



Before the Board of Chiropractic Examiners
State of Oregon

In the Matter of) FINAL ORDER
J. Kent Llewellyn, DC)
Respondent)

1.

The Chiropractic license of J. Kent Llewellyn, DC, is revoked and costs are assessed. Pursuant to ORS 676.210, Llewellyn shall cease practicing immediately and shall not practice during any appeals process.

2.

Introduction

This license revocation case followed a two week trial in Benton County Circuit Court in which the Oregon Attorney General at SAIF Corporation sued Dr. Llewellyn for racketeering, fraud and money had and received. The underlying facts of that case essentially track the underlying facts of this license revocation case and most of the evidence admitted at the trial was also admitted in this proceeding. Dr. Llewellyn and the state settled the racketeering case with the entry on March 19, 1990, of a Stipulated Judgement which included a money judgement in the amount of \$250,000 against Llewellyn and an injunction against treating patients whose employers were insured by SAIF Corporation.

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On May 14, 1990, the Oregon Board of Chiropractic Examiners commenced the instant action with the filing of an Amended Notice of Proposed License Revocation. A hearing request was made on May 21, 1990, through the licensee's counsel. On June 21, 1990, an Answer, including affirmative defenses, and a Motion to Dismiss were served on the Board of Chiropractic Examiners. In addition, other motions were served, which were previously resolved through a Referee's Denial of Respondent's Motions on September 7, 1990. That denial is incorporated into this record by reference, with a modification to accurately reflect that the indictment was issued by the Benton County Grand Jury, but was subsequently dismissed with prejudice. A hearing began on October 22, 1990. The hearing was concluded on December 10, 1990, when the briefs were received from the parties. The record was reopened on January 11, 1990, on the referee's own motion, in order to request an additional document. That document was received as Exhibit 90, on January 15, 1991, and the record again closed.

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On February 28, 1991, the Hearings Referee issued a Proposed Order. Exceptions were filed by the state and the respondent and the referee issued a "Response to Objections" to the Proposed Order on March 19, 1991. The Board of Chiropractic Examiners met and deliberated this case at a special meeting of the Board on April 18, 1991. The Board reviewed the pleadings, motions, orders and evidence presented in this case. The Board concluded its deliberations and reviewed a draft of this Final Order at its meeting on May 16, 1991, at which time the Board directed entry of this form of Final Order on or before May 30, 1991.

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Legal Issues

The legal issues are those outlined by the Referee:

- A) Has the licensee violated ORS 684.100 (1)(g), (1)(g)(A) and/or (1)(j). {No claims have been made in regard to violations of (1)(g)(B) or (C)}. If so, should his license to practice chiropractic be revoked.
- B) Should a civil penalty be imposed upon the licensee for a violation of ORS 684.100 (1)(g).
- C) Should the costs of disciplinary proceedings be assessed against the licensee under ORS 684.100 (9)(g).

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Motions

Licensee requested dismissal of the Amended Notice of Revocation on five grounds. The fifth ground was addressed in the Referee's Denial of September 7, 1990. The other four grounds were addressed herein by the Referee's Proposed Order as follows in paragraph 7 through 11.

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Licensee moves for dismissal because the Notice failed to "state facts sufficient to state a basis for any adverse action". The Notice alleged that the licensee submitted bills to third party payers which were false and misleading. It was also alleged that the licensee created chart notes to match the billing records. These allegations are sufficient. So long as the licensee was given notice of the issues to be raised at the hearing, the notice is adequate. See ORS 183.415.

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It is also proposed that there is an attempt to apply laws and regulations enacted after the dates of the alleged acts, and that such an application would violate both the Oregon Constitution and the U S Constitution. There is no ex post facto application in this case. The licensee is accused of obtaining fees through fraud or misrepresentation. This statute, although modified after the period in dispute, was in effect at all relevant time. The other statutes and rules cited were in existence at all times with the exception of the civil penalty provision.

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Thirdly, it is contended that the evidentiary basis for the proceeding is based on Grand Jury information which is confidential. The parties were given the right to object to the submission of all evidence presented to the referee. If the information was not discoverable, and was obtained through improper means, such objections could have been made on the record. No such objections were made. Finally, it is clear that most of the evidence submitted at the hearing appears to be the evidence relied upon by the Board in issuing the Notice. That evidence was public record, part of a civil court proceeding.

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Fourth, the licensee argues that the dismissal of the civil case of State of Oregon v. Llewellyn precludes any state agency from seeking penalty or forfeiture. Although the State of Oregon was named as a party to the proceeding, there is no indication that the Board of Chiropractic Examiners was a party. The fact that the Attorney General's office represents both the State and the Board does not imply that the Board was a party to the settlement. Nothing in the settlement indicates that the Board did not have the right to pursue independent action. In fact, the settlement agreement specifically states, "Nothing in this Settlement Agreement or the Judgement entered pursuant to it shall affect the authority vested in the State Board of Chiropractic Examiners by ORS Chapter 684." The Board was not foreclosed from pursuing forfeiture.

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Finally, it should be noted that administrative hearings, and the agencies which hold such hearings, are limited by statutory authority. There is no statutory authority for dismissing a Notice of Proposed Revocation based on procedural errors, even if any existed. In this case, the Board was entitled to review Dr. Llewellyn's activities as alleged by the Notice.

Rulings on Objections and Exceptions to the Proposed Order

The Board adopts the referee's Proposed Order and Response to Objections to the Proposed Order, as they relate to objections to evidence and findings with the following distinctions:

- A) As to the issue of imposing a civil penalty, the Board rules that a civil penalty may be imposed, in addition to other sanctions, in appropriate cases. ORS 684.100(a).
- B) As to the issue of imposing the costs of the disciplinary hearing, the Board also rules that it has discretion, pursuant to ORS 684.100 (9)(g), to impose such costs as outlined by the Board's counsel in the Exceptions to Proposed Order, paragraph 4.
- C) The adoption by the referee of licensee's exception to finding of fact number (3) is adopted by the Board.

Findings of Fact

With these distinctions, the Board of Chiropractic Examiners adopts and incorporates by reference herein the Findings of Fact and Credibility Discussion in the Proposed Order of the referee, along with the amendments and explanations promulgated in the referee's "Response to Objections."

Ultimate Findings of Fact

1. Llewellyn directed his clinic's staff to bill insurance companies' for patient's missed appointments ("no-shows") through a system which concealed the fact that the billing was for a no show. Such billings were regularly made to insurers.
2. Llewellyn's no show billings easily could have disclosed on the claim forms (in the column labeled "Explain Unusual Services or Circumstances") that no services were provided and that this was a "no show billing." Such disclosure was not ever made, according to the evidence presented.

3. Llewellyn directed his clinic's staff with respect to handling requests for chart notes from insurance companies, to include date-stamping chart notes after-the-fact and presenting files to the doctors with ledger cards, claim forms, and chart notes so that the doctor could, and did, fill in chart notes after-the-fact for those dates where insurers had been billed for no-shows. Such chart note creations were regularly made by Dr. Llewellyn.

4. While Llewellyn inaccurately testified under oath on the three occasions alleged, testimony concerning one's pre-chiropractic education, given as background which is not material to the inquiry, does not violate the profession's standards of ethics.

5. Billing for services which were not rendered, as in the system Llewellyn used to surreptitiously bill for no-shows, does not comport with the profession's standards of ethics.

6. Creating chart notes to give the appearance that treatment was rendered when it was not, fails to comport with the profession's standard of ethics.

7. Llewellyn's examination fees were not justified by a proper diagnostic work-up and report when he billed for examinations which did not occur on the dates billed for. Such conduct does not comport with the profession's standard of ethics.

8. Llewellyn directed his clinic's staff to bill the clinic's own workers compensation insurance carrier for chiropractic care provided to the associate doctors. Such conduct is unprofessional and does not comport with the profession's standards of ethics, which mandates that all chiropractors are entitled to the gratuitous services of any one or more of the profession.

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Conclusion of Law

The Board finds that the referee's Conclusions of Law in the Proposed Order, as amended and explained in the Response to Objections, are well founded and adapts and incorporates them as if fully set forth herein, with the changes notes in paragraph 12 above.

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Additionally, the Board specifically finds, and wishes to clarify for the record:

1. Billing for a missed appointment would not have violated the profession's standard of ethics if:

a. there had been a clear and understandable disclosure on the billing or claim form to the insurer that a no-show billing was being made, and

b. such a policy had applied to all patients, whether insured or not.

2. Llewellyn's conduct amounted to an intentional failure to disclose information he knew would be pertinent to the insurer's decision to pay, as well as an intentional affirmative misrepresentation in billing via CPT codes that indicate treatment was rendered. Such conduct violates ORS 684.100 (1)(g)(A) and 684.100 (1)(j); either one of which would support a license revocation under these facts.

3. Llewellyn's conduct in creating false chart notes in order to perpetuate the no show billing scheme was intentionally committed misrepresentations which rise to the level of fraud, as well as violating the profession's standards of ethics. Such conduct violates ORS 684.100 (1)(g)(A) and 684.100 (1)(j); either of which would support a license revocation sanction.

4. The violations of ORS 684.100 (1)(g)(A) were proven by at least a preponderance of the evidence and the violations of ORS 684.100 (1)(j) were proven by evidence which at least rise to the standard of clear and convincing.

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Order

Therefore, it is ordered that:

1. Llewellyn's license to practice chiropractic in the State of Oregon is revoked as of the date of this order. ORS 684.100 (1)(g)(A) and/or ORS 684.100 (1)(j).

2. Llewellyn is not assessed a civil penalty of \$1000 because the only conduct alleged in the Notice which post-dates the civil penalty statute is the allegation of false testimony under oath. ORS 684.100 (9)(f).

3. Llewellyn is assessed the costs of this disciplinary action to include hearings officer/referee costs, fees of witnesses, publication of or mailing of the Notice, and copying public records. ORS 684.100 (9)(g).

IT IS SO ORDERED THIS 23 DAY OF MAY, 1991.

Original signature on file
at the OBCE office.

Christie Joachim, Executive Director
Oregon Board of Chiropractic Examiners