

BEFORE THE
BOARD OF CHIROPRACTIC EXAMINERS

In the matter of the license
of MARK E. WALSH, D.C.

(CASE NO. 92-CEB-002
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FINAL ORDER

History of the Case: The Board of Chiropractic Examiners (Board) served the licensee with Notice of Intent to Revoke License on July 17, 1992. An Emergency Suspension Order was sent on the same date. A request for hearing was made on August 7, 1992. An Amended Notice of Proposed Revocation and Order of Suspension was served August 25, 1992.

A hearing was held before Wendy Comstock, a hearings officer, on September 18, 1992, in Salem, Oregon. Assistant Attorney General Paul Sundermier appeared as counsel for the Board. Norman Sepenuk, attorney at law, represented the licensee. Testimony was taken from the licensee.

The parties presented stipulated facts to the referee at the time set for hearing. The Board of Chiropractic Examiners deliberated in executive session on November 20, 1992.

Legal Issues: Did the licensee violate ORS 684.100(1)(a) and ORS 684.100(1)(g)(A)? If so, what is the appropriate sanction?

Referee's Findings of Fact: (1) Mark E. Walsh is licensed to practice chiropractic in the State of Oregon. He has an office in Portland, Oregon. He is responsible for the office procedures and billing practices in the office. (2) In 1984, the licensee became a partner with a [redacted]. They shared the office space. (3) In 1990, the licensee bought Dr [redacted] interest in the business for \$175,000. The price was set based on the parties understanding of the value at the time of the sale. It was agreed that the licensee would pay the entire cost within two years. The licensee was to pay \$6,500 per month to [redacted]. (4) At about the same time, the Oregon Legislature substantially changed the Worker's Compensation laws. This resulted in significantly less business for the chiropractic community. The licensee suffered a loss of receivables as a result of these changes. (5) The licensee continued to receive payments on past receivables for awhile after the change in the law, and was not attentive to his financial outlook. He continued to keep his large staff and draw a large salary. (6) In 1990, the licensee had an income of \$110,000. In the first six months of 1992, he took \$37,000 out of the business. (7) The gross receipts of the business dropped from \$525,000 in 1990 to \$410,000 in 1991. (8) The licensee had a conspicuous lifestyle. He spent a great deal of his money on luxury items. (9) Near the end of 1990, the licensee had difficulty meeting his business expenses and taking his draw. He had 11 employees. (10) The licensee got behind on his tax withholding for wages. (11) In early 1991, the licensee laid off three employees. He had borrowed money from friends and relatives to keep his business afloat. (12) The licensee consolidated his tax withholding debt with another tax debt, and agreed to pay the IRS \$2,500 per month, one-half from the business, one-half from his personal income. He owed the IRS \$115,000. (13) The licensee's business situation became worse. (14) The licensee did

not discuss the matter with . . . He continued to pay the burdensome payments. He continued to take money for his salary. (15) The licensee laid off several other staff members in early 1992 to try to keep a positive cash flow. (16) The licensee had a bank machine which enabled him to charge his patient's VISA accounts automatically. He could also credit accounts through this machine. The licensee had borrowed money from friends using this process in the past. The friends had given the licensee permission to do so. (17) In April, 1992, the licensee came across the old VISA slips of some patients. He decided to get more cash for his business expenses by charging the patient's accounts for services not rendered. (17) The licensee intended to repay the patients' accounts through his bank machine. (18) Between April 18, 1992, and May 18, 1992, the licensee charged \$51,000 to 29 different VISA accounts; two thousand dollars of it had been repaid by May 18, 1992. (19) When patients called asking about these billings, the licensee told them that there had been a bookkeeping error and that the error would be corrected. (20) On May 22, 1992, the merchant bank pulled the licensee's bank machine because he had been using it to excess. He had lost the ability to repay the patients electronically. (21) The licensee applied to another bank to get a VISA machine so that he could correct the error. He was unable to acquire a new machine until July, 1992. (22) By July 17, 1992, the licensee had repaid all but \$15,000 of the monies "borrowed" through his bank machine. He paid finance charges to all of those persons who had such charges assessed. (23) By September 19, 1992, all of the patients had been repaid. (24) The licensee was able to repay all of the debt by taking out personal loans from family members. (24) The licensee's license to practice was suspended based on complaints made in regard to these matters. He now works at the office in an administrative capacity only. (25) The licensee's business has projected receipts of about \$300,000 for 1992. Dr. Aungst has taken over the practice since the suspension, and he is being paid \$3,500 per month for his services. (26) The Board was made aware of three patient complaints in regard to these matters. The licensee provided information about the remainder of the facts. He fully cooperated with the Board during the investigation. (26) It is contrary to the recognized standards of ethics to use the patients' VISA accounts for purposes other than billing for services rendered.

Conclusion and Reasons: The licensee violated ORS 684.100(1)(g)(A).

ORS 684.100(1)(a) provides that the Board of Chiropractic Examiners may suspend or revoke a license or impose a civil penalty if there is fraud or misrepresentation. The licensee admits that he made misrepresentations in his chiropractic business which were fraudulent. The licensee violated ORS 684.100 (1)(a).

ORS 684.100(1)(g)(A) provides that the Board can discipline a licensee for unprofessional or dishonorable conduct which includes, but is not limited to, any repeated conduct or practice contrary to recognized standards of ethics. The licensee admits that his conduct in billing his clients for services not rendered was a violation of the recognized standards of ethics. There is no dispute about this issue.

The only issue in this case is what the appropriate sanction should be. The Attorney General's office has offered two cases as precedent for revoking the licensee's license. These cases must be discussed in detail.

In The Matter of the License of Kent Wilson, D.C. involved a chiropractor who established a bookkeeping system whereby overpayments were not recorded on individual patient accounts. If more than was due was paid to the doctor, either because of clerical error by an insurance company, or multiple insurance companies, the doctor kept the money, without recording the overpayment on the patient account. Unless the payors requested repayment, the monies were absorbed by the business. These practices were a violation of state law. Dr. Wilson denied the charges throughout the course of the administrative process, although he had previously been found liable in a civil R.I.C.O. (racketeering) action on this matter. Dr. Wilson had a very large, lucrative practice. He utilized this procedure for the express purpose of permanently depriving the payors (insurance companies) of monies. He had no arguable legal claim to said monies, and had no intention of repaying these overpayments.

In the Matter of Kent Llewellyn, D.C. involved a chiropractor who billed insurance companies for appointments which were not kept. He did not indicate to the insurance companies that those persons had not appeared for appointments. If a request for his chart notes was made, Dr. Llewellyn added chart notes to indicate an office visit. Dr. Llewellyn had a lucrative practice. He consistently argued that he had not violated any standards of ethics. He showed no remorse for his actions.

In both of these cases, the Board found that there was clear and convincing evidence of fraud and revoked the licenses of these individuals.

The Assistant Attorney General argues that these cases are precedent, and indicate a need for the Board to impose a similar sanction in this case. This case is distinguishable in many regards.

In both of the other cases, there was a clear, long-term, and deliberate attempt by the licensees to permanently deprive insurance companies of money. They established record-keeping systems to hide their wrongdoing. They had no intention of ever repaying the funds. Both justified their actions by indicating that insurance companies did not always pay all of the amounts that the doctors believed were due to them. Neither doctor showed remorse. Neither doctor was under any emotional or financial pressure during the times they committed these frauds.

The licensee in this case had no intent to permanently deprive his patients of their funds. It was always his intent to "borrow" the money to get him through a difficult financial period. His conduct lasted for only a month, although it involved a large sum of money. The licensee has indicated remorse.

Certainly, the licensee's financial situation was self-imposed. He did not act in a fiscally conservative manner when his receipts began to diminish. He continued to live an extravagant lifestyle during a period of low income. He did not lay off his employees even though his work load did not justify such a

large complement of employees. All of this indicates that the licensee lacks good fiscal judgment, both personally and in a business setting.

While it is not clear whether the licensee would have continued to use the VISA scheme longer if he had been given the opportunity, the credible evidence indicates that the licensee would have repaid all of the funds taken through his misrepresentations.

The Assistant Attorney General argued that the licensee has not shown sufficient remorse in this case and that he did not really appreciate the significance of the situation. He questioned the licensee's sincerity.

The hearings officer had the opportunity to observe the licensee's demeanor. The licensee clearly understands that what he did was wrong. He fully cooperated with the Board, giving them plenty of ammunition to shoot him down permanently. He did not have to do so. The Board was only aware of three individual charges at the time they moved for discipline. The licensee should be subject to a penalty and other appropriate sanctions.

FINAL ORDER

The licensee is subject to a suspension from July 17, 1992, through November 20, 1992. In addition, the licensee shall have a civil penalty of \$5,000 assessed payable by January 4, 1993. He must open his business records and books to the Board of Chiropractic Examiners at any time requested for a period of five years (from the date the suspension ends). The licensee cannot use bank machines in his business for a period of two years.

Dated this 22 day of December, 1992


CHRISTIE JOACHIM
Executive Director
Board of Chiropractic Examiners

wbc/sls

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

In the event the Final Order is appealed to the Oregon Court of Appeals, a copy of the petition should be mailed to H. Scipio, Hearings Section, Employment Division, 875 Union St NE, Salem, OR 97311 as a means of expediting the preparation of a transcript of the hearing.

CERTIFICATE OF SERVICE

I certify that, on December 22, 1992, I served the foregoing Final Order upon the parties hereto by mailing, certified mail, postage prepaid, a true, exact and full copy thereof to:

Mark Walsh, D.C.
2306 SE 39th
Portland, OR. 97214

Norman Sepenuk
1800 Security Pacific Plaza
1001 SW 5th
Portland, OR. 97204

Original signature on file
at the OBCE office.

Michael J. Tryon, Investigator

