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STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY

PROCEEDINGS AGAINST:

FINAL DECISION

AND ORDER

GEORGE D. DARNELL, D.C.,

LS9810261CHI

RESPONDENT.

The State of Wisconsin, Chiropractic Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Chiropractic Examining Board.

The Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs with the Department General Counsel within 15 days of this decision. The Department General Counsel shall mail a copy thereof to respondent or his or her representative.

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

Dated this 16th day of February, 1999.

Terry K. Freitag, Chair

STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY

PROCEEDINGS AGAINST:

LS9810261CHI

GEORGE D. DARNELL, D.C.

Respondent

PROPOSED DECISION

The parties to this proceeding for the purposes of sec. 227.53, Stats. are:

George D. Darnell, D.C.

1225 Marinette Avenue

Marinette, WI 54143

State of Wisconsin Chiropractic Examining Board

1400 East Washington Avenue

P.O. Box 8935

Madison, WI 53708

State of Wisconsin Department of Regulation & Licensing

Division of Enforcement

1400 East Washington Avenue

P.O. Box 8935

Madison, WI 53708

This matter was commenced by the filing of a Complaint by the Division of Enforcement on October 26, 1998. No Answer was received from the respondent, and the hearing went forward as scheduled on December 14, 1998. Appearing for the Division of Enforcement was Attorney John R. Zwiig. Respondent did not appear, nor did anyone appear to represent him. Complainant proceeded to present evidence establishing a *prima facie* case.

Based upon the entire record in this case, the administrative law judge recommends that the Chiropractic Examining Board adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Respondent George D. Darnell, D.C., born on January 3, 1962, was at all times relevant to the facts set forth herein licensed by the Wisconsin Chiropractic Examining Board to practice chiropractic in the state of Wisconsin, pursuant to license number 2362, which was granted December 1, 1988.
2. Respondent's license to practice chiropractic expired on December 31, 1996, and Respondent failed to renew it. Pursuant to sec. 440.08(3)(a), Stats. and sec. CHIR 3.02(2), Code, Respondent may renew his license at any time within five years by merely paying the required fees and providing proof of compliance with continuing education requirements.
3. Respondent's last address reported to the Department of Regulation and Licensing (Department) is 1225 Marinette Avenue, Marinette, WI 54143. Sometime prior to March of 1997 Respondent moved from that address and left no forwarding address.
4. In attempting to discover respondent's current whereabouts, the Division of Enforcement made the following inquiries and determinations:
 - (a) On September 2, 1998, it was determined that the Wisconsin Chiropractic Association (WCA) had the same address for Respondent as set out in paragraph 3, above; and that the American Chiropractic Association (ACA) listed Respondent as a former member and had an address for Respondent which predated the address set out in paragraph 3, above.
 - (b) On September 3, 1998, it was determined that Respondent had written to the Department on October 20, 1996, seeking information, and had at that time used a return address of 115 E. Paradise Lane, Phoenix, AZ 85022.
 - (c) On September 3, 1998, it was determined that the Arizona Board of Chiropractors had suspended respondent's Arizona license for nonpayment of renewal fees on January 15, 1998. Respondent's address as listed by the Arizona Board was P.O. Box 30640, Mesa, AZ 85275.
 - (d) On September 3, 1998, the telephone number that had been provided by the Arizona Board of Chiropractors was called. A woman answered, who identified herself and said that she knew Respondent. She also stated as follows:

Respondent had stayed with her for a while, but then "just disappeared" in December of 1996.

Many people have called her trying to find Respondent and those people contend that Respondent owes them money.

She did not have Respondent's address or telephone number.

Respondent's parents, Jim and Lotis (phonetic), and wife Marni are in Necedah, Wisconsin.

The Wisconsin family members had not been willing to tell anyone in Arizona where Respondent is living.

(e) On September 21, 1998, the Arizona Department of Transportation provided records indicating that Respondent was issued an Arizona drivers license on January 24, 1997, with an address of 36889 N. Tom Darlington, Carefree, AZ 85377.

(f) Responding to an inquiry initiated on September 30, 1998, Arizona directory assistance advised that there was no listing under Respondent's name in Carefree or any of the surrounding areas.

(g) On September 30, 1998, Respondent's father, James Darnell, residing in Necedah, Wisconsin was contacted by telephone. Mr. Darnell stated that he did not have Respondent's telephone number or address and that he had not had any contact with Respondent for a "long, long time." He said that Respondent was now divorced and that he, James Darnell, had no idea where his former daughter-in-law was.

(h) On October 6, 1998, Respondent's ex wife contacted the Division of Enforcement in response to the Division's letter of inquiry. She stated that she has not had any contact with Respondent for more than a year, that she has no idea where Respondent is living at this time, and that his location has been a "secret" ever since he left the state. She also stated that when she filed for divorce, Respondent never appeared for the hearing, that she was awarded custody of their child and that, although Respondent was ordered to pay child support, he neither paid any child support nor had any contact with their child for an extended period of time.

5. The following attempts were made by the department to serve the Complaint and Notice of Hearing on the respondent:

(a) The Complaint and Notice of Hearing were mailed to respondent at his address of record by both first class mail and certified mail. Both were returned as "undeliverable as addressed; forwarding order expired."

(b) The Complaint and Notice of Hearing were mailed to respondent at the Carefree, Arizona address by both first class mail and certified mail. The certified letter was not claimed, and the first class letter was not returned to the sender.

(c) The Complaint and Notice of Hearing were mailed to respondent at the Mesa, Arizona Post Office Box by first class mail. The letter was not returned to the sender.

6. §440.11, Stats. provides as follows:

(1) An applicant for or recipient of a credential who changes his or her name or moves from the last address provided to the department shall notify the department in writing of his or her new name or address within 30 days of the change.

(2) The department or any examining board, affiliated credentialing board or board in the department may serve any process, notice or demand on the holder of any credential by mailing it to the last-known address of the holder as indicated in the records of the department, examining board, affiliated credentialing board or board.

7. On December 7, 1990, Patient One, who was then 25 years of age, first saw Respondent in his professional capacity. Patient One's primary complaints were: occipital headaches, neck pain, bilateral shoulder pain and lower back pain. Patient One also complained of tightness in her chest, shooting pain in her calves following work as a waitress, and cold hands and feet.

8. Under "objective findings," Respondent noted:

a. Restricted Range of Motion: "Cervical ROM limited upon right lateral flexion at 25° at C7 T1. Rotation to the right is limited at 60° pain at C7 T1 level, rotation to left is limited to 65°. Lumbar ROM is normal."

b. Palpation Findings: "Fixation and tenderness at the C1 C2 level, T3 T4 level and at the T8 Level."

c. Positive Orthopedic Tests: "Positive cervical compression test at the C7 T1 level on the left Positive Derified (sic) on the left."

d. Muscle & Motor Nerve Weakness: "Good. Upon observation this patient has a high head tilt on the left. the left shoulder is high, and the right hip is high, from side the neck is flat, she has an accessive (sic) low back curve (lordosis). Patients (sic) spine-she has a right rhomboid area prominent-possible curvature. Right foot pronates out from the body. Taut and tender trapezius muscle (bi-laterally), bi-lateral rhomboid, and bi-lateral subluxipital muscles tenderness and spasticity."

9. Under x-ray findings, Respondent noted no fractures or pathologies, but noted as Misalignment: "C1 ASL, C6 PR, T2 PRI-M, Sacrum is 14-R."

10. Respondent recorded his diagnoses of Patient One as: " Cervicalgia, cervical sub com, lumbalgia, LS sub com, cephalalgia."

11. Respondent's treatment plan was: "[A]djustments, possibility of muscle stim.,

I will issue orthotics for her, linear gravity pillow, and possible massage therapy with Elaine Fleischman possibility with specific spinal exercises (ligamentus) for her neck."

12. Respondent provided chiropractic services to Patient One for those conditions on December 7, 1990 and on the following dates:

a. December 8, 10, 13, 14, 18, 20, 26, and 28, 1990.

b. January 7, 10, 16; February 11, 18, 25; and March 4, 1991.

13. During an appointment, which Patient One believes to have been on December 8, 1990, the following occurred:

a. Respondent adjusted Patient One's neck and spine.

b. After the adjustment, and while Patient One was seated in a chair, Patient One told Respondent that her shoulders were extremely stiff from waitressing and requested that Respondent massage her neck and shoulders.

c. Respondent told Patient One that she had a lactate build up in her muscles which caused the muscles to stiffen in her shoulders. Respondent told Patient One that he was going to release the lactate to make her feel better.

d. Respondent sat in a chair behind Patient One and from behind began by massaging with his finger tips what he described as pressure points on Patient One's shoulders.

e. Respondent then told Patient One that he would have to massage the muscles near her breast area to release the lactate build up and relieve the soreness in Patient One's shoulders.

f. Patient One did not object, but thought it was strange that Respondent would apply pressure near her breast tissue when it was Patient One's shoulder and back that hurt.

g. Respondent, while still behind Patient One, began by pressing his finger tips underneath Patient One's breasts. Respondent then proceeded to massage Patient One's breasts with both of his hands in what Patient One described as a "groping" manner.

h. Respondent's head was very close to Patient One's head as he massaged her breasts and he asked her: "Do you have any objections to this?" Although Patient One felt uncomfortable, she replied "no" because she thought the breast massage was a part of the standard procedure.

14. Respondent, when questioned by DOE about the December 8, 1990 procedure, said that he was concerned with Patient One's lymphatic system, not her breasts. He said that he applied pressure in the axially region, the mid-sternum region and under the rib cage.

15. The procedure described by Respondent would not require that he touch Patient One's breasts in the manner she describes.

16. Respondent's massage of Patient One's breasts had no legitimate chiropractic purpose, and no minimally competent chiropractor would have engaged in that conduct.

17. On two occasions, while Patient One was receiving treatment from Respondent, Respondent asked Patient

One to give him a back rub. Although Patient One thought Respondent's request was unusual, on one of the occasions she agreed and performed a back rub on Respondent. The second time that Respondent asked Patient One for a back rub, she refused to do so. No minimally competent chiropractor would request that a patient perform a back rub on the chiropractor during a treatment session.

18. During another treatment, Respondent told Patient One, who was lying face down on the table, that she "looked nice in those jeans." Respondent made the comment just before he performed a massage of Patient One's buttocks cheeks. The buttocks massage was appropriate for her condition, but no minimally competent chiropractor would have made that comment at that time.

19. On January 5, 1994, Patient Two, who was then 29 years of age, first saw Respondent in his professional capacity. Patient Two complained of headaches and pain in her right hip, neck and shoulders which resulted from an automobile accident.

20. Respondent provided chiropractic services to Patient Two for those conditions on January 5, 1994 and on the following dates in 1994:

January 8, 11, 12, 14, 17, 24, 25, 26.

February 2, 3, 11, 14, 16, 25, 28.

March 2, 11, 14, 16.

April 11, 15.

21. Patient Two's symptoms recurred and she had increased pain in her neck and back and experienced sharp pain in her right buttock that traveled around her pelvis down inside her right leg, with a tingling numbness. For that reason, she returned to Respondent and received professional services on December 29 and 30, 1994.

22. On January 3, 1995, Patient Two arrived for a scheduled appointment with Respondent to receive heat and electrical stimulation on her back. She reported that she was feeling much improvement since treatment began; the pain in her back and neck was much better; and that the pain in her buttocks and hip persisted, but the tingling sensation was gone.

23. Following the heat and electrical stimulation treatment on her back, Patient Two was taken to another room where Respondent, after performing adjustments, told Patient Two that she had excessive tension in her upper back and lower neck. Respondent's assessment noted: "Very tight in Intrascapular Area." and recommended as treatment: "Massage Intrascapular, cuff, pectoral parasternal areas."

24. Respondent asked Patient Two if she wanted treatment for her intrascapular (shoulder blade) area. After Patient Two agreed, Respondent told Patient Two that he would be working near and under her breasts to relieve the tightness in Patient Two's back and that she would need to partially disrobe at some point in the treatment. Respondent then had Patient Two initial the treatment record next to his handwritten note: "Informed pt. what to expect - close to breasts and exposed. Pt. understands and agrees."

25. Respondent told Patient Two that he was going to leave the lights off so that Patient Two would be more comfortable and relaxed. The only light in the room came from partially open blinds. Respondent told Patient Two to lie down on the table.

26. Respondent told Patient Two to remove her shirt and bra so Respondent could work on the area. When Patient Two responded that she was embarrassed, Respondent said that he had told her she was an attractive woman. Patient Two reluctantly removed her bra but not her shirt because she wanted to remain covered. Respondent did not offer Patient Two a gown or a sheet to drape the area.

27. Respondent applied lotion to his hands while Patient Two laid on her back on the table. Respondent next cupped Patient Two's breast with one hand and massaged it in a circular motion with his other hand. Using his fingertips, Respondent circled Patient Two's breast approximately three to four times.

28. Respondent next pressed on a fibroid cyst on top of Patient Two's breast and continued to do so after Patient Two told Respondent that it was painful. As Respondent continued to massage the top of Patient Two's breast, he asked her "if she was uncomfortable." When Patient Two told Respondent that the massage made her feel uncomfortable, Respondent told her that it would make her feel better.

29. Patient Two thought it strange that Respondent massaged the top of her breast instead of underneath where Respondent had told her the muscles were located.

30. Respondent then cupped Patient Two's breasts with both hands and massaged and squeezed them, with Respondent hand's eventually touching Patient Two's entire nipples. Patient Two thought Respondent's massage felt like "something a husband would do to his wife in the privacy of their bedroom."

31. After a time, Respondent asked Patient Two to sit in a chair. When Patient Two lifted to get off of the table, Respondent said "let's get rid of this" and removed Patient Two's shirt which was hanging around her neck. Patient Two, naked from the waist up, sat in the chair, as Respondent directed.

32. Respondent sat in a chair directly behind Patient Two and told her to lean back and relax. Respondent pulled Patient Two's shoulders back, put his arms around the chair underneath Patient Two's arms, and proceeded to massage and cup Patient Two's breasts. While massaging Patient Two's breasts, Respondent told Patient Two that it was his 31st birthday.

33. Respondent was so close to Patient Two that his head was over Patient Two's left shoulder and he was looking down at her breasts as he massaged them. Patient Two was nervous and uncomfortable because whenever she leaned back, Patient Two could feel Respondent's chest against her back.

34. At one point during the massage, Respondent, who had begun massaging the side of Patient Two's left breast, told Patient Two that she could have the gentleman friend she was seeing do the massage and it could be a romantic moment.

35. After Respondent finished massaging Patient Two's breast, Respondent told Patient Two that he wanted to perform the same treatment on her breasts a few more times. When Patient Two responded with a questioning look, Respondent said, "at least every other week okay, to get you feeling real good."

36. At the end of treatment, Respondent told Patient Two that he would leave the treatment room so that Patient Two could get dressed. Patient Two waited for Respondent to leave, but he remained in the room. Patient Two was forced to put her clothing back on while Respondent looked at her.

37. Respondent's massage of Patient Two's breasts had no legitimate chiropractic purpose, and no minimally competent chiropractor would have engaged in that conduct.

CONCLUSIONS OF LAW

1. The Chiropractic Examining Board has jurisdiction in this matter pursuant to sec. 446.05, Stats.

2. Respondent has failed to file an Answer as required by sec. RL 2.09, Code, and has failed to appear at the hearing at the time fixed therefor. Pursuant to sec. RL 2.14, Code, respondent is therefore in default, and the Chiropractic Examining Board may make findings and enter an order on the basis of the Complaint and the *prima facie* evidence presented at the hearing herein.

3. Respondent, by engaging in the conduct with Patient One set forth in Findings of Fact 6 through 17, has engaged in practice which constitutes a substantial danger to the health, welfare or safety of patient or the public, within the meaning and in violation of sec. Chir 6.02(1), Code; has practiced in a manner which substantially departs from the standard of care ordinarily exercised by a chiropractor, within the meaning and in violation of sec. Chir 6.02(3), Code; has performed professional services inconsistent with training, education or experience, within the meaning and in violation of sec. Chir 6.02(6), Code; and has engaged in sexual contact, exposure, gratification or other sexual behavior with a patient, within the meaning and in violation of sec. Chir 6.02(7), Code. Respondent is therefore guilty of unprofessional conduct within the meaning and in violation of sec. 446.03(5), Stats.

4. Respondent, by engaging in the conduct with Patient Two set forth in Findings of Fact 18 through 37, has engaged in practice which constitutes a substantial danger to the health, welfare or safety of patient or the public, within the meaning and in violation of sec. Chir 6.02(1), Code; has practiced in a manner which substantially departs from the standard of care ordinarily exercised by a chiropractor, within the meaning and in violation of sec. Chir 6.02(3), Code; has performed professional services inconsistent with training, education or experience, within the meaning and in violation of sec. Chir 6.02(6), Code; and has engaged in sexual contact, exposure, gratification or other sexual behavior with a patient, within the meaning and in violation of sec. Chir 6.02(7), Code. Respondent is therefore guilty of unprofessional conduct within the meaning and in violation of sec. 446.03(5), Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of George D. Darnell, D.C., to practice chiropractic medicine in the State of Wisconsin, and any existing right to renew that license under sec. 440.08(3)(a), Stats. and sec. Chir 3.02(2), Code, are hereby revoked.

IT IS FURTHER ORDERED that pursuant to sec. 440.22(2), Stats., the costs of this proceeding are assessed against the respondent.

OPINION

The attempts to locate and to serve the respondent are well documented in this record and far exceed what is

statutorily required to effect service. Respondent is clearly in default, and the board is therefore permitted to make findings based upon the Complaint and other evidence of record herein.

In the latter regard, the record is replete with documentation of respondent's unprofessional conduct. In the case of Patient One, the events described in her initial complaint in 1991 (Exhibit 1), and her subsequent statements regarding those facts upon being interviewed in 1995 (Exhibit 2) are consistent and persuasive.

While the investigation of the informal complaint filed by Patient One in 1991 was closed at that time, the matter was reopened when the complaint filed by Patient Two, which described similar conduct, was received in 1995. The various documents comprising evidence of respondent's conduct with respect to Patient Two are also consistent and persuasive. These include her account given to the police following the incidents set forth herein (Exhibit 4), the contemporaneous description of the events provided to a friend (Exhibit 7), and the events as described to the department's investigator during the interview of the complaining witness (Exhibit 6). In light of respondent's failure to appear and defend against these allegations, there is ample evidence in this record to justify the findings and conclusions set forth herein, and those findings describe behavior by respondent completely inimical to the standards of conduct required of a health care provider.

It is well established that the objectives of licensing discipline are protecting the public, promoting the rehabilitation of the licensee, and deterring other licensees from engaging in similar misconduct. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*, 41 Wis. 2d 481 (1968). Application of the stated objectives leads to the conclusion that revocation of respondent's license is the only appropriate discipline. There is nothing in this record to show that imposition of any discipline short of revocation would have any rehabilitative effect or even that the respondent has any interest in being rehabilitated. As to deterrence, absent mitigating evidence of any kind, imposition of discipline less than revocation would not only fail to deter those who might be inclined to engage in similar misconduct, but could in fact encourage them. Finally, there is no reason to believe that given another opportunity, respondent would not again engage in this reprehensible conduct, and protection of the public therefore requires that respondent be deprived of his license and of any opportunity to renew that license.

Dated this 5th day of January, 1999.

Respectfully submitted,

Wayne R. Austin

Administrative Law Judge