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STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

HAROLD J. DYKEMA, D.C.

LS0105071CHI

Respondent

FINAL DECISION AND ORDER

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

Harold J. Dykema, D.C.
1620 South Hastings Way
Eau Claire, WI 54701

Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin Chiropractic Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

A Class II hearing was held in the above-captioned matter on June 11 and 12, 2002, at 1400 East Washington Avenue, Madison, Wisconsin. Dr. Dykema appeared personally and by Attorney Richard L. Wachowski. The Division of Enforcement appeared by Attorney James E. Polewski. Closing arguments were filed by September 12, 2002.

The administrative law judge (ALJ) filed his Proposed Decision on November 11, 2002. On November 27, 2002, Dr. Dykema, by Attorney Wachowski, filed his Objections to Proposed Decision, and the Division of Enforcement, by Attorney Polewski, filed its Response to Respondent's Objections to Proposed Decision on December 3.

The Chiropractic Examining Board took up the matter at its meeting of December 19, 2002, at which time the board approved the ALJ's Proposed Decision. However, what was deemed to be an irregularity in the procedure exercised by the board in its consideration of the matter was discovered following adjournment of the meeting. Contrary to policy established by the department, the Board Advisor on the case was permitted to participate in the deliberations and voting on the matter. Accordingly, the board Chair approved staying the issuance of the final decision pending reconsideration by the board at its next meeting.

On January 8, 2003, the board again considered the matter. The board's legal counsel at that time recommended to the board that in reconsidering the matter, the board vacate its previous decision and remand the matter to the ALJ under § 22746(3), Stats., to make the final decision in the case following his consideration of the respondent's objections to the Proposed Decision. The board approved that recommendation and, on January 21, 2003, the board entered its Order Vacating Previous Board Action and Ordering the ALJ's Decision to Be the Final Decision.

Based upon the entire record in this case, including the Objections to the Proposed Decision, the administrative law judge makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Harold J. Dykema, D.C., 1620 South Hastings Way, Eau Claire, WI 54701, born on January 15, 1940, was at all times relevant to this matter licensed to practice as a chiropractor in Wisconsin by license # 1253, granted on February 7, 1967.
2. On April 28, 1998, Celina Kobs, an investigator with the Department of Regulation & Licensing Division of Enforcement, made her first visit to Dykema Chiropractic Clinic in Eau Claire, Wisconsin. The ostensible purpose of the visit was to receive chiropractic examination and treatment, but the underlying purpose was to conduct an undercover investigation of Dr. Dykema's practice.
3. During the initial patient interview, Dr. Dykema informed Ms. Kobs that "the way I do the chiropractic is somewhat unique and not the usual type of chiropractic care. It's not done in the fashion that most chiropractors do it."
4. Dr. Dykema did a history and an initial examination, which included checking Ms. Kobs' range of motion, pulse and blood pressure. He then proceeded to evaluate and treat Ms. Kobs utilizing a number of techniques, including use of an evaluative device called a "sensometer," utilization of a laser in a manner similar to that exercised in laser acupuncture, use of a treatment modality known as "Neuro Organization Technique," use of another treatment modality called "Neuro Emotional Technique," and use of "Live Cell Analysis."
5. During his evaluation of Ms. Kobs, Dr. Dykema used a plastic disk, or "sensometer" as a means of alerting him to vertebral subluxations. Ms. Kobs described the process as one where Dr. Dykema moved one hand above Ms. Kobs, who was lying prone on the examination table, without making contact with her body; while with the fingers of his other hand, Dr. Dykema rubbed the sensometer. Dr. Dykema informed Ms. Kobs that when the plastic disk became "sticky" to the fingers of his hand touching the disk, it meant that his other hand was over an area of subluxation requiring manipulation.

6. The sensometer is a Plexiglas disc approximately three inches in diameter. Dr. Dykema asserts that use of the sensometer substitutes for muscle testing, provides the same information, and is easier and faster than actual muscle testing. He further asserts that the device permits him to establish the location of areas of irritation in the human body.

7. There is insufficient evidence in this record to establish Dr. Dykema's theory as to the manner in which the sensometer permits him to establish the location of areas of irritation in the human body, but there is sufficient evidence to establish that there is no scientific basis for concluding that the device is a viable diagnostic tool.

8. The sensometer is a component of a similar device referred to as the "Toffness device," which operates on the same principle. In 1983, the Federal Court of Appeals for the Seventh Circuit banned the use of the Toffness device.

9. In his examination and treatment of Ms. Kobs, Dr Dykema utilized a technique identified as "Neuro Organization Technique." A pamphlet provided to Ms. Kobs explains the concept in part as follows:

Think of the brain as a computer and the nervous system, which passes through the spine, as the electrical wiring. As a computer, the brain has many sets of programs to keep the body working. N.O.T. is a system of going through the body in a specific sequence to check the "computer programs" (neurological reflexes) and making corrections where indicated."

10. The premise of Neuro Organization Technique is that it is possible to detect imbalances in the operation of the human nervous system by estimating the strength of muscle resistance, and to correct imbalances in the operation of the human nervous system by "reprogramming" the nervous system by physical contact with "neurovascular" and "neurolymphatic" points on the surface of the body.

11. There is no valid anatomical or pathological basis for the "neurovascular" or "neurolymphatic" points Neuro Organization Technique purports to identify on the surface of the body, nor any proven clinical utility to the manipulation of these points.

12. There is limited physiological basis and no proven clinical utility for reflexes utilized in Neuro Organization Technique

13. In his treatment of Ms. Kobs, Dr. Dykema utilized a technique named "Neuro Emotional Technique." The premise of Neuro Emotional Technique is that the body in effect stores the memories of emotional traumas in the body (emotional fixations), and that chiropractic adjustments are less effective in treating patients whose bodies are carrying these emotional fixations because they tend to reverse the chiropractic adjustment over time so that the adjustment does not "hold." Neuro Emotional Technique purports to identify the character of emotional fixations, of which the patient may be unaware and, by having the patient contemplate the identified emotional event while the chiropractic adjustment is made, the chiropractic treatment is rendered more effective.

14. Neuro Emotional Technique purports to determine the character and location of emotional fixations, or the patient's "Neuro emotional complex," by having the chiropractor ask yes and no questions of increasing specificity while applying pressure to one limb of the patient. Supposedly, a sudden weakness of the muscle supporting the limb indicates a positive answer to the question, permitting a more specific follow-up yes/no question. Eventually, the practitioner is ostensibly able to identify a specific emotional fixation, and the place in the body where it is located.

15. During his examination of Ms. Kobs using Neuro Emotional Technique, Dr. Dykema instructed Ms. Kobs to resist his attempt to move her upraised arm so he could detect muscle weakness as he questioned her. Throughout most of the procedure, Ms. Kobs offered no resistance to Dr. Dykema's manipulation of her arm, and it would therefore have been impossible to detect muscle weakness in the manner in which the procedure was carried out. Nonetheless, Dr. Dykema carried out the procedure to its conclusion and reached conclusions regarding her neuro emotional complex.

16. There is insufficient evidence to conclude that there is no scientific validity to the concept that the human body operates as Neuro Emotional Technique procedures presuppose, and insufficient evidence to conclude that the technique is not an effective system of analysis and procedure for assessment or treatment of disease or disorders of the human.

17. As a result of Dr. Dykema's examination of Ms. Kobs, Dr. Dykema diagnosed Ms. Kobs with several physical disorders, including a hiatal hernia and a malfunctioning pituitary gland.

18. Dr. Dykema treated Ms. Kobs for the malfunctioning pituitary gland by shining a laser pointer at a spot just above the bridge of her nose, informing her that he was stimulating her pituitary reflex point. Dr. Dykema also uses the laser as a substitute for physical manipulation in strengthening or balancing muscles.

19. Dr. Dykema's use of the laser is based on the premise that it is possible to produce therapeutic effects by stimulating one or more acupuncture points or meridians on the surface of the body. That is the basic premise of acupuncture therapy.

20. Dr. Dykema's assistant performed an analysis of Ms. Kobs' blood by means of Live Cell Analysis as part of Dr. Dykema's examination and treatment of Ms. Kobs.

21. Ms. Kobs was informed by Dr. Dykema's assistant that the Live Cell Analysis of Ms. Kobs' blood demonstrated that she had toxic blood, based on the presence of rouleau and erythrocyte aggregation, caused by stress, coffee, tobacco, or meat, or drugs; and that the analysis demonstrated that Ms. Kobs had a notable amount of yeast in her blood.

22. Rouleaux are not caused by stress, coffee, tobacco, or meat, but are associated with disease processes such as multiple myeloma. Erythrocyte aggregation is not caused by stress, coffee, tobacco, meat or drugs, but may be caused by poor laboratory technique.

23. A person with a notable amount of yeast in his or her blood would be seriously and obviously ill, and in need of immediate hospitalization. Ms. Kobs was not aware of any significant physical illness at the time Dr. Dykema's assistant informed her that she had a notable amount of yeast in her blood.

24. Dr. Dykema used, and provided to Ms. Kobs, a printed sheet detailing the results of the Live Cell Analysis. The diagnostic characteristics listed in Dr. Dykema's Live Cell Analysis chart for various qualities and conditions of blood samples are false.

CONCLUSIONS OF LAW

1. The Chiropractic Examining Board has jurisdiction in this matter pursuant to §§ 446.03 and 446.04, Stats.

2. Respondent's use of the "sensometer" to alert him to the presence of vertebral subluxations constitutes the use of an instrument which is unsafe or ineffective, in violation of § CHIR 4.05(2) and s. CHIR 4.05(2)(e), Wis. Admin. Code, and thereby constitutes unprofessional conduct in violation of § 446.03(5), Stats.

3. Dr. Dykema's use of Neuro Organization Technique constitutes use of a technique which is unsafe or ineffective, in violation of § Chir 4.05(2), Code, and thereby constitutes unprofessional conduct in violation of § 446.03(5), Stats.

4. There is insufficient evidence to establish that Dr. Dykema's use of Neuro Emotional Technique constitutes use of a technique which is unsafe or ineffective, but there is sufficient evidence to establish that the manner in which Dr. Dykema used the technique rendered it ineffective, in violation of § Chir 4.05(2), Code, and thereby constitutes unprofessional conduct in violation of § 446.03(5), Stats.

5. Dr. Dykema's use of a laser to perform therapy based on the theories and the practice of acupuncture constitutes practice beyond the scope of chiropractic, is a prohibited practice under § CHIR 4.05(1)(b)(3), Wis. Admin. Code, and thereby constitutes unprofessional conduct in violation of § 446.03(5), Stats.

6. Dr. Dykema's use of Live Cell Analysis in the practice of chiropractic constitutes the use of a technique, ancillary procedure or instrument which is ineffective, in violation of § Chir 4.05(2), Wis. Admin. Code, and thereby constitutes unprofessional conduct in violation of § 446.03(5), Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Harold J. Dykema, D.C., to practice as a chiropractor in Wisconsin be, and hereby is, revoked.

IT IS FURTHER ORDERED that pursuant to § 440.22(2), Stats., the costs of this proceeding, up to and including the costs associated with complainant's preparation of Division of Enforcement Response to Respondent's Objections to the Proposed decision, are assessed against Dr. Dykema. No costs associated with the remand to the ALJ are assessed.

ALJ'S OPINION ACCOMPANYING THE PROPOSED DECISION

What follows is the ALJ's Opinion which accompanied the Proposed Decision. Any portion of the Opinion, Findings of Fact or Conclusions of Law which are modified based upon respondent's Objections to the Proposed Decision will be noted in the subsequent section headed "Modifications to Proposed Decision."

As noted in Mr. Wachowski's Final Argument, "[Complainant's expert, Dr. Booske,] provided some very detailed testimony regarding principles of electrical generation. The Division attempted to tie this testimony to Dr. Dykema's use of the [sensometer], though the actual connection was difficult to ascertain." Dr. Booske's testimony effectively debunked the theory that Dr. Dykema could distinguish radiation produced by human beings in the range of 16 to 169 gigahertz from radiation produced by human beings at other frequencies. There was no testimony, however, by Dr. Dykema or anyone else, that Dr. Dykema's theory as to the basis for his ability to detect areas of subluxation utilizing the device was his ability to distinguish between such changes in radiation frequency. The only basis for Dr. Booske's analysis derives from the following testimony:

Q. (by Mr. Polewski) Did I ask you to review some material in regards to Dr. Dykema's practice of chiropractic?

A. (by Dr. Booske) Yes.

Q. What did you review?

A. I reviewed a portion of I believe -- like a transcript of some interaction, question and answer -- what I assume is a deposition perhaps.

Q. Between whom?

A. Between Dr. Dykema and some interviewer. I don't recall precisely --

The transcript is not in evidence, and there is insufficient evidence to establish just exactly what Dr. Dykema's theory is in terms of the principles upon which he believes the device works. There is ample evidence, however, that it doesn't.

On cross-examination by Mr. Polewski, Dr. Dykema was questioned at length regarding the decision of the U.S. Court of Appeals for the Seventh Circuit upholding a U.S. District Court decision, which issued "a permanent nationwide injunction against the manufacturing, promoting, leasing, distributing, shipping, delivering or using in any way any Toftness Radiation Detector or any device that is substantially the same as, or employs the same principles as, the Toftness Radiation Detector."^[1] Dr. Dykema concedes that the Sensometer operates on the same principle as the Toftness detector, is aware that the Toftness detector is a prohibited device, and is presumably aware of the reason the federal courts have enjoined its use. He therefore knows that the so-called "sticky disc" is a discredited device.

Exhibit 23 is a video tape of a compelling demonstration by Ray Hyman, Ph.D., demonstrating the principle of Ideomotor Action. The tape includes an explanation of the psychological principle that makes the rubbing plate from a Toftness device appear to work. That principle is that a person's muscles will behave unconsciously in accordance with an implanted expectation. Absent any rational explanation or scientific principal supporting the proposition that Dr. Dykema's fingers will stick to the device in the presence of a subluxation, the only reasonable explanation is the one offered by the concept of ideomotor action.

The question remains whether Dr. Dykema believes that the rubbing plate works, or knows that it doesn't and uses it anyway. If he believes it works, then his competence as a trained health care professional is thrown into question. If he knows that it doesn't, then he is attempting to defraud and deceive his patients. Either way, he has violated the board's rules of conduct. Absent evidence of knowledge by Dr. Dykema that use of the device is quackery, however, it must be assumed that he does not possess that knowledge. Accordingly, the violation found is simply that he used an ineffective device in his practice in violation of § Chir 4.05(2), Code.

As stated at Finding of Fact # 10, the premise of Neuro Organization Technique is that it is possible to detect imbalances in the operation of the human nervous system by estimating the strength of muscle resistance, and to correct imbalances in the operation of the human nervous system by "reprogramming" the nervous system by physical contact with "neurovascular" and "neurolymphatic" points on the surface of the body. Rand Steven Swenson, D.C., M.D., testified for the complainant on the efficacy of the technique. The following is an excerpt from that testimony.

Q. In the course of reviewing this material [regarding Neuro Organization Technique], have you been able to form an opinion [whether] the basic theory of Neuro organizational technique is valid?

A. Well, if by that you mean is the several theories underpinning some of the evaluation methods that they use, the answer is yes, I've come to an opinion that there is no scientific basis for believing the presence of many of these reflexes, or the accuracy of many of these evaluative tools.

A. The basic concept [of Neuro Organization Technique] is that there are several problems that can occur in the body in a somewhat hierarchical way that can interfere with the ability of the body to recover from the problems that they're faced with. And those can be everything from chiropractic subluxations to problems with neurovascular reflexes, neurolymphatic reflexes, various other reflexes to problems with cranial sutures and cranial bone movement to problems with balance and motion and -- in the pelvis and other areas of the body. Some of the evaluative tools that are applied to do that include things like therapy localization which, I mean, in a basic nutshell says that if an area that is in need of treatment or is abnormal is either contacted or actually -- in mostly cases actually just a hand placed in that area that it will change muscle strength to the point that diagnosis can be made. And many of the evaluative tools are -- that are presented in Neuro organizational technique are dependent, critically dependent on the validity of Neuro -- of this kind of procedure called therapy localization.

Q. You use the term -- in addition to therapy localization you also use the terms neurolymphatic and neurovascular. Can you describe what those are?

A. Certainly. Both of these actually came from the osteopathic literature or actually came from a couple of osteopathic practitioners in the early part of the century in which these osteopathic practitioners felt that there were points, reflex points on the body that could be massaged or touched to change neurovascular tone or neurolymphatic function. And these were two separate -- completely separate individuals that devised these procedures. And that these neurolymphatic or neurovascular points were highly associated with certain organ functions, certain areas of muscle strength, certain areas of symptoms that they could be used as treatment for those symptoms.

Q. You said that was developed in the early part of the century meaning 1900's?

A. Yeah, usually -- I mean, I actually I believe the neurovascular was around -- more like 1930 and the neurolymphatics I believe was in the 20's. But it was in that neighborhood. These were basically resurrected if you will, were found in old manuscripts by George Goodheart who was a chiropractor who incorporated these reflex points into his methods of treatment. And that's how these reflexes came into the chiropractic literature which is where you find them exclusively now.

Q. Is the neurolymphatic and neurovascular point reflex -- one of things that's changed as understanding human anatomy has changed?

A. Well, I mean, it was never really based on an understanding of human physiology or anatomy. I mean, it was -- these were basic clinically derived points that these individuals in the 30's at a time when our understanding of physiology was pretty embryonic. Felt to be connected clinically to certain responses in the body. Subsequently in the chiropractic literature they have undergone some changes in that there have been often additional associations derived for these points, this neurolymphatic, this neurovascular point doing more -- being connected with -- with different -- different kinds of functions and actions. But the base -- the base line premise that the neurolymphatic and neurovascular points are connected to certain body functions, certain remote -- functions of certain remote areas to the body has really not changed that much. Our understanding of physiology is such that there is no physiologic mechanism that you can use to validate those -- those reflex points. Furthermore, I mean, some of the original concepts are clearly wrong.

Q. Has there been any attempt to prove the validity of the neurolymphatic points or neurovascular points?

A. No, there's been no scientific attempt to demonstrate their validity.

Q. Is there any reason to believe that they are valid?

A. No, there's no reason to believe they're valid. (Tr. pp. 164-169)

Respondent's expert witness was Carol A. Ferreri, inventor of the Neuro Organization technique. Dr. Ferreri's testimony was that Neuro Organization technique is a 100% successful treatment regimen for a variety of conditions ranging from scoliosis to dyslexia. That boast in and of itself all but destroys his credibility. Nearly as damaging is his testimony that in the 25 years that he has promoted the technique he has been unable to interest anyone in funding a study of its viability. In fact, when he contributed \$5000 to New York College to study the use of Neuro Organization Technique in the treatment of scoliosis, the school gave the money back rather than initiating the study. (Ferreri Deposition, p. 70). Dr. Swenson's testimony is credited, and Dr. Ferreri's testimony is rejected, and the conclusion therefore follows that Neuro Organization Technique is an ineffective treatment modality, and constitutes a violation of Chir 4.05(2)(e).

The parties stipulated to the fact that the Chiropractic Examining Board in 1991 approved the use of Neuro Organization Technique, and it is respondent's position that complainant should be estopped from prosecuting Dr. Dykema for its use. The gravamen of complainant's argument is that use of an ineffective technique is a violation of the board's rules, and the board may not validly approve a treatment modality the use of which violates its own rules.

Basic concepts of due process would seem to militate for the conclusion that Dr. Dykema should not be held to violate the rules of the board for utilizing a treatment modality specifically approved by the licensing body before which the violation is alleged. "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harris et al*, 347 U.S. 612, 74 S. Ct. 808 (1954). While the rule alleged to be violated is obviously not a criminal statute, the principle is the same. In other circumstances, therefore, Dr. Dykema might be excused for a failure to understand that the Neuro Organization Technique was forbidden to him. In this instance, however, it was in fact Dr. Dykema himself who elicited approval from the board for use of the technique in 1991, and the board's approval does not change the fact that as a trained health care provider and presumed expert on the technique, he should have known in 1991 and should have known in 1998 that the technique is nothing more than a sham.

As described in Finding of Fact #13, the premise of Neuro Emotional Technique is that the body in effect stores the memories of emotional traumas (emotional fixations), and that chiropractic adjustments are less effective in treating patients whose bodies are carrying these emotional fixations because they tend to reverse the chiropractic adjustment over time so that the adjustment does not "hold." Neuro Emotional Technique purports to identify the character of emotional fixations, of which the patient may be unaware and, by having the patient contemplate the identified emotional event while the chiropractic adjustment is made, the chiropractic treatment is rendered more effective.

Dr. Swenson's testimony casts the viability of the procedure into considerable doubt. He testified that there has been no scientific study demonstrating that the premise of Neuro emotional technique is valid. Asked as to the possible validity of the procedure involving the chiropractor and the patient coincidentally turning their heads in various directions, Dr. Swenson concluded that any tangible effect is "pure conjecture," and that there is no evidence of one person's electrical energy contained in his or her body interacting with the electrical energy in another person's body. Asked about "visceral manipulation," Dr. Swenson opined that there is no scientific

reason to believe that applying pressure to specific points in the body can affect the function of the underlying organs. Acknowledging that the meridian access reflex points utilized in Neuro Emotional Technique are for the most part acupuncture points and that manipulation of these points could affect the nervous system, Dr Swenson was nonetheless of the opinion that there is no proven affect on internal organs. As to the claim that neuropeptides are ejected from the neurons in the brain and carry information to other sites within the body, Dr. Swenson stated that while neuropeptides are present in both the brain and other organs in the body, the neuropeptides in the brain do not, with the exception of a small area of the hypothalamus, migrate to the remainder of the body.

Dr. Swenson was asked about three scientific papers supporting the scientific basis for Neuro Emotional Technique. He testified that the first of these, by Dr. Candice Purt, who he conceded to be a well known authority on neuropeptides, was unconvincing in its conclusion that neuropeptides flow from the brain to have affects on specific areas and organs of the body. The second paper documented a test of comparative muscle strength in a test subject making "congruent and incongruent self-referential statements." The test ostensibly found that when individuals said things that were true their muscles remained strong, while if they said something that was false the muscle weakened. Dr. Swenson found the study flawed, first because it wasn't a "blinded" study; and second, because it does not follow from the test findings that it is possible to identify particular emotional roots by using these kinds of muscle testing paradigms.

Dr. Swenson found the third paper "very interesting and worthy of follow-up." The study used two groups, each member of which had a phobia of some kind. Each participant was exposed to an image of that to which he or she had a phobia, and his or her physical reactions were recorded. Half the group was then given a chiropractic adjustment, and both groups were retested. The members of the group that had received chiropractic treatment testified that their reaction to the subject of their phobia after treatment was not as strong. The members of the group which had not received chiropractic treatment testified that their reaction the second time was no different. Dr. Swenson's principle criticism was that the study did not establish that Neuro Emotional Technique was a particularly important element in the observed effect.

Scott Walker, D.C., is the original developer of Neuro Emotional Technique, and he testified as an expert for Dr. Dykema. His testimony was reasoned and somewhat informative. Dr. Walker was asked about Dr. Swenson's doubts regarding the concept of visceral manipulation vectors, and his reservations about whether or not there is a scientific basis to believe that employing pressure to specific external body points could affect underlying organs. Dr. Walker testified, "I believe that Dr. Swenson may have temporarily lost sight of the fact that that in applied kinesiology, which I believe I read elsewhere he had taken courses in, it's a common thing [for chiropractors and other health professionals] to manipulate, for example, the ileocecal valve area, which is the junction between large intestine and small intestine, and also hiatal hernias, which is when the stomach rises up into the thoracic cavity. And these are not uncommon at all. These are pretty well established visceral manipulation moves. And I'm speculating, but I would guess that he temporarily forgot that as he was looking at this other chart where there's other manipulations that he may not have been familiar with."

Commenting on Dr. Swenson's testimony as to his doubts whether or not contacting meridian access reflex points would have any effect on the function of different bodily organs and functions, Dr. Walker testified "There's some confusion that exists here. The meridian access points are simply that: they're meridian access points. They're not access to organs. So if we get organs and meridians mixed up, then we have a faulty premise to begin with. . . there has been [acknowledgement that] the stimulation of acupuncture points definitely affects physiology, if that's the question, and for thousands of years." (Deposition transcript, p. 35)

Asked about Dr. Swenson's comments about neuropeptides and their applicability to Neuro Emotional Technique, Dr. Walker testified as follows:

A. I made the statement that neuropeptides were applicable to Neuro Emotional Technique I never saw a neuropeptide in my life. But this is the most plausible reason for N.E.T. working the way that it does. . .

Q. (by Mr. Wachowski) One of the things he says is that he has some doubts about the

connection between neuropeptides and Neuro Emotional Technique, because he doesn't believe neuropeptides ever leave the brain because there's a barrier that prevents their transfer.

A. Yes. It's impossible to stay up with everything that's going on in neurology. But actually the truth of it is that neuropeptides do pass what is known as the blood-brain barrier. And there was some mention of that in Rossi's book. And some of the mention goes back to 1985. But I wanted to double-check on that myself. And I actually got in contact with Dr. Purt, and she definitely and emphatically told me that indeed neuropeptides do pass that barrier and actually told me the name of one scientist that was doing a little bit of work on it by the name of Kastin. . . And there was actually a protein carrier to take the neuropeptide across the blood-brain barrier. (Deposition Transcript, pp. 36-37)

There is certainly room for skepticism whether Neuro Emotional Technique is a viable treatment modality. Dr. Walker's testimony was sufficiently persuasive, however, to lead to the conclusion that there is not a preponderance of the evidence establishing that it is a hoax.

Which does not lead to the conclusion that Dr. Dykema's use of the technique was not deceitful. The credible testimony of Ms. Kobs was that in her treatment, she offered no resistance whatever as Dr. Dykema went through the exercise of testing her muscle resistance as he attempted to determine her emotional fixations. Accordingly, even if it is assumed that Neuro Emotional Technique is a valid procedure, the manner in which Dr. Dykema administered the technique rendered it useless.

Dr. Dykema testified that he in fact used a laser in treating Ms. Kobs, though it's not entirely clear whether its use was an adjunct to Neuro Organization Technique, Neuro Emotional Technique or some combination of these. His testimony in that regard included the following:

Q. (by Mr. Wachowski) And what's the purpose of the usage of that laser?

A. To replace the physical contact with the correction -- instead of doing it physically by rubbing it or stretching it I can do it with a laser.

Q. When you say rubbing it or stretching it what are you making reference to?

A. Mostly muscles, some reflex points.

Q. Do you use that laser as a means of practicing acupuncture or acupressure?

A. No.

Q. What is it for?

A. It's for -- for normalizing the function of the body in that area that I'm working with. For instance, if you have a muscle that is weaker than it should be there's a procedure to strengthen it mechanically, or if a muscle is hyper tense there's a mechanic -- there's a procedure to mechanically re-balance it. But I have found that the laser will do it very quickly and with less -- and it has better staying power than it would if I did -- I did it mechanically. (tr. p. 261)

While Dr. Dykema thus testified that his use of the laser was not the practice of acupuncture, it is quite apparent that it was. The following exchange took place on cross-examination:

Q. (by Mr. Polewski) Okay. Well, doctor, take a look at Exhibit number 28 . . . the chiropractic procedures and adjustments utilized in your office. And on the first page, section

3B of the last paragraph it says, "Acupressure points for the following internal organs are monitored and treated." Correct?

A. Yes.

Q. And it makes reference to "spleen 21" and "K27."

A. Those are the locations.

Q. And in fact those are traditional acupuncture points, aren't they?

A. Yes.

Q. And throughout the exhibit the – throughout Dr. Ferrari's work he refers repeatedly to the acupuncture meridians and acupuncture points, doesn't he?

A. Yes.

Q. And he used the laser to contact those points, correct?

A. Those points give us relative locations of those reflexes. It doesn't mean that we're treating the acupuncture system.

Q. Excuse me. You use the laser on the traditional acupuncture points as part of your treatment, don't you?

A. Some of them I do. (Tr. 286-287)

If Dr. Dykema used the laser to treat traditional acupuncture points, then he was practicing acupuncture utilizing a laser, and acupuncture by laser application is specifically prohibited by § Chir 4.05(1)(b)3., Code.

On her second visit to Dr. Dykema's clinic, Dr. Dykema's assistant, Diana Backus, did a blood test on Ms. Kobs, who described the process as follows:

Q. (by Mr. Polewski) Tell us about that blood examination? How did it -- how did it start?

A. Well, she had a little area kind of back beyond the reception area with a table and some stuff. And she had me sit in a chair. She had me wash my hands first and then she pricked my finger and a little pool of blood formed and she talked about how the shape of the pool is important. And then she took a little thing and put it on the slide, put a cover on it and put it under the microscope and started describing the things that she saw.

Q. Were you able to see what she saw?

A. She did show me what she was looking at once or twice, yes.

Q. What did she tell you about your blood?

A. Well, I had problems, a few different problems mostly associated -- she also went over my -- my sheet. I had kept a sheet of the food I had eaten for three days as part of my initial pack -- well, no -- yeah. And then she also had me describe what I had eaten for breakfast that morning. And then she talked about how the different foods affected my blood and how medications and meat and alcohol and cigarettes would have negative impacts on my blood.

Following the blood exam, Ms. Backus prepared a report captioned "Microscopic Blood Exam (MBX) (Dark Field Microscopic Examination of Live Blood)." The report lists 29 blood irregularities with a simple diagram accompanying each one. (Exh. 1). Eleven of these were indicated as occurring in Ms. Kobs' blood, with the severity of the irregularity or problem indicated on a scale of 1 to 5, with 5 being the most severe. Those findings

were as follows:

- Rouleau – RBC's stacked; worse stage of protein linkage – 4
- Erythrocyte Aggregation – "blood sludge" – 3
- Ovalocytes – oval shaped RBC's due to vitamin B12 and folic acid deficiency – 1
- Echinocyte – poor quality, dying RBC's – 1
- Low Viability – WBC's too round, lack of mobility activity – 2
- Chylus – fat molecules from food intake – 3
- Spicules – fibers fibrinogen) which form in response to liver stress and congestion.
- Yeast (Candida Albicans) – yeast infection of the blood stream – 3
- L-Forms – bacterial parasite which produces toxic by-products; can invade tissues of the body 4
- Rod Forms – bacterial parasite which produces toxic by-products – 1
- Tubules – colony of L-forms (bacterial parasites) which produce toxic by-products; can invade the tissues of the body – 4

Zsuzsa Fabry, PhD, Associate Professor in the University of Wisconsin Department of Pathology and Laboratory Medicine, testified as an expert regarding the live blood cell analysis performed under Dr. Dykema's supervision. Speaking of the validity of the testing generally, Dr. Fabry's testimony included the following:

You can get quite a bit of information just looking at a drop of blood because if you look at the drop of blood it could tell you actually many things. But it has to be analyzed in a way, it has to be treated, it has to be diluted, it has to be analyzed in a way which are standard ways that we are using in research and in the laboratories in which I teach in the courses that I am teaching which have to be more than the analyzed blood samples. And I just didn't see overall -- you know, some point might have some relevance but overall when I was looking at this whole thing I just felt like that this was scientifically invalid and it's not a proper way of drawing the conclusion which was drawn from this. And it could be misleading actually for the patients who are turning to people to get some help and they might not get it actually all the way how they're supposed to.

Addressing individual findings, Dr. Fabry testified in part as follows:

- **Rouleau** (a finding of 4 on the test report) "The rouleau formation is generally a condition which is associated with higher protein level endoplasm. And it's causing the red blood cells to stick together and it's a particular formation in which the red blood cells lining up to each other and kind of touching sides with each other. And rouleau formation can be electrically -- aggregation for example can be caused by different conditions, not just the normal status of the blood. It can be caused by improper handling of blood -- blood samples using not appropriate dilutants or buffers. And I got particularly concerned about that because that -- that buffer which was used to dilute that blood sample was not identified. So depending on the type of dilutant you can cause some kind of aggregation in the red blood cells and it could be a very important aggregation as usually we do in -- on the different conditions actually. In -- in certain microplates which are designed for looking at aggregation of red blood cells and they are indications of some very important and very dangerous diseases . . . Like hemolytic anemia or some other diseases in which the red blood cells have certain components on their surface which makes them stuck together. And the -- one of the components could be an antibody which is a cell antibody which is binding to red blood cells and causing this aggregation of the cells together. So it's pretty dangerous condition because when you have red blood cells aggregating in your blood then eventually there will be hemolysis as a result of activation of another system which is in the blood which is -- which is the compliman [sic] system. And that will -- and that system relies [sic] the red blood cells. So it's a pretty dangerous condition if that is really happening."
- **Erythrocyte Aggregation "blood sludge"** (a finding of 3 on the test report) "Blood sludge is not considered as a scientific or clinical -- so erythrocyte aggregation again as I pointed it out could result -- or could happen under different conditions. But blood sludging, we don't use blood sludging as a correct scientific way to describe those conditions."
- **Yeast (*Candida Albicans*)** (A finding of 3 on the test report) "So as I stated in the earlier candida albicans, the presence of candida albicans is extremely dangerous in the blood and that is yeast in blood. That's a sign of a very serious condition. And that person needs immediate medical attention and treatment for that because it's actually a deadly condition. So that's -- I think a yeast contamination in blood is extremely rare. I would not see this on the condition of the patient, the patient walked into the office and did not feel that bad actually. If you had yeast in your blood then you have high blood -- high temperature and you just feel really absolutely bad. That -- that's a very dangerous condition. I would think if there would be any yeast that might be coming from that dilutant which was used to dilute blood sample, that would be the most likely source of contamination. In that case I would just call it contamination of the sample due to the fact that that buffer or whatever was used is not sterile. But generally there is no yeast in blood in a -- in a patient with -- walking up happily and -- and not -- you know, somebody who doesn't feel that -- that bad."

In her testimony, Dr. Fabry commented as well on other blood irregularities included in the report form and whether it is possible for them to be identified by the blood test performed. Her testimony concluded that many of the conditions noted either could not be detected by analyzing a single drop of blood, or could not be induced in the manner suggested by the report form. For example, Dr. Fabry discounted the role of coffee, cigarettes and meat in rouleau, was skeptical of the proposition that lack of iron or poor digestion could cause target cells, and dismissed the idea that microcytes could be the result of a deficiency of Vitamin B 12 or folic acid. These were listed as the causes of those conditions in Dr. Dykema's report form.

Dr. Dykema's testimony in response to Dr. Fabry's opinions was in essence that her opinions should be largely discounted because they were based on her assumption that the blood analysis was done utilizing bright field analysis rather than dark field analysis. When asked what difference that made in terms of the obviously erroneous finding of substantial yeast in Ms. Kobs' blood, he avoided answering the question. It is clear that the so-called Live Blood Analysis performed as a part of Dr. Dykema's treatment is useless if not bogus. To the extent that Dr. Dykema in fact believes that the test has validity, he demonstrates incompetence. To the extent he recognizes that it is useless, then he is deceiving and victimizing his patients.

It is well established that the objective of licensing discipline is the protection of the public by promoting the rehabilitation of the licensee and by 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). The evaluative and treatment modalities utilized by Dr. Dykema in this case run the gamut from questionable to absurd. With the possible exception of Neuro Emotional Technique, there is

satisfactory evidence that the techniques utilized are useless and, as a trained health care professional, Dr. Dykema should know that they are useless. The problem remains, however, that the evidence in this case stops short of determining whether he believes in these techniques and procedures, or is purposefully deceiving and duping his patients.

As previously stated, however, it makes no difference in terms of the required outcome. Either way, rehabilitation is probably not a possible objective. If his treatment of Ms. Kobs is a manifestation of underlying incompetence, retraining would probably not be of value. If he is aware that he provides ineffective care, then his rehabilitation is beyond the powers of this board to effect. Consequently, it is concluded that the objectives of deterring other licensees from engaging in similar misconduct and protecting the public militate for revocation of Dr. Dykema's license.

The Department of Regulation and Licensing is a "program revenue" agency, which means that the costs of its operations are funded by the revenue received from its licensees. Moreover, licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions, and are proportionate to those costs. This budget structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engaged in misconduct. Rather, to the extent that misconduct by a licensee is found to have occurred following a full evidentiary hearing, that licensee should bear the costs of the proceeding.

MODIFICATIONS TO PROPOSED DECISION

1. Costs. Any irregularity in the procedure utilized in the board's consideration of this matter, and any costs associated with remedying that irregularity, were obviously not under the control of the respondent. The portion of the Order by which costs are assessed is therefore modified to specify that no costs associated with the remand to the ALJ are to be assessed.

2. Finding of Fact #3. The proposed Decision found that "during the initial patient interview, Dr. Dykema informed Ms. Kobs that he practices a different form of chiropractic than most other chiropractors." Respondent's Objections argue that what Dr. Dykema told Ms. Kobs was that "the way I do the chiropractic is somewhat unique and not the usual type of chiropractic care. It's not done in the fashion that most chiropractors do it" (tr., pp.253-254). This is not a substantive change to the findings, but respondent's version of the exchange is accepted, and Finding of Fact #3 is modified accordingly.

3. Finding of Fact #4. Respondent argues that "respondent used standard chiropractic technique, incorporating to some degree the techniques set forth in this Finding of Fact." In examining the testimony of both Ms. Kobs and the respondent, there is some brief reference to use of conventional chiropractic treatment modalities. For example, Ms. Kobs was asked whether Dr. Dykema had done anything that felt like treatment to her during the initial phase of treatment, she responded, "Well, he had -- just did my neck. . . . it was painful and I didn't like it. And after he did it a couple times I said, 'You know, this hurts.' And he said, 'Well, it hurts because your muscles are so tight. It'll get better.'" (Tr., p.23) The finding in question does not, however, attempt to exhaustively detail every procedure or interaction involved in respondent's treatment of Ms. Kobs, but rather describes those procedures which constitute the underlying issues in this case. No modification to Finding of Fact #4 is therefore justified or necessary.

4. Finding of Fact #9. This finding states as follows:

In his examination and treatment of Ms. Kobs, Dr. Dykema utilized a technique identified as "Neuro Organization Technique." A pamphlet provided to Ms. Kobs explains the concept in part as follows:

"Think of the brain as a computer and the nervous system, which passes through the spine, as the electrical wiring. As a computer, the brain has many sets of programs to keep the body working. N.O.T. is a system of going through the body in a specific sequence to check the "computer programs" (neurological reflexes) and making corrections where indicated."

Respondent's objection states that "N.O.T. is but a component of his standard chiropractic technique and not the underlying premise of said technique." The finding does not state that N.O.T. is the underlying premise of respondent's chiropractic technique.

5. Finding of Fact #10. This finding states that, "The premise of Neuro Organization Technique is that it is possible to detect imbalances in the operation of the human nervous system by estimating the strength of muscle resistance, and to correct imbalances in the operation of the human nervous system by "reprogramming" the nervous system by physical contact with "neurovascular" and "neurolymphatic" points on the surface of the body." Respondent argues that "the premise of N.O.T. is based upon the principles of applied kinseology, which is an accepted chiropractic technique."

Dr. Dykema's testimony was that his treatment protocol incorporated some aspects of N.O.T. along with some elements of applied kinesiology. That testimony in no way contradicts the finding in question.

6. Finding of Fact #11. This finding is that "there is no valid anatomical or pathological basis for the 'neurovascular' or 'neurolymphatic' points Neuro Organization Technique purports to identify on the surface of the body, nor any proven clinical utility to the manipulation of these points." Respondent disagrees with this finding "based upon the Ferreri deposition." As explained in the Opinion section of the Proposed Decision, Dr. Ferreri's testimony was discounted in favor of the testimony of complainant's expert, Dr. Swenson.

7. Finding of Fact #12. Finding of Fact #12 finds that "there is limited physiological basis and no proven clinical utility for reflexes utilized in Neuro Organization Technique." The objection is that this finding is contradicted by respondent's "longstanding experience as a chiropractic practitioner." The finding is, however, supported by credible expert testimony in the record.

8. Finding of Fact #15. Respondent disputes the finding that Ms. Kobs offered no resistance to respondent's muscle resistance testing, as "there is no reason to believe Ms. Kobs recollection of the events above [respondent's]." There is indeed reason to credit Ms. Kobs' testimony, as she has no reason to lie. More important, however, is the fact that Dr. Dykema in his testimony did not contradict Ms. Kobs on that issue.

9. Finding of Fact #19. Respondent disputes that his use of the laser constitutes laser acupuncture. The basis for this finding was fully discussed in the opinion, and respondent fails to point to any evidence outside of that discussion which would provide a basis for modifying the finding.

10. Conclusions of Law. Respondent objects to Conclusions of Law #2 through #5, asserting that the "Sensometer" is not an unsafe or ineffective instrument," that N.O.T. is not an unsafe or ineffective technique," that respondent's use of the Neuro Emotional Technique was not done in such a manner as to render it ineffective, and that his use of the laser was not the practice of acupuncture. Respondent offers little or no argument in support of these objections aside from the argument offered relative to the associated Findings of Fact, and he therefore establishes no basis for modifying them. In objecting to Conclusion of Law #6, regarding live cell analysis, it is asserted that respondent ceased the usage of the technique prior to commencement of these proceedings. That fact does nothing to mitigate his use of the technique for many years prior to that time.

11. Respondent's Argument. In the argument section of his Objections, respondent makes essentially two points. First that the proceedings were commenced based upon the assertions of an undercover

investigator with no prior training in chiropractic techniques and who misrepresented her status and health background. It is true that Ms. Kobs' testimony, as well as her contemporaneous reports in the matter, have been accepted. The findings and conclusions relating to the efficaciousness of Dr. Dykema's evaluative and treatment techniques, however, are based upon expert testimony rather than upon any chiropractic opinions or legal conclusions which may or may not have been held by Ms. Kobs.

Second, respondent argues that there is no evidence that the techniques utilized by him were unsafe, and the allegations are therefore only that those techniques are ineffective. The essence of the argument is that the evidence does not establish that use of these techniques, whether effective or ineffective, deceived or defrauded the public because there is no evidence that any member of the public was actually deceived or defrauded. On the contrary, the clear evidence is that any member of the public treated using the discredited techniques which are the subject of this proceeding was deceived, defrauded or both.

Finally, respondent's Objections reference his Closing Argument in the matter, which he appended to his Objections. The Closing Arguments of both parties were fully considered in reaching the findings and conclusions set forth in the Proposed Decision, and no modification of the findings or conclusions based on those closing arguments is appropriate.

Dated this 29th day of January, 2003.

Wayne R. Austin

Administrative Law Judge

[1] *United States v. An Article of Device . . . "Toftness Radiation Detector," Toftness Post-Graduate School of Chiropractic, and Irwing N. Toftness*, 731 F.2d 1253 (1984)