

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
BOARD OF CHIROPRACTIC EXAMINERS**

IN THE MATTER OF:)	FINAL ORDER
)	
MARK GARDNER, D.C.)	OAH Case No. 2017-ABC-00274
)	Agency Case No. 2016-3005
)	
)	

HISTORY OF THE CASE

On November 21, 2016, the Board of Chiropractic Examiners (Board) issued a Proposed Notice of Discipline (Suspension) Notice of Rights to Mark Gardner, D.C. On December 21, 2016, Dr. Gardner requested a hearing.

On January 19, 2017, the Board referred the matter to the Office of Administrative Hearings (OAH). On March 6, 2017, Administrative Law Judge (ALJ) Samantha Fair convened a telephone prehearing conference. Dr. Gardner did not appear. The Board appeared and was represented by Senior Assistant Attorney General Lori Lindley. ALJ Fair scheduled the hearing for August 30, 2017, and set deadlines for submission of motions, witness lists, and exhibits.

On March 7, 2017, the Board issued a First Amended Proposed Notice of Discipline (Suspension) Notice of Rights to Dr. Gardner.

On April 28, 2017, the Board filed a Motion for Summary Determination (Motion). The record closed on May 22, 2017, without receipt of any response from Dr. Gardner.

On June 6, 2017, ALJ Samantha Fair issued a Ruling on Motion for Summary Determination and Proposed Order granting the Board's motion and cancelling the hearing. In the Proposed Order, ALJ Fair notified Gardner that exceptions must be filed within 10 days. Gardner failed to file timely exceptions to the Proposed Order.

ISSUES

1. Whether there are any genuine issues as to any material facts and, if not, whether the Board is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.
2. Whether Dr. Gardner engaged in unprofessional conduct and demonstrated impairment. ORS 684.100(1) and OAR 811-035-0015.
3. Whether the Board should indefinitely suspend Dr. Gardner's chiropractic physician

license. ORS 684.100(1).

4. Whether the Board should assess Dr. Gardner the costs of the disciplinary matter. ORS 684.100(9).

EVIDENTIARY RULINGS

Exhibits 1 through 5 and the Affidavit of George Finch with its Exhibits A and B, offered by the Board, were admitted into the record.

FINDINGS OF FACT

1. Dr. Gardner holds an Oregon chiropractic license. (Ex. 5 at 2.)

2. Dr. Gardner was addicted to Oxycodone and habitually used it, so that the drug was constantly in his system including when he performed chiropractic services on clients in Oregon. Dr. Gardner had an "extreme dependence on the drug." (Ex. 1 at 2.) When Dr. Gardner could no longer afford to buy the drug illegally on the street, he used Dr. Steven Gardner's prescription pad to forge prescriptions for Oxycodone. He used the forged prescriptions to obtain the drug at a cheaper cost from the pharmacy. Dr. Steven Gardner is Dr. Gardner's father. (*Id.*)

3. In March 2015, Dr. Gardner was arrested for illegally possessing Oxycodone. No charges were filed. (Ex. 1 at 2.) After his March 2015 arrest, Dr. Gardner attended an outpatient rehabilitation and 12-step recovery program. Beginning in October 2015, Dr. Gardner resumed illegally obtaining and using Oxycodone. (Ex. 5 at 2.)

4. On March 12, 2016, Dr. Gardner unlawfully possessed Oxycodone. On April 20, 2016, he pled guilty to the felony charge of possession of a controlled substance and entered Multnomah County's drug diversion program. Pursuant to the terms of the drug diversion program, the charge would be dismissed upon Dr. Gardner's successful completion of the drug diversion program. (Ex. 2 at 1-3.) On June 15, 2016, the Circuit Court of Multnomah County, Oregon, issued a bench warrant for Dr. Gardner's arrest for his failure to comply with the conditions of the drug diversion program. (Ex. 4 at 1.)

5. In late May 2016, Dr. Gardner moved from Oregon. He did not provide a new address to the Board when he moved. After moving from Oregon, Dr. Gardner entered a 30-day inpatient rehabilitation program and then moved to Hawaii. (Ex. 1 at 2.)

6. On May 25, 2016, the Board issued a letter to Dr. Gardner at his last known address, requiring him to submit a written response to allegations that he abused prescription medications and obtained them illegally. The Board required his response to be submitted within 14 days of Dr. Gardner's receipt of the letter. (Ex. 3 at 1.)

7. Dr. Gardner did not receive the Board's May 25, 2016 letter until June 20, 2016. (Ex. 5 at 1.) On June 29, 2016, Dr. Gardner emailed the Board a letter in response to its May 25, 2016 letter. (Ex. 5.) In his letter to the Board, Dr. Gardner indicated that he was "enrolled and

participating in an outpatient rehabilitation program * * * to continue my recovery and abide by the [drug diversion program].” (*Id.* at 2.)

8. On August 8, 2016, the Board’s investigator emailed Dr. Gardner, seeking to schedule an in-person interview in Hawaii sometime during the period August 10 through 16, 2016. (Finch Aff. Ex. A at 1.)

9. On August 31, 2016, the Board’s investigator emailed Dr. Gardner and his father, requesting Dr. Gardner’s current phone number and/or current address and requesting that Dr. Gardner contact the investigator. (Finch Aff. Ex. B at 1.)

10. As of April 25, 2017, Dr. Gardner has not updated his contact information with the Board and has not responded to either of the Board investigator’s emails.¹ (Finch Aff. at 2.)

11. Dr. Gardner failed to respond to the Board’s attempts to communicate with him because he “shut everything from my life in Oregon out,” including not checking his emails, while he dealt with suicidal feelings. (Ex. 1 at 2.)

12. Dr. Gardner is seeking to obtain a master’s degree in biomedical engineering through the University of Hawaii and wishes to obtain a chiropractic license in Hawaii. (Ex. 5 at 2.) In his December 21, 2016 request for hearing, Dr. Gardner indicated that he “still intends to complete [the drug diversion] program. I am joining an outpatient rehabilitation program * * *.” (Ex. 1 at 2.)

13. Dr. Gardner never injured a patient and received no complaints regarding the quality of his chiropractic services. (Ex. 1 at 2.)

CONCLUSIONS OF LAW

1. There are no genuine issues as to any material facts and the Board is entitled to a favorable ruling as a matter of law.
2. Dr. Gardner engaged in unprofessional conduct and demonstrated impairment.
3. The Board should indefinitely suspend Dr. Gardner’s chiropractic physician license.
4. The Board should assess Dr. Gardner the costs of the disciplinary matter.

OPINION

Standard of Review for Motion for Summary Determination

OAR 137-003-0580 addresses motions for summary determination. It provides, in relevant part:

¹ In his June 29, 2016 letter and his December 2016 request for hearing, Dr. Gardner advised the Board he resided in Hawaii but did not provide an address. (Exs. 1 and 5.)

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

* * * * *

(12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling * * *.

The Board proposes to indefinitely suspend Dr. Gardner's chiropractic license and assess him the costs of the disciplinary proceedings based upon allegations that he engaged in unprofessional conduct and impairment. As the proponent of the allegations, the Board has the burden to establish, by a preponderance of the evidence, that the allegations are correct and that it is entitled to suspend his license and assess him the costs of the disciplinary proceedings. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Unprofessional Conduct and Impairment

ORS 684.100(1) provides, in part:

The State Board of Chiropractic Examiners may refuse to grant a license to any applicant or may discipline a person upon any of the following grounds:

* * * * *

(e) Impairment as defined in ORS 676.303.

(f) Unprofessional or dishonorable conduct, including but not limited to:

(A) Any conduct or practice contrary to recognized standard of ethics of the chiropractic profession or any conduct or practice that does or might constitute a danger to the health or safety of a patient or the public or any conduct, practice or condition that does or might adversely affect a physician's ability safely and skillfully to practice chiropractic[.]

ORS 676.303(1)(b) provides:

"Impairment" means an inability to practice with reasonable competence and safety due to the habitual or excessive use of drugs or alcohol, other chemical dependency or a mental health condition.

OAR 811-035-0015 provides, in part:

Unprofessional conduct means any unethical, deceptive, or deleterious conduct or practice harmful to the public; any departure from, or failure to conform to, the minimal standards of acceptable chiropractic practice; or a willful or careless disregard for the health, welfare or safety of patients, in any of which cases proof of actual injury need not be established. Unprofessional conduct shall include, but not be limited to, the following acts of a Chiropractic physician:

(9) Possessing, obtaining, attempting to obtain, furnishing, or prescribing controlled drugs to any person, including self, except as directed by a person authorized by law to prescribe drugs; illegally using or dispensing controlled drugs;

* * * * *

(13) Using any controlled or illegal substance or intoxicating liquor to the extent that such use impacts the ability to safely conduct the practice of chiropractic;

* * * * *

(20) Failing to fully cooperate with the Board during the course of an investigation, including but not limited to, waiver of confidentiality privileges, except attorney-client privilege[.]

While practicing as a licensed Oregon chiropractic physician, Dr. Gardner was habitually

and illegally using Oxycodone. He was twice arrested for illegal possession of Oxycodone and pled guilty to a charge of unlawful possession of a controlled substance following his second arrest. Because of his dependency upon Oxycodone, he even forged prescriptions from his father's prescription pad in his ongoing attempts to feed his addiction. By illegally using and dispensing a controlled substance, Dr. Gardner engaged in unprofessional conduct as defined in OAR 811-035-0015(9).

During a period when Dr. Gardner performed chiropractic services, he was extremely dependent on Oxycodone. Although there was no evidence that any patients were harmed by his chiropractic services, actual injury does not have to be proven to establish unprofessional conduct. See OAR 811-035-0015. The Board established that Dr. Gardner's illegal use of Oxycodone adversely impacted his exercise of sound judgment. His Oxycodone dependence clouded his judgment as demonstrated by his multiple arrests for unlawful possession of the drug, his theft of his father's prescription pad, his forging of prescriptions for Oxycodone, and his failure to comply with the terms of the drug diversion program. His inability to exercise sound judgment adversely impacted his ability to safely perform chiropractic services. Therefore, Dr. Gardner also engaged in unprofessional conduct as defined in OAR 811-035-0015(13). Dr. Gardner further demonstrated impairment in his chiropractic practice as he was unable to perform chiropractic services with reasonable competence and safety due to his habitual and excessive use of drugs as defined by ORS 676.303(1)(b).

During the course of its investigation into his conduct, the Board made multiple attempts to obtain information from Dr. Gardner. Although Dr. Gardner did not respond within 14 days of the issuance of the Board's May 25, 2016 letter, he did respond to it within 14 days of his receipt of the letter. However, he failed to respond to the Board investigator's emails and never provided his updated contact information to the Board. Therefore, Dr. Gardner failed to cooperate with the Board, demonstrating further unprofessional conduct as defined in OAR 811-035-0015(20).

Suspension of License

As shown above, the Board established that Dr. Gardner engaged in unprofessional conduct in violation of ORS 684.100(1)(f) and demonstrated impairment in violation of ORS 684.100(1)(e). Based upon Dr. Gardner's extensive illegal use of Oxycodone, his failure to abide by the terms of his drug diversion program, and his failure to cooperate with the Board, it is appropriate for the Board to indefinitely suspend Dr. Gardner's chiropractic license. His license will remain suspended until such time as:

- Dr. Gardner provides the Board proof that he has successfully completed an appropriate drug addiction treatment program as determined by a drug evaluation performed by a Board approved licensed professional;
- Dr. Gardner provides the Board a current alcohol and drug assessment performed by a Board approved licensed professional that demonstrates he has successfully dealt with his addiction issues;

- Dr. Gardner provides the Board his current physical and mailing address and telephone number; and
- Dr. Gardner must submit to a Board interview.

Costs of the proceedings

ORS 684.100(9) provides, in part:

In disciplining a person as authorized by subsection (1) of this section, the board may use any or all of the following methods:

* * * * *

(g) Take other disciplinary action as the board in its discretion finds proper, including assessment of the costs of the disciplinary proceedings.

The Board contends that Respondent should be assessed the costs of the disciplinary proceedings. The ALJ agreed with the Board.

Pursuant to the authority cited above, the Board may assess against a person the reasonable costs of a disciplinary action taken against the person. Accordingly, after review of the record, the ALJ and Board find that it is appropriate to assess against Dr. Gardner the reasonable costs of the disciplinary proceedings in this case.

ORS 687.081(6) gives the Board the right to assess costs against Dr. Gardner. The record in this case supports that assessment. At hearing of this matter, the Board expended the following itemized costs:

DOJ Costs

AAG costs: hours at \$175 per hour for 4.7 hours	\$822.50
Paralegal hours at \$90 per hour for 7.4 hours	\$666.00
Total DOJ costs;	\$1,488.50

OAH Costs²

² "Office of Administrative Hearings costs are based on actual charges calculated by Oregon Employment Department financial services for the administrative law judge, for the hearing, and for all associated administrative costs, pursuant to ORS 183.655. Direct costs include ALJ and OAH staff time, and any travel, transcripts and interpreters. Administrative costs include OAH overhead calculated based on hours. Working capital is assessed at 9%."

A.	OAH Direct Charges: (ALJ & Operations Staff Time, Travel, & Transcripts, includes working capital)	\$1,810.00
B.	OAH Admin. Charges: (OAH Overhead, includes working capital)	\$339.00
	Total OAH Costs:	\$2,149.00
	Total Costs:	\$3,637.50

The ALJ and Board find, that pursuant to ORS 684.100(9)(g), the Board may assess Dr. Gardner the costs of the disciplinary proceedings.

RULING AND ORDER

The Board of Chiropractic Examiners' Motion for Summary Determination is GRANTED. The hearing, scheduled for August 30, 2017, is canceled.

Dr. Mark Gardner's chiropractic license is indefinitely suspended. The Board of Chiropractic Examiners will lift the suspension upon Dr. Mark Gardner's compliance with the following:

- Dr. Gardner must provide the Board proof that he has successfully completed an appropriate drug addiction treatment program as determined by a Board approved drug evaluation performed by a licensed professional;
- Dr. Gardner must provide the Board a current alcohol and drug assessment performed by a Board approved licensed professional that demonstrates he has successfully dealt with his addiction issues;
- Dr. Gardner must provide the Board his current physical and mailing address(es) and telephone number; and
- Dr. Gardner must submit to a Board investigative interview.

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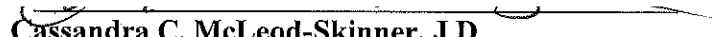
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- Dr. Mark Gardner must pay the Board of Chiropractic Examiners the costs in the sum of \$3,637.00 for the disciplinary proceedings within 30 days this order becomes final.

Dated: 9/22/2017

Original signatures on file in OBCE administrative office


Cassandra C. McLeod-Skinner, J.D.
Executive Director
Oregon Board of Chiropractic Examiners

APPEAL

If you wish to appeal the final order, you must file a petition for review with the Oregon Court of Appeals within 60 days after the final order is served upon you. *See ORS 183.480 et seq.*

CERTIFICATE OF MAILING

September 26, 2017,
On ~~August~~ *September 26, 2017* I mailed the foregoing FINAL ORDER issued on this date in OAH Case No. 2017-ABC-00274.

By: First Class Mail

Mark Gardner, D.c.
19690 SE Semple Rd
Damascus OR 97089

By: Electronic Mail

Lori H Lindley, Assistant Attorney General
Department Of Justice
1162 Court St NE
Salem OR 97301

Original signatures on file in OBCE administrative
office

Cassandra C. McLeod-Skinner, J.D.