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STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF :
DISCIPLINARY PROCEEDINGS AGAINST : **FINAL DECISION AND ORDER**
: **Case No. LS-9112042-CHI**
JOHN W. DUNN, D.C., :
RESPONDENT. :

The parties in this matter for purposes of §227.53, Stats. are:

John W. Dunn, D.C.
14860 W. Burleigh Road
Brookfield, WI 53005

Chiropractic Examining Board
1400 East Washington Ave.
Madison, WI 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

The rights of a party aggrieved by this decision to petition the board for rehearing and to petition for judicial review are set forth in the attached "Notice of Appeal Information."

A hearing was held before an Administrative Law Judge in this matter from March 17 through March 29, 1993. The complainant, Division of Enforcement was represented by Attorney Judith Mills Ohm. Respondent, Dr. Dunn, was represented by Attorneys Paul Erickson and Colleen Fleming of the law firm Gutglass, Erickson & Bonville, 735 North Water Street, Milwaukee, Wisconsin 53202.

The Administrative Law Judge issued a proposed decision on July 23, 1993. Both counsel filed written objections to the proposed decision, and later filed replies to the objections filed by opposing counsel.

Based on the record of this proceeding, the Chiropractic Examining Board makes the following Findings of Fact, Conclusions of Law and Order as its Final Decision in this matter.

FINDINGS OF FACT

1. Respondent John W. Dunn is and was at the time of the facts set forth below a chiropractor licensed in the state of Wisconsin, under license number 00898, originally granted on June 12, 1950.
2. Approximately 75% of Dr. Dunn's current practice consists of conducting second opinions for insurance companies (also called "independent medical evaluations" or "IME"s), and he performs approximately 200 IMEs per year.
3. Dr. Dunn conducted the IMEs which form the basis for this disciplinary action between April 1, 1988 and December 8, 1989. The IMEs were conducted at the request of various insurance companies, and Dr. Dunn prepared his IME reports for the insurance companies. The purpose of the IMEs was to confirm whether treatment being received by a patient from another chiropractor was necessary and appropriate to treat symptoms arising from a work-related injury.
4. No generally-accepted standards exist for the preparation of IME reports.

With regard to patient Denise Richards:

5. Denise Richards suffered an injury to her lower back on November 23, 1987.
6. Dr. Dunn performed an IME on Ms. Richards on April 1, 1988.
7. When Dr. Dunn performed the cervical compression test, Ms. Richards reported that she felt pain in her head, her neck and her lower back. She did not report pain radiating from her neck into her arms. Soto-Hall's test was negative, cervical motion was unrestricted, and palpation of the paravertebral structures did not elicit pain. Dr. Dunn reported "neck compression test was negative/normal".
8. When Dr. Dunn performed the straight leg raise, Ms. Richards told him "it hurt". Bechterew's test and lower limb range of motion tests were negative. Dr. Dunn reported "SLR test was negative".
9. Ms. Richards told Dr. Dunn that she experienced pain upon straightening up from the test for thoracolumbar motion. Bechterew's test and lower limb range of motion tests were negative. Dr. Dunn reported "thoracolumbar motion was normal and no pain was complained of". Dr. Dunn's statement that "no pain was complained of" was false.
10. During the interview portion of the IME, Dr. Dunn made comments to Ms. Richards about her weight and her marital status, and what he considered to be overtreatment by Dr. Radermacher. At one point he told her that she didn't need to see a chiropractor "to have a man touch her" or "to have a man's hands on her". This statement was inappropriate.

11. Unrelated to the injury of November 23, 1987, Ms. Richards had suffered a severe strain to the cervical and lumbar spine in 1979, and she weighed 260 1/2 pounds at the time of the IME.

With regard to patient Susan Beahm:

12. Susan Beahm suffered an injury to her back on January 28, 1988.

13. Dr. Dunn performed an IME of Ms. Beahm on May 11, 1988.

14. On the cervical range-of-motion test, passive side-to-side movement was not restricted, although Ms. Beahm reported pain at some point while Dr. Dunn was moving or palpating her neck.

15. Dr. Dunn performed a breast exam on Ms. Beahm. Dr. Dunn legitimately performs breast exams of private patients, but there was no legitimate chiropractic purpose to the breast exam of Ms. Beahm.

16. While Ms. Beahm was lying on the exam table, Dr. Dunn raised her gown, covered her pubic area with a napkin or paper towels, and asked her about an abdominal scar.

17. Dr. Dunn asked Ms. Beahm whether the stress of raising three children or an earlier ectopic pregnancy could be the cause of her problems, but he did not conclude that they were.

With regard to patient Karen Strauss:

18. Karen Strauss suffered an injury to her neck on February 19, 1988.

19. Dr. Dunn performed an IME of Ms. Strauss on June 10, 1988.

20. When Dr. Dunn performed the cervical compression test, Ms. Strauss reported that she felt pain. She did not report pain radiating from her neck into her arms. Dr. Dunn reported "the neck compression and Soto-Hall's tests were negative/normal".

21. When Dr. Dunn performed the cervical range-of-motion test, Ms. Strauss reported pain. Dr. Dunn reported "cervical spinal motion was not restricted".

22. Dr. Dunn did not tell Ms. Strauss to remove all of her clothes before putting on the examination gown.

23. Dr. Dunn told Ms. Strauss she was a "pretty" or "attractive" person.

24. Dr. Dunn did not tell Ms. Strauss they could go walking together.

25. Dr. Dunn did not tell Ms. Strauss he could help her or do more for her than her regular chiropractor could.

26. Dr. Dunn was standing behind Ms. Strauss when she bent over on the thoracolumbar test.

27. Dr. Dunn patted Ms. Strauss on her bare buttock and told her to stand up from the thoracolumbar test. Dr. Dunn did not at this point tell Ms. Strauss that she was attractive.

28. Dr. Dunn palpated Ms. Strauss's neck and upper back and auscultated her lungs while she was seated. At this time Dr. Dunn's hands brushed the sides of Ms. Strauss's breasts through the fabric of her gown. Dr. Dunn did not press his erect penis against Ms. Strauss's back.

With regard to patient Rhonda Manthe:

29. Rhonda Manthe reported an injury to her neck on November 16, 1987.

30. Ms. Manthe was discharged by her treating chiropractor on August 12, 1988.

31. Dr. Dunn performed an IME of Ms. Manthe on August 17, 1988.

32. During various tests, Ms. Manthe complained of significant pain. Dr. Dunn reported "cervical spinal motion was restricted in lateral flexion only. Extremely light palpation elicited pain over the cervical small joints. Pain was also complained of when the paravertebral structures were lightly touched." Dr. Dunn concluded that these complaints of pain were psychosomatic.

33. Dr. Dunn directed Ms. Manthe to perform a pelvic tilt. She complained of severe back pain, but Dr. Dunn urged her to complete the maneuver.

With regard to patient Willie Sullivan:

34. Willie Sullivan suffered an injury to her back on May 27, 1988.

35. Dr. Dunn performed an IME of Ms. Sullivan on January 16, 1989.

36. When Dr. Dunn performed the straight leg raise, Ms. Sullivan reported a "pulling" behind her knee. She did not report that the pain ran down the back to the buttock and into the thigh. Kemp's test was negative, Bechterew's test was negative, and the lower limb range of motion tests were normal. Dr. Dunn reported "SLR produced 'pulling' in the back of the right knee".

37. When Dr. Dunn asked Ms. Sullivan to hop on each foot, she told him she experienced pain when she hopped on her left foot and she told him she could not hop at all on her right foot without holding on to the exam table. Dr. Dunn reported "hopping, heel/toe, eversion/inversion and tandem walking could be performed".

38. Ms. Sullivan experienced pain upon standing up from the front flexion portion of the thoracolumbar test, but she did not report it. Dr. Dunn reported "thoracolumbar motion was normal".

39. Unrelated to the injury of May 27, 1988, Ms. Sullivan had osteoporosis, spondylosis, and scoliosis of the spine, she had a "bad knee" from a prior injury, and she weighed 204 pounds at the time of the IME.

With regard to patient Reuben Blum:

40. Reuben Blum suffered an injury to his upper back on October 4, 1988.

41. Dr. Dunn performed an IME of Mr. Blum on January 24, 1989.

42. Mr. Blum's treating chiropractor accompanied him to and during the IME.

43. Mr. Blum told Dr. Dunn that his lower back problems began only after he began treatment.

44. Dr. Dunn palpated Mr. Blum's back.

45. Dr. Dunn instructed Mr. Blum before he began the physical exam that he should volunteer any reports of pain. During the exam he did not ask Mr. Blum if he was experiencing pain.

With regard to patient Connie Bush:

46. Connie Bush suffered an injury to her neck on December 25, 1985.

47. Dr. Dunn performed an IME of Ms. Bush on August 29, 1989.

48. Ms. Bush was in her eighth month of pregnancy at the time of the IME.

49. Ms. Bush told Dr. Dunn that she experienced cervical, dorsal and lumbar pain a few times per week, usually for fifteen to twenty minutes at a time, which would cease spontaneously, but that the cause of the pain was unknown.

50. X-rays had not been taken of Ms. Bush for two to three years prior to the IME, and the most recent X-rays were not available to Dr. Dunn at the time of the IME.

51. Dr. Dunn ordered X-rays of Ms. Bush, which were taken by Dr. Dunn's daughter and X-ray technician, Deborah Dunn. Dr. Dunn's order included lumbar X-rays, which Deborah Dunn decided not to take.

52. Dr. Dunn performed a breast exam on Ms. Bush. Dr. Dunn legitimately performs breast exams of private patients, but there was no legitimate chiropractic purpose to the breast exam of Ms. Bush.

With regard to patient Barbara Adler:

53. Barbara Adler suffered an injury to her lower back on October 28, 1989.

54. Dr. Dunn performed an IME of Ms. Adler on December 8, 1989.

55. When Dr. Dunn performed the straight leg raise, Ms. Adler reported pain. Bechterew's test was negative and lower limb range of motion tests were normal. Dr. Dunn reported "SLR was negative".

56. When Dr. Dunn had Ms. Adler bend from side to side, she reported pain. Dr. Dunn reported "thoracolumbar motion was normal and no pain was complained of".

57. Unrelated to the injury of October 28, 1989 Ms. Adler had "mild degenerative changes at L3-4 and L4-5".

58. Dr. Dunn's IME report stated that Ms. Adler was "fully recovered". Under "IMPRESSION" Dr. Dunn reported "Lumbar muscle strain."

CONCLUSIONS OF LAW

I. The Chiropractic Examining Board has personal jurisdiction over the respondent under § 801.04(2), Stats., based on his receiving notice of the proceeding and his holding a credential issued by the board.

II. The Chiropractic Examining Board has jurisdiction over the license issued to Dr. Dunn, since the Board is the legal authority responsible for issuing and controlling credentials for chiropractors in Wisconsin, under chapter 446, Stats.

III. The Chiropractic Examining Board has jurisdiction over the subject-matter of this complaint, under § 15.08(5)(c) and § 446.03, Stats, based on the filing of a complaint alleging unprofessional conduct.

IV. With regard to patient Denise Richards, by making a false statement in his IME report and by making inappropriate comments to the patient, Respondent performed professional services inconsistent with training, education or experience, contrary to § Chir 6.02(6), Wis. Admin. Code; by making a false statement in his IME report, Respondent also engaged in conduct of a character likely to deceive or defraud the public, contrary to § 446.04(1), Stats.

V. With regard to patient Susan Beahm, by performing a breast examination without legitimate chiropractic purpose, Respondent performed professional services inconsistent with training, education or experience, contrary to § Chir 6.02(6), Wis. Admin. Code.

VI. With regard to patient Karen Strauss, by patting her bare buttock Respondent performed professional services inconsistent with training, education or experience, contrary to § Chir 6.02(6), Wis. Admin. Code.

VII. With regard to patient Connie Bush, by ordering lumbar X-rays of a pregnant female, Respondent practiced in a manner which substantially departed from the standard of care ordinarily exercised by a chiropractor, contrary to § Chir 6.02(3), Wis. Admin. Code, and he performed professional services inconsistent with training, education and experience, contrary to § Chir 6.02(6), Wis. Admin. Code. By performing a breast examination without legitimate chiropractic purpose he performed professional services inconsistent with training, education or experience, contrary to § Chir 6.02(6), Wis. Admin. Code.

VIII. The violations in IV, V, VI, and VII above constitute unprofessional conduct, and professional discipline for such conduct is mandated under § 446.03(5), Stats.

ORDER

THEREFORE, IT IS ORDERED that John W. Dunn, D.C., be reprimanded for his unprofessional conduct in this matter.

IT IS FURTHER ORDERED that the license issued to Dr. Dunn to practice as a chiropractor in the state of Wisconsin be suspended for a period of 60 days, to begin on the 30th day after this order is signed on behalf of the board.

IT IS FURTHER ORDERED that Dr. Dunn's license be limited to require

- 1) that within nine months of the date this order is signed, he complete twelve hours of continuing education in boundary training, and that he forward confirmation to the board, and
- 2) that for three years following the date this order is signed, a female attendant be present during his physical examination of any female patient.

IT IS FURTHER ORDERED that the assessable costs of this proceeding be imposed upon Respondent Dr. Dunn, pursuant to §440.22, Stats.

EXPLANATION OF VARIANCE

The board has accepted the Findings of Fact and Conclusions of Law recommended by the Administrative Law Judge (ALJ) in his Proposed Decision. The board has also accepted all of the Order proposed by the ALJ regarding discipline. However, the board has added to the Order a provision that Dr. Dunn pay the assessable costs of the proceeding, pursuant to §440.22, Stats.

The ALJ states that it is his preference not to assess costs against a respondent pursuant to §440.22, Stats., unless the respondent has been recalcitrant or obstructionist with the process of the hearing. While the board understands the position, the board disagrees with that standard.

Section 440.22, Stats. authorizes the imposition of costs as follows:

(2) In any disciplinary proceeding against a holder of a credential in which the department or an examining board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department.

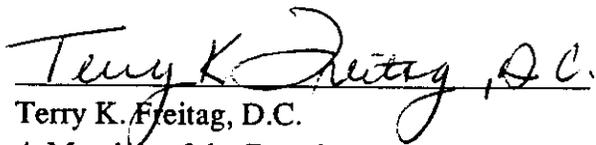
The prerequisite for imposing costs against a licensee under the statute is the imposition of discipline in the proceeding. The statute's language is identical to that within the Wisconsin Supreme Court Rules pertaining to attorney disciplinary proceedings. See, SCR 22.20(1). Accordingly, resort to its decisions on this issue is not only appropriate, but instructive.

The customary practice of the Wisconsin Supreme Court appears to be to impose full costs against a disciplined attorney. In the Matter of the Disciplinary Proceedings against Willis B. Swartout, 116 Wis. 2d 380, 384-5 (1984); Disciplinary Proceedings Against Hur, 126 Wis. 2d 119, 122 (1985). The assessment does not constitute discipline. Disciplinary Proceedings Against Nora, 173 Wis. 2d 660, 663 (1993). Accordingly, the determination as to whether costs are imposed need not be founded upon the factors required for assessing discipline -- which are rehabilitation, public protection and deterrence. Indeed, it is appropriate that the offending licensee be required to pay for the actual cost of enforcement of a disciplinary action, rather than the remainder of the profession (and ultimately the consumer-public) through licensing fees. In the Matter of the Disciplinary Proceedings Against Hur, above.

The respondent who is found to have violated an established rule of professional conduct should expect to bear the cost of enforcement of the rule, in accordance with the plain authority of §440.22, Stats. The person who violates the rule and necessitates the cost of enforcement, not the other licensees or the public, should pay those costs.

Dated: November 11, 1993.

STATE OF WISCONSIN
CHIROPRACTIC EXAMINING BOARD


Terry K. Freitag, D.C.
A Member of the Board

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review,
the times allowed for each, and the identification
of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Chiropractic Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Chiropractic Examining Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Chiropractic Examining Board.

The date of mailing of this decision is November 12, 1993.

STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	NOTICE OF FILING
	:	PROPOSED DECISION
JOHN W. DUNN, D.C.,	:	LS9112042CHI
RESPONDENT.	:	

TO: Paul Erickson, Attorney
Gutglass, Erickson & Bonville
735 North Water Street
Suite 1400
Milwaukee, WI 53202
Certified P 992 818 955

Judy Mills Ohm, Attorney
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Chiropractic Examining Board by the Administrative Law Judge, John N. Schweitzer. A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. Your objections and argument must be received at the office of the Chiropractic Examining Board, Department of Regulation and Licensing, Room 174, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before August 23, 1993. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Chiropractic Examining Board no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision, together with any objections and arguments filed, the Chiropractic Examining Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 23rd day of July, 1993.


John N. Schweitzer
Administrative Law Judge

PARTIES

The parties in this matter under § 227.44, Stats. and § RL 2.036, Wis. Adm. Code, and for purposes of review under § 227.53, Stats. are:

John W. Dunn, D.C.
14860 W. Burleigh Road
Brookfield, WI 53005

Chiropractic Examining Board
1400 East Washington Ave.
Madison, WI 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

APPLICABLE STATUTES AND RULES

Section 446.03, Stats. **Reprimand; license revocation, limitation or suspension.**

The examining board, by order, may reprimand a licensee or registrant and may deny, limit, suspend or revoke any license or certificate of registration if the licensee or registrant:

..
(5) Is guilty of unprofessional conduct;

Section 446.04, Stats. **Unprofessional conduct.**

Unprofessional conduct includes, without limitation because of enumeration:

(1) Any conduct of a character likely to deceive or defraud the public;

Section Chir 6.02, Wis. Admin. Code **Unprofessional conduct.**

Unprofessional conduct by a chiropractor includes:

..
(3) Practicing in a manner which substantially departs from the standard of care ordinarily exercised by a chiropractor

...
(6) Performing professional services inconsistent with training, education or experience.

(7) Engaging in sexual intimacies with patients in the office.

...
(9) Failing to conduct a competent assessment, evaluation or diagnosis as a basis for treatment or consultation.

11. Unrelated to the injury of November 23, 1987, Ms. Richards had suffered a severe strain to the cervical and lumbar spine in 1979, and she weighed 260 1/2 pounds at the time of the IME.

With regard to patient Susan Beahm:

12. Susan Beahm suffered an injury to her back on January 28, 1988

13. Dr. Dunn performed an IME of Ms. Beahm on May 11, 1988.

14. On the cervical range-of-motion test, passive side-to-side movement was not restricted, although Ms. Beahm reported pain at some point while Dr. Dunn was moving or palpating her neck.

15. Dr. Dunn performed a breast exam on Ms. Beahm. Dr. Dunn legitimately performs breast exams of private patients, but there was no legitimate chiropractic purpose to the breast exam of Ms. Beahm.

16. While Ms. Beahm was lying on the exam table, Dr. Dunn raised her gown, covered her pubic area with a napkin or paper towels, and asked her about an abdominal scar.

17. Dr. Dunn asked Ms. Beahm whether the stress of raising three children or an earlier ectopic pregnancy could be the cause of her problems, but he did not conclude that they were.

With regard to patient Karen Strauss:

18. Karen Strauss suffered an injury to her neck on February 19, 1988.

19. Dr. Dunn performed an IME of Ms. Strauss on June 10, 1988.

20. When Dr. Dunn performed the cervical compression test, Ms. Strauss reported that she felt pain. She did not report pain radiating from her neck into her arms. Dr. Dunn reported "the neck compression and Soto-Hall's tests were negative/normal".

21. When Dr. Dunn performed the cervical range-of-motion test, Ms. Strauss reported pain. Dr. Dunn reported "cervical spinal motion was not restricted".

22. Dr. Dunn did not tell Ms. Strauss to remove all of her clothes before putting on the examination gown.

23. Dr. Dunn told Ms. Strauss she was a "pretty" or "attractive" person.

37. When Dr. Dunn asked Ms. Sullivan to hop on each foot, she told him she experienced pain when she hopped on her left foot and she told him she could not hop at all on her right foot without holding on to the exam table. Dr. Dunn reported "hopping, heel/toe, eversion/inversion and tandem walking could be performed".

38. Ms. Sullivan experienced pain upon standing up from the front flexion portion of the thoracolumbar test, but she did not report it. Dr. Dunn reported "thoracolumbar motion was normal".

39. Unrelated to the injury of May 27, 1988, Ms. Sullivan had osteoporosis, spondylosis, and scoliosis of the spine, she had a "bad knee" from a prior injury, and she weighed 204 pounds at the time of the IME.

With regard to patient Reuben Blum:

40. Reuben Blum suffered an injury to his upper back on October 4, 1988.

41. Dr. Dunn performed an IME of Mr. Blum on January 24, 1989.

42. Mr. Blum's treating chiropractor accompanied him to and during the IME.

43. Mr. Blum told Dr. Dunn that his lower back problems began only after he began treatment

44. Dr. Dunn palpated Mr. Blum's back.

45. Dr. Dunn instructed Mr. Blum before he began the physical exam that he should volunteer any reports of pain. During the exam he did not ask Mr. Blum if he was experiencing pain.

With regard to patient Connie Bush:

46. Connie Bush suffered an injury to her neck on December 25, 1985.

47. Dr. Dunn performed an IME of Ms. Bush on August 29, 1989.

48. Ms. Bush was in her eighth month of pregnancy at the time of the IME.

49. Ms. Bush told Dr. Dunn that she experienced cervical, dorsal and lumbar pain a few times per week, usually for fifteen to twenty minutes at a time, which would cease spontaneously, but that the cause of the pain was unknown.

50. X-rays had not been taken of Ms. Bush for two to three years prior to the IME, and the most recent X-rays were not available to Dr. Dunn at the time of the IME.

IV. With regard to patient Denise Richards, by making a false statement in his IME report and by making inappropriate comments to the patient, Respondent performed professional services inconsistent with training, education or experience, contrary to § Chir 6.02(6), Wis. Admin. Code; by making a false statement in his IME report, Respondent also engaged in conduct of a character likely to deceive or defraud the public, contrary to § 446.04(1), Stats.

V With regard to patient Susan Beahm, by performing a breast examination without legitimate chiropractic purpose, Respondent performed professional services inconsistent with training, education or experience, contrary to § Chir 6.02(6), Wis. Admin. Code.

VI. With regard to patient Karen Strauss, by patting her bare buttock Respondent performed professional services inconsistent with training, education or experience, contrary to § Chir 6.02(6), Wis. Admin. Code.

VII. With regard to patient Connie Bush, by ordering lumbar X-rays of a pregnant female, Respondent practiced in a manner which substantially departed from the standard of care ordinarily exercised by a chiropractor, contrary to § Chir 6.02(3), Wis. Admin. Code, and he performed professional services inconsistent with training, education and experience, contrary to § Chir 6.02(6), Wis. Admin. Code. By performing a breast examination without legitimate chiropractic purpose he performed professional services inconsistent with training, education or experience, contrary to § Chir 6.02(6), Wis. Admin. Code.

VIII. The violations in IV, V, VI, and VII above constitute unprofessional conduct, and professional discipline for such conduct is mandated under § 446.03(5), Stats.

ORDER

THEREFORE, IT IS ORDERED that John W. Dunn, D.C., be reprimanded for his unprofessional conduct in this matter.

IT IS FURTHER ORDERED that the license issued to Dr. Dunn to practice as a chiropractor in the state of Wisconsin be suspended for a period of 60 days, to begin on the 30th day after this order is signed on behalf of the board.

IT IS FURTHER ORDERED that Dr. Dunn's license be limited to require

- 1) that within nine months of the date this order is signed, he complete twelve hours of continuing education in boundary training, and that he forward confirmation to the board, and
- 2) that for three years following the date this order is signed, a female attendant be present during his physical examination of any female patient.

Prior to presenting her case, Attorney Ohm moved to dismiss count XIX of the complaint (alleging sexual intimacy with Willie Sullivan). The motion was tentatively granted, subject to the board's ratification. This is an appropriate point on which to remind the board that the complaint by itself is not evidence, and that the complaint must be ignored, even if testimony in the hearing conflicts with what is in the complaint, or if nothing at all is mentioned in the hearing. Because Ms. Ohm placed the motion to dismiss on the record at the beginning of the hearing, Dr. Dunn and his attorney did not cross-examine or present any evidence on this charge, and it would therefore be a violation of the respondent's right to due process to find a violation. The board must either grant the motion to dismiss or remand the charge for the taking of evidence.

Of the twenty charges in the complaint, seven were sufficiently proven to merit a finding of unprofessional conduct. The evidence did not sufficiently support findings of unprofessional conduct on the other thirteen charges, and Dr. Dunn is therefore legally innocent of those charges.

The Legal Standards

The ultimate question of whether Dr. Dunn's conduct in this case was unprofessional depends on both the facts and the law. The law is contained in statutes and rules, but all law is subject to interpretation. The issue of the legal standards to be applied was raised initially in respondent's motion to dismiss, and it arose again in the testimony of Dr. Kurt Wood [tr. 1006-1011].

With regard to § Chir 6.02(6), Wis. Admin. Code, performing professional services inconsistent with training, education or experience, respondent's position is that a violation can be shown only by evidence that Dr. Dunn performed services which were inconsistent with the training or education **which he received**, or the experience **which he has personally had in the field** [motion to dismiss and tr. 1008]. Although a literal reading of the rule can be used to support this position, it is pointless and almost absurd. The purpose of a professional rule such as this one is to safeguard the public and to ensure the skills and ability of the practitioner, not to police an individual's practice by determining whether it is consistent with his or her unique background. In the words which I used in the hearing to give direction to both counsel on this issue, this rule is "directed at a general level of ... training, education or experience which ... a person practicing chiropractic can be expected to exhibit" [tr. 1008].

One of respondent's arguments against this interpretation is that two other rules address the issue of general competence. § Chir 6.02(3) states that unprofessional conduct includes "practicing in a manner which substantially departs from the standard of care ordinarily exercised by a chiropractor", and § Chir 6.02(9) covers "failing to conduct a competent assessment, evaluation or diagnosis as a basis for treatment or consultation". There are indeed similarities among the three, but they each address a different aspect of chiropractic practice.

The Psychology Examining Board and the Hearing and Speech Examining Board also regulate "engaging in sexual intimacies", but one major difference between those two professions and chiropractic is that, as testified in this hearing, there are situations in which a chiropractor would legitimately touch the parts of a person's body which are traditionally considered private. This includes breast examinations and palpating in the area of the buttock. I therefore find that there is a rebuttable presumption that any touching of a patient's private parts by a medical professional is legitimate. In this way, chiropractic is closer to medicine and nursing, and any discussion of the issue in psychology or hearing and speech cases may be informative, but it is not compelling legal authority. *Davis v. Psychology Examining Board*, 146 Wis.2d 595, 431 N.W.2d 730 (Ct. App., 1988) involved a violation of the analogous disciplinary rule for psychologists, but the court in the case again faced little difficulty interpreting the phrase "sexual intimacy" since the allegations involved sexual intercourse and oral intercourse.

In "In the Matter of Disciplinary Proceedings Against James Kirkpatrick, Ph.D.", a case decided by the Psychology Examining Board in 1992, "sexual intimacy" was used interchangeably with "sexual contact". The definition of "sexual contact" in the criminal statutes is a useful starting point.² In brief, it prohibits any touching of private body parts if the touching is done with what I will characterize as a "sexual purpose". However, since this board did not adopt the phrase "sexual contact", it is appropriate to assume that a different meaning was intended. In the absence of any other authority, I interpret the phrase "sexual intimacy" as broader than "sexual contact", and I opine that § Chir 6.02(7) is not restricted to actions which involve contact with private parts.

Even though "sexual intimacy" may not be limited to contact, the second part of the definition of "sexual contact" is still important, and the requirement that the actions be imbued with a sexual purpose should be incorporated into any interpretation of § Chir 6.02(7). This narrowness in the definition is necessary to protect a person who innocently makes contact with another's private parts or, especially in this setting, to protect someone who legitimately touches a patient's private body parts in a diagnostic or treatment setting. There was no legitimate chiropractic purpose to Dr. Dunn's breast exams of Susan Beahm and Connie Bush, but neither was there

²§ 940.225(5)(b), Stats. defines "sexual contact" as "any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or for the purpose of sexually humiliating the complainant, or sexually arousing or gratifying the defendant, or if the touching contains the elements of actual or attempted battery under s. 940.19(1)."

Denise Richards and Barbara Adler made no report of pain when they did, and although his statements were more the result of his tendency to discount uncorroborated reports of pain than a conscious attempt to defraud anyone, the statements were likely to deceive any reader and they were made without regard for the truth. (Only one of them was charged in the complaint, so only one violation of § 446.04(1) was found.)

General Issues Related to IMEs

Standards for IME Reports

Closely related to the discussion of legal standards is the issue of what standards, if any, apply to the preparation of IME reports. Dr. Dunn stated that there are no legal requirements for what must be put in an IME report, that he has seen a wide variety of styles [tr. 1652-1653], that no courses are offered in chiropractic school on how to write IME reports [tr. 1647], and that none of the insurance companies who requested reports in these cases has complained about either the format or the content of Dr. Dunn's reports [tr. 1648].

Dr. Wood set a very high standard for what should be recorded in an IME report. Among other things he stated that a practitioner should record a complaint of pain even if the practitioner decides that the complaint is clinically insignificant and that a failure to do so would be inconsistent with training, education, and experience [tr. 1031]. On cross-examination, Dr. Wood agreed that he had performed as an independent evaluator in preparing his testimony for this case yet he had prepared no written report, and that the form or content of an IME report can be contingent upon what the requestor asks the evaluator to do [tr. 1134-1141]. He also agreed that there are no written standards for IME reports [tr. 1249-1252].

This last point was confirmed by Dr. Miller,⁴ who testified that no rules or standards or regulations exist for preparing IME reports, and that chiropractic students are not taught how to prepare them [tr. 1744-1745]. She stated that she has seen many IME reports prepared by other practitioners, and having reviewed Dr. Dunn's IME reports which are the subject of the

⁴Dr. Joyce Miller [tr. 1732-1873; ex. 92, 94, 95] received her Doctor of Chiropractic degree from Northwest College. She is also a diplomate in orthopedics from National College, certified by the American College of Chiropractic Consultants, and certified as an independent examiner in Minnesota. She has taught in educational courses and seminars, including one entitled "Special Considerations in the Chiropractic Care of Women", and she currently teaches gynecology at Northwestern College of Chiropractic. She also practices at the Center for Clinical Studies in Bloomington, Minnesota, maintains a part-time practice in Green Bay, Wisconsin, and is chief of staff for four outpatient clinics at Northwestern College. She has taken coursework in advanced radiology.

3) Two of the patients complained that Dr. Dunn did not ask about pain on each test, and this was a crucial issue in Reuben Blum's IME. Dr. Wood said that it would be inconsistent with training, education and experience not to instruct the patient at some time during the physical exam to express any complaints of pain [tr. 1277], but Dr. Dunn stated that he tells patients prior to the exam to volunteer anything they wish to during the exam. He said that he does not ask patients if a particular maneuver causes pain, because it suggests that they should be feeling pain [tr. 1641-1642]. Dr. Miller confirmed that Dr. Dunn's approach -- to inform the patient before the exam to volunteer complaints of pain, but not to ask on each test whether it causes pain -- is a standard acceptable approach to determining when a patient feels pain [tr. 1752]. Both Reuben Blum and Willie Sullivan said that they did not hear him give this instruction, but Dr. Jerosch, who accompanied Mr. Blum, remembered the instruction [tr. 497]. The most likely conclusion is that Dr. Dunn does instruct patients before the exam to volunteer reports of pain, and that this is an acceptable practice, but that not all patients hear or understand the instruction.

4) The testimony indicated that, besides not querying his patients about whether they experienced pain on a particular test, Dr. Dunn often did not follow up on a report of pain by asking where and how it hurt, even though he said that if a patient grimaces or say "ow" he asks him or her to describe what he or she is experiencing [tr. 1687-1689, 1703-1714]. On at least one occasion, with Willie Sullivan, he did record the nature and location of pain, and he said that he puts all reports of pain into his reports, but the testimony of many of the patients disagrees with this. In Dr. Wood's terms, this was a failure to locate and grade pain, which is inconsistent with training, education and experience [tr. 1011-1013, 1024]. However, the evidence is simply not sufficient to prove that someone with Dr. Dunn's experience could not properly interpret the myriad ways in which a person can say "ow", and perform follow-up tests to confirm or disprove his conclusion, even without asking the patient to verbalize.

5) The final issue with regard to Dr. Dunn's response to reports of pain is that, with rare exceptions, Dr. Dunn leaves uncorroborated complaints of pain out of his final report. Dr. Wood stated that a practitioner should record a complaint of pain even if the practitioner decides that the complaint is clinically insignificant, and that a failure to do so would be inconsistent with training, education, and experience [tr. 1026-1027]. On the other hand, Dr. Miller stated that there is no requirement that an evaluator include a report of pain which is not clinically significant in his or her report [tr. 1794-1795]. Given the undefined nature of IME reports, and in light of the comments above regarding the high standards propounded by Dr. Wood, I find that Dr. Dunn's omissions in this area are acceptable, at least when he reported that testing in a certain area was "negative" or "normal". However, his reports that "no pain was complained of" in the face of credible testimony to the contrary constituted rule violations as detailed below.

Dr. Dunn's position combines the power of the doctor-patient relationship, the Robespierre-like independent reviewer role, and -- for seven of these eight patients -- the male-female relationship. In addition, Dr. Dunn is comfortable in his office setting, which would be unfamiliar to all the patients. It is very likely that the unequal power relationship of the IME affected both the way the patients perceived aspects of the examination, and the way they saw Dr. Dunn himself. A person in such a position of power must be excruciatingly careful to wield it with care and sensitivity. A number of the charges in this complaint allege comments or actions with regard to female patients which are arguably inappropriate. However, they are more an unprofessional use of power than they are sexual. None of the allegations constitutes sexual intimacy, largely because they were done "thoughtlessly" rather than with a sexual purpose.⁶

There are also aspects of Dr. Dunn's evaluations which show that he ultimately distrusts the patients, or is at least skeptical of what they say. This is shown in his general direction before the exam to volunteer reports of pain, without asking them about pain on each test, in the redundant tests for pain, and in tests which are performed surreptitiously, such as the cervical range-of-motion test which he performs under the guise of checking the patient's ears and nose [tr. 1671-1672]. He may also watch a patient as he or she walks in from the parking area. Dr. Wood confirmed that this is an essential aspect of being an independent evaluator. He said that the evaluator attempts to arrive at an accurate description of a patient's condition, and that to do so, the evaluator may do a number of redundant tests, some of which the patient may not know are intended to elicit similar responses. He even agreed that "our strategy is not to -- is not to completely inform them of -- of their -- or your expectation of them." [tr. 1187-1188].

Dr. Dunn's sensitivity to "faking" seems to be increased when another practitioner sits in. He stated that if a patient is accompanied by a treating chiropractor, as Dr. Hans Jerosch accompanied Reuben Blum, he alters his procedure slightly so that the patient cannot receive signals [tr. 1692]. This heightened distrust may well have been an element in the breakdown in communication during Mr. Blum's exam.

Even though Dr. Dunn maintains that he tries to be an advocate for the patient, he articulated an opinion which would nevertheless be seen by patients as contrary to their interests because it would lead to termination of their chiropractic treatment: Dr. Dunn stated that "protection ... of the patient also includes overtreatment because ... this is serious ... when people

⁶Many of the actions and comments raise the issue of **sexual harassment**, which can be a misuse of the male-female power relationship without being explicitly sexual, even when done thoughtlessly. This issue could be discussed at great length given the facts of this case, but that is not the standard to be applied.

Individual Patients

Denise Richards
[tr. 516-583; exs. 4, 31]

Denise Richards suffered an injury at work on November 23, 1987 from bending and lifting which caused pain in her lower back. The following day she went to Dr. Radermacher and continued treatment with him. On April 1, 1988 she was sent to Dr. Dunn for an IME.

Dr. Dunn was charged with 1) **performing professional services inconsistent with training, education or experience**, and 2) **engaging in conduct of a character likely to deceive or defraud the public**. These charges were based on his conclusion following the IME that there was no objective evidence to support the need for additional chiropractic treatment for Ms. Richards, and upon comments he allegedly made to her during the exam.

His conclusion regarding further treatment is echoed in the discussion of many of these patients, in that he received some positive reports of pain but concluded that they were not significant, based on negative or normal results of other tests. This is discussed in more detail above, under "Recording Complaints of Pain". The evidence was insufficient to prove that he reached an improper conclusion. However, as with Barbara Adler, he did record one false statement of fact in his IME report. That specific statement was not the basis of the charge with regard to Ms. Adler, but it was one of the bases of the charges here, and **the false statement made in Dr. Dunn's IME report constituted engaging in conduct of a character likely to deceive or defraud the public, as well as performing professional services inconsistent with training, education or experience.**

The other part of the charge was that Dr. Dunn allegedly said to Ms. Richards "that she was a very beautiful young woman" and "that if she would lose some weight she would not have to go to a chiropractor in order to have a man touch her" (or in an alternative wording "to have a man's hands on her"). This allegation raises a serious question of propriety which echoes similar concerns raised by Karen Strauss, and although the evidence on both sides of this issue is thin, by the preponderance of the evidence test, **Dr. Dunn did make a comment to Ms. Richards which was inconsistent with training, education and experience.**

When Dr. Dunn performed the cervical compression test, Ms. Richards told him she felt pain in her head, her neck and her lower back [tr. 523]. On cross-examination she stated that the pain on top of her head was in the area where his hands were, the pain in her lower back was just above the tail bone, and the pain in her neck did not radiate out into her arms [tr. 542]. Dr. Dunn reported "the neck compression test was negative/normal" [ex. 4, p. 26].

Ms. Richards stated that she was able to bend forward and touch the ground on the front flexion test, but "trying to stand up again was painful", which she told him [tr. 522, 548-549]. Dr. Dunn reported "thoracolumbar motion was normal and no pain was complained of" [ex. 4, p. 26].

Dr. Dunn said pain as described by Ms. Richards would not be a positive finding unless confirmed by other related tests. He stated that he performed other tests which would give him further information about a report of pain upon straightening up from a thoracolumbar motion test: Bechterew's test, straight leg raise test, and lower limb range of motion tests [tr. 1876]. Since none of these indicated an abnormality, he concluded that her report of pain, if she even gave it, was not clinically significant, and in that case "it would not have any clinical significance" [tr. 76-83].

Dr. Wood stated that if Ms. Richards experienced pain when she straightened up after bending over on the forward flexion maneuver, that is a significant clinical finding, because it is evidence of some sort of tissue damage, and that recording that "thoracolumbar motion was normal and no pain was complained of" would be inconsistent with training, education and experience [tr. 1014-1020].

Had Dr. Dunn only recorded that "thoracolumbar motion was normal" he could not be faulted. However, he went farther and reported "and no pain was complained of", and this went beyond his interpretation of an interrelated series of tests. I accept Ms. Richards' statement that she made some indication of pain, and I find that Dr. Dunn's statement in his IME is false. He probably did not intend to make a false statement, but his habit of discounting uncorroborated complaints of pain led him to use language which was inaccurate and misleading, and showed a disregard for the truth which caused it to be of a nature to deceive or defraud the public as well as inconsistent with training, education and experience.

With regard to Dr. Dunn's overall conclusion regarding Ms. Richards' condition, the evidence is not sufficient to prove that he was wrong. The purpose of the IME was to determine whether she was still suffering the effects of the injury on November 23, 1987, and Ms. Richards stated that when he asked about prior back injuries during the interview, she told him she had had a severe strain to the cervical and lumbar spine in 1979 [tr. 546]. She also said that Dr. Radermacher's treatments had helped her and her condition had improved by time she saw Dr. Dunn [tr. 547]. Dr. Dunn said she told him she was 80% recovered [tr. 1872]. Dr. Miller stated that the information which Dr. Dunn put in his letter to the Travelers Insurance Company (ex. 4, p. 37) was accurate and reasonable regarding the number of chiropractic treatments necessary to treat a complaint such as Denise Richards' [tr. 1783-1784].

The other basis for the charges against Dr. Dunn were two related comments he made to Ms. Richards. She stated that in the interview, "he asked me if I was married, and I told him that

Susan Beahm
[tr. 1297-1368; exs. 62, 66, 67, 68, 69, 71]

Ms. Beahm was involved in a work-related accident on January 28, 1988 in which her neck was injured. She went the same day to see Dr. Kemp, and continued in treatment with her. During the course of treatment, Dr. Kemp referred Ms. Beahm to Dr. Zerofsky for consultation. Dr. Dunn conducted an IME of Ms. Beahm on May 11, 1988, and Ms. Beahm drove to Dr. Dunn's office with a neighbor, Diane Seiler.

Dr. Dunn was charged with 1) **failing to conduct a competent assessment, evaluation or diagnosis as a basis for treatment or consultation**, 2) **engaging in conduct of a character likely to deceive or defraud the public**, 3) **engaging in sexual intimacies with a patient in the office**, and 4) **performing professional services inconsistent with training, education or experience**. The first and second charges were based on Dr. Dunn's conclusion that there was no objective basis for Ms. Beahm's subjective complaints, despite a restriction of her neck movement. The third charge was based on an allegation that Dr. Dunn performed a breast examination on Ms. Beahm even though he did not mention it in his IME report. The fourth charge was based on the alleged breast exam as well as on comments made to Ms. Beahm

The evidence was not sufficient to show that Dr. Dunn's assessment was incompetent, nor that it was of a character likely to deceive or defraud the public. The comments attributed to Dr. Dunn do not rise to the level of being inconsistent with training, education and experience, but the evidence establishes that Dr. Dunn did perform a breast exam, and although this did not constitute a sexual intimacy with a patient, it was inconsistent with training, education and experience.

The crux of the charge that Dr. Dunn performed an inadequate evaluation is the allegation that Ms. Beahm was not recovered from her neck injury at the time of the exam. Ms Beahm stated that she complained of pain on the passive range of motion of her neck; Dr. Dunn's report differs from this and says "the patient moved her head and neck incompletely actively, however, cervical spinal motion was not restricted with passive movement" [ex. 5, p. 11]. His report also says "palpation elicited pain to the right of the spinous of axis" [tr. 99-101]. On this disagreement of fact, the more credible evidence is Dr. Dunn's report, which was written contemporaneously or immediately after the exam. Also, since he mentioned both a restriction in the range of motion and a report of cervical pain (upon palpation), these are more likely than not what Ms. Beahm remembered as a report of pain when Dr. Dunn moved her neck passively.

Dr. Wood said that these would be significant clinical findings, because the test results are suggestive of disfunction in the neck area [tr. 1053-1055]. He further expressed the opinion that these findings were not adequately interpreted, and that "it's contingent upon the doctor in the discussion to be able to -- to determine which way it's interpreted and why" [tr. 1046] However, as noted above, the range of analyses in IMEs varies considerably, and despite Dr.

issue based on the meaning of "sexual intimacy", more than it is a practice issue, and as discussed above under "The Legal Standards", the determination of this issue depends on whether the action had a sexual purpose.

Although there are strong issues of power between Dr. Dunn and these patients, and reports by two female patients of breast exams, only two sources suggest that Dr. Dunn's actions contained "sexual overtones". The first was Karen Strauss, whose testimony was not entirely credible, especially on this issue. The second is the legal notion of *res ipsa loquitur*, which means "the thing speaks for itself". This says that if Dr. Dunn performed a breast exam without legitimate purpose, it **must** have been a sexual act. However, as stated above in the section on "The Legal Standards", chiropractors are medical professionals like doctors and nurses, and some presumption of legitimacy must be accorded acts which would constitute sexual contact by others. Any other interpretation creates the danger of disciplinary or even criminal charges any time certain tests involving the private parts of a patient's body could later be shown to have been unnecessary.

Dr. Dunn does perform legitimate breast exams on some patients. There was no suggestion in the testimony of Susan Beahm that Dr. Dunn's breast exam was "sexual". In the absence of any credible evidence in the record of a sexual purpose, that is, that Dr. Dunn was humiliating or degrading the patient, or being himself aroused or sexually gratified, the more reasonable interpretation is that he thoughtlessly performed tests which he deemed were for the patient's benefit, but which were not appropriate in the IME setting. I find that Dr. Dunn did perform a breast exam on Susan Beahm, that it was without legitimate chiropractic purpose, and that therefore it was a lapse which was inconsistent with training, education and experience, but that it did not constitute a sexual intimacy.

The charge that Dr. Dunn performed services which were inconsistent with training, education or experience was also based on certain comments he allegedly made to Ms. Beahm regarding a scar on her abdomen. Ms. Beahm stated that Dr. Dunn raised her gown, and asked her about an abdominal scar. Dr. Dunn testified that he routinely inquires about scars, although he made no note of her scar [tr. 96-97]. Dr. Dunn's report does show that in the interview portion of the exam she informed him that she had had exploratory abdominal surgery [ex. 5, p. 11]. He further stated that if a gown is pulled up, a napkin (or paper towel) is used to cover the patient's pubic area, and Willie Sullivan confirmed that as Dr. Dunn raised her gown he covered her pubic area with paper towels [tr. 808]. Ms. Beahm did not allege that Dr. Dunn touched her in any inappropriate way during this part of the exam, thus in a negative way reinforcing the conclusion that there was no sexual purpose to the breast examination. She stated that she told him she had three children and that when she told him that the scar was from an ectopic pregnancy, "he said, is that -- is that what all your problems are is from the ectopic pregnancy? And he said I know it's a lot of -- a lot of stress raising three kids. He said, 'Could that be what your problems are?'" [tr. 1310].

for IME Reports" and "Recording Complaints of Pain" above. The entire record of the hearing demonstrates that Dr. Dunn simply does not record complaints of pain unless he finds them corroborated on the redundant tests. I have concluded that this is not inconsistent with training, education or experience.

Ms. Strauss testified that she told Dr. Dunn it hurt when he pushed down on the top of her head [tr. 599] and that it hurt when he turned her head [tr. 600]. Dr. Dunn's report says "the neck compression and Soto-Hall's tests were negative/normal" [ex. 6, p. 17], and "cervical spinal motion was not restricted" [ex. 6, p. 16]. He says if she had complained of pain when he "pushed her neck from side to side" he would have recorded it [tr. 109].

Dr. Dunn testified that the purpose of cervical compression is to test for pain radiating from the neck into the arms, and that any other report of pain is incidental, and a negative finding. Dr. Miller gave the same opinion. Dr. Wood said if she experienced pain during the neck compression test, or if she experienced pain when Dr. Dunn "pushed on the side of her neck", and told Dr. Dunn, this would be a significant clinical finding, and failing to mention it in his report was inconsistent with training, education, and experience. However, as stated before, Dr. Wood's standards are too high to serve as a realistic basis for a finding of unprofessional conduct, especially in the context of an IME report written for an insurance company [tr. 1057-1059]. Without some evidence that Ms. Strauss complained to Dr. Dunn of pain radiating into the arms from the neck, his report cannot be considered inconsistent with training, education or experience, or likely to deceive or defraud the public.

With regard to the passive cervical range of motion, Dr. Dunn exaggerated when he said he would have recorded any complaint of pain (because, as described in "Recording Complaints of Pain", he often doesn't). Nevertheless, Dr. Dunn testified that he observes the patient's range of motion at various times, sometimes as they walk in from their parked car, and always as part of his examination of the patient's ears and nose. It is entirely possible that Ms. Strauss expressed mild discomfort at the extreme of the range, or even if she complained of significant pain within the normal range that her complaint was belied by her active movement at other times. Without very detailed proof of exactly what Ms. Strauss said at what point on the range of motion test, and how that correlated to Dr. Dunn's other observations, Dr. Dunn's report cannot be considered inconsistent with training, education or experience, or likely to deceive or defraud the public.

Further proof that Dr. Dunn's evaluation was not inadequate was Ms. Strauss's statement that "When I went to see Dr. Dunn I was pretty much done with -- it was pretty close to the end of the treatment program. ... I was much, much better than I was." [tr. 671], and Dr. Dunn remembered Karen Strauss telling him she was 90 to 95% recovered [tr. 1872].

Rhonda Manthe

[tr. 896-959, exs. 15, 16, 17, 18, 20, 51, 52, 53]

On November 16, 1987 Ms. Manthe was injured while lifting an object at work. In describing the injury, she stated that she felt a pinch in her neck. She subsequently began chiropractic treatment with Dr. Gregg Bakke. Dr. Bakke's records show that Rhonda Manthe presented at his office on Nov. 17, 1987 for treatment of a work-related injury and that her complaints at that time were "painful neck, back and hip (right side)" [ex. 15, p. 7]. He treated her on a continuing basis for this injury. On June 28, 1988 Dr. Bakke informed the Travelers Insurance Company that "Ms. Rhonda Manthe has responded very well to treatment at our office. Discharge is anticipated shortly ..." [tr. 286; ex. 15, p. 12], but on July 6, 1988 Ms. Manthe reported an additional work-related injury which aggravated the previous one [tr. 274; ex. 15, p. 13], and Dr. Bakke continued treating her. Dr. Dunn conducted an IME on Ms. Manthe on August 17, 1988.

Dr. Dunn was charged with **performing professional services inconsistent with training, education or experience**. This is based on his alleged failure to evaluate reports of pain and document his opinion that they were psychosomatic, on his requiring her to perform a pelvic tilt although she reported that it caused pain, and on his assuming that the straight leg raise would be negative since thoracolumbar flexion and Bechterew's test were normal even though her behavior was such that the straight leg raise could not be performed.

Dr. Dunn's medical evaluation of Ms. Manthe and his actions regarding the pelvic tilt were not inconsistent with training, education or experience. The history of Ms. Manthe's treatment with Dr. Bakke raised significant questions about the objective nature of her perceptions of pain and her expectations for chiropractic care. Consequently, her testimony cannot serve as the basis for a finding that Dr. Dunn falsified his report or unprofessionally caused her pain by requesting that she perform a pelvic tilt. He did ask questions and make comments which can be criticized as less than thoroughly professional, but those statements were not the basis of this charge.

It is somewhat ironic that a disciplinary charge was lodged against Dr. Dunn for his finding on August 17, 1988 that Ms. Manthe did not need further chiropractic care when she had been discharged from Dr. Bakke's care five days earlier, especially since Dr. Bakke stated "I did not feel that this patient required any additional treatment" [tr. 311], and testified that he would not terminate treatment until a patient has received maximum improvement [tr. 284-288].

There were some difficulties with Dr. Bakke's records because of entries which appeared differently in photocopies made at different times, and Dr. Bakke's position may have been unclear prior to the hearing, but ultimately, it was established that Dr. Bakke discharged Ms. Manthe from treatment on August 12, 1988 [tr. 274], five days before Dr. Dunn's IME, and this testimony by itself tends to confirm that Dr. Dunn's physical evaluation of Ms. Manthe was accurate.

expanded to her neck, back and hip, and on cross-examination the following questions and answers were given:

Q: This work injury that you talked about. You said that you had a -- during a lifting episode or when you were working on these totes, you had a pain in the side of your neck, is that right?

A: Correct. ...

Q: And when you went to see Dr. Bakke, you were complaining among other things about pain in your hip and knee, isn't that true? ...

A: That's because I -- when this went out of joint I couldn't -- I was constantly kinking my neck or sitting funny.

Q: So if I understand what you're saying, you're saying that this pain up around the base of your skull caused you to sit funny?

A: Well, it started right there and it went down my entire neck, so my neck was constantly kinked. That's where I was sitting funny or holding my body funny. And that would make my hips and my back sore.

Q: And how did your knee get into play? How did that become painful as a result of this --

A: Maybe I was walking funny, too.

[tr. 924-925]. Dr. Dunn's daughter Deborah stated that she remembered speaking to Ms. Manthe, and that she did not give the appearance of someone in pain. Deborah Dunn further stated that after Ms. Manthe left, she returned "and I don't know if she had forgotten her X-rays from Dr Bakke or what else went on, but she asked if she could have a treatment" [tr. 931, 1439].

Ms. Manthe stated that at one point while she was on her back Dr. Dunn placed his hand on the table beneath the arch of her back and told her to lower her back and touch his hand, that her back hurt and she told him she couldn't do it, but that he continued to urge her to do it, and "I went beyond my limit of pain and touched it just to get him to be quiet so I could get out of there" [tr. 905-906]. Dr. Dunn explained that he attempted to teach her pelvic tilt, "a corrective exercise for her lumbar curve when she was recumbent" [ex. 9, p.37]. He denied that he told her to keep doing the maneuver after she complained of pain [tr. 145], although he reported that "In the performance of pelvic tilt she complained of severe back pain and acted in a hysterical manner." [tr. 144; ex. 9, p. 37].

Dr. Wood gave his opinion that if Dr. Dunn asked Ms. Manthe to do a pelvic tilt, and she told him she couldn't because it caused her pain, and he continued to insist until she finally did, that would be inconsistent with training, education and experience [tr. 1117]. Dr. Miller, on the other hand, expressed the opinion that "there's virtually no way that I am aware of -- that I'm aware of that a pelvic tilt could cause any harm" and that it would not be inconsistent with training, education or experience to instruct Rhonda Manthe to continue to do that even if it caused her pain, "because some maneuvers in rehabilitation do cause -- doctors call it discomfort, patients call it pain" [tr. 1861].