentencing, or November 8, 1993. In rejecting a proposed sentence of 6-12 months of incarceration, the Judge found that the licensee "came into the scheme at the end, after it had been set up". Consequently, he adjusted the sentence to reflect a guideline sentence of 0-6 months.

Conclusion and Reasons: The licensee should be disciplined for a violation of ORS 684.100(1)(a) and (d).

ORS 684.100(1)(a) provides that the Board of Chiropractic Examiners may discipline a person for fraud or misrepresentation. Subsection (1)(d) of the statute provides that the Board may discipline an individual for a conviction of a felony or misdemeanor involving moral turpitude.

The licensee has acknowledged the commission of fraud by pleading guilty to four counts of mail fraud. In addition, he has been convicted of a felony. He entered a plea of guilty in this matter, indicating that he had committed a fraud.

"Moral turpitude" is defined as conduct which is contrary to justice, honesty, modesty or good morals. See Black's Law Dictionary. In this case, by pleading guilty to the crimes, the licensee has admitted sending erroneous billings in the mail to the insurance company with knowledge that they were fraudulent. This constitutes a crime of moral turpitude.

Counsel for the licensee does not argue that there has been no fraud or conviction of a crime involving moral turpitude. In fact, she admits as much. Clearly, the admission of four counts of mail fraud in federal court constitutes an act which can result in discipline under either subsection (1)(a) or (1)(d) of the statute.

The licensee knew that there had been no automobile accident, and yet he billed the automobile insurance carrier, and received payment from the carrier. He withheld a material fact to ~~obatin~~ obtain a benefit. The evidence on this point is clear and convincing.

The only remaining issue is what an appropriate sanction would be in this case. The licensee has offered to "surrender" his license, but a voluntary surrender may not prevent him from reapplying soon thereafter. On the other hand, disciplinary action could result in a waiting period before reapplication by the licensee.

The Board has consistently held that fraud is a basis for revocation of a license. In the Matter of Kent Wilson, D.C., and In the Matter of Kent Llewellyn, D.C., the Board found fraud and misrepresentation to insurance companies. In neither of those cases were the individuals prosecuted criminally, although both were the subject of investigations and civil R.I.C.O. actions.

There is no reason for the licensee's case to be distinguished from these previous cases. He fraudulently received monies from an insurance company. He knew that he was not entitled to receive the money from that source. He has admitted guilt in federal court. The licensee's license should be revoked.

The licensee argues that the Board is equitably estopped from revoking his license because Dr. Apple agreed to surrender the license, and the Board was aware of this agreement. It is asserted that because the licensee believed that the Board agreed to this resolution of the case, the Board could not proceed to a hearing. Equitable estoppel is that condition in which justice forbids one to gain from his own acts or assertions. It requires that someone have detrimentally relied upon a misrepresentation of another. The licensee has failed to demonstrate any misrepresentation or detrimental reliance.

The licensee requested a hearing. The Board did not reach any formal settlement with the licensee as to the status of the disciplinary action. The Board was not a party to the negotiations the licensee had with the federal authorities. The Board did not represent that they would go along with the federal sanction as the only sanction. Furthermore, even if such a misrepresentation had been made there was no detrimental reliance. There is no evidence that the licensee would have entered into a different sort of agreement with the federal authorities if he had realized that the Board wished to proceed with a hearing, and perhaps revoke the license. The doctrine of equitable estoppel does not apply to this case.

ORDER

Licensee has violated ORS 684.100(1)(d) and (1)(a), and his license to practice chiropractic should be revoked effective November 5, 1993.

Original signature on file at the OBCE office.

Executive Director

Dated this 5th Day of November, 1993

NOTICE: You are entitled to judicial review of the Final Order. Judicial review is by the Court of Appeals pursuant to the provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the State Court Administrator, Supreme Court Building, Salem, Oregon 97310, within 60 days from the service of the final order.