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STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST

RICHARD D. ESENBERG, D.C.,
RESPONDENT.

FINAL DECISION AND ORDER
Case No. LS-9510241-CHI

PARTIES

The parties in this matter under § 227.44, Stats., and for purposes of review under § 227.53, Stats., are:

Richard D. Esenberg, D.C.
106 East Riverview Drive
Jefferson, WI 53549

Chiropractic Examining Board
P.O. Box 8935
Madison, WI 53708-8935

Department of Regulation & Licensing
Division of Enforcement
P.O. Box 8935
Madison, Wisconsin 53708

This matter was commenced by the filing of a Notice of Hearing and Complaint on October 24, 1995. An Amended Complaint was filed October 31, 1995. A hearing was held in the above-captioned matter on January 9, 1996. Atty. Peter Sammataro appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. Dr. Esenberg appeared in person and by Atty. Andrew R. Griggs, Law Offices of Neuberger, Lorenz, Griggs & Sweet. The Administrative Law Judge filed her Proposed Decision, the Division of Enforcement filed Objections to the Proposed Decision, and the Respondent filed a response to the Division of Enforcement's Objections. The Board heard oral argument from by the parties.

Based upon the entire record herein, the Wisconsin Chiropractic Examining Board makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The respondent is Richard D. Esenberg, D.C. Dr. Esenberg's most recent address on file with the Department of Regulation and Licensing is P.O. Box 201, Jefferson, Wisconsin 53549.

Respondent's current address is 106 East Riverview Drive, Jefferson, Wisconsin 53549. Dr. Esenberg was born on September 28, 1934.

2. Respondent was licensed as a chiropractor in the state of Wisconsin on November 12, 1981, under license #1695.

3. On October 24, 1995, the Chiropractic Examining Board, by its designee, issued an order summarily suspending respondent's license. This order took effect on October 24, 1995, and has remained in effect since that time.

Count I

4. On May 28, 1995, Jefferson County Circuit Court, Branch 2, found Dr. Esenberg guilty of presenting or causing to be presented false or fraudulent insurance claims in violation of s. 943.395 (1) (a), Stats. Respondent submitted these claims in order to receive payment for chiropractic services that he had provided.

5. The court withheld sentence, placed Dr. Esenberg on probation for four years and, as a condition of probation, ordered that respondent serve a jail sentence of thirty days.

Count II

6. Dr. Esenberg's registration to practice chiropractic expired on December 31, 1992.

7. Respondent knew as of October 12, 1993, that his registration had expired. Respondent had not renewed his registration as of November 17, 1993.

8. Between October 28, 1993, and November 12, 1993, respondent caused fourteen claim forms to be submitted to Blue Cross & Blue Shield United of Wisconsin ("Blue Cross") on behalf of individuals insured by Blue Cross. These claim forms were requests for payment from Blue Cross for chiropractic services respondent provided to the insureds between July 12, 1993, and November 5, 1993. The total amount of these claims was $1, 397. Blue Cross made payments in the amount of $1, 054 for thirteen of these claims.

9. All of the claim forms submitted to Blue Cross required the signature of Dr. Esenberg as the service provider along with an indication of his degree or credentials.

10. None of the claim forms that Dr. Esenberg caused to be submitted to Blue Cross indicated that his registration had expired. The claim forms submitted to Blue Cross appeared to have been submitted by another chiropractor whose registration was current.

11. None of Blue Cross's contracts for insurance authorized payment for services provided by unlicensed health care providers. If Blue Cross had known that Dr. Esenberg's registration had expired, Blue Cross would not have paid the claims that he submitted.

Count III

12. Between early December 1992 and January 27, 1993, Dr. Esenberg provided chiropractic care to Patient RC.

13. Patient RC alleged that he had suffered physical injury as a result of the chiropractic care provided by respondent. Patient RC sued respondent for damages he suffered as a result of this injury.

14. On June 5, 1995, Jefferson County Circuit Court, Branch 1, entered judgment in favor of Patient RC and against Dr. Esenberg in the amount of $275,605.91.

15. On July 10, 1995, an investigator with the Department of Regulation and Licensing, Division of Enforcement, sent to respondent via United States mail a request for copies of Patient RC's treatment records. A form signed by Patient RC that authorized respondent to release these records accompanied the investigator's request.

16. Dr. Esenberg did not provide Patient RC's treatment records to the investigator as requested.

17. For the sole purpose of determining the discipline to be imposed, Dr. Esenberg did not have in effect malpractice insurance that would have satisfied, at least in part, Patient RC's judgment against him.

Count IV

18. Dr. Esenberg's chiropractic registration expired on December 31, 1994. Respondent had not renewed his registration as of October 27, 1995.

19. On July 22, 1995, respondent provided chiropractic care to Patient MAG in the form of a chiropractic adjustment.

20. Dr. Esenberg did not have in effect on July 22, 1995, malpractice insurance that would have satisfied, at least in part, any malpractice judgment Patient MAG might obtain against him.

21. For the sole purpose of determining the discipline to be imposed, the Chiropractic Examining Board reprimanded Dr. Esenberg on January 13, 1994, for practicing after his registration had expired.

Count V

22. On December 13, 1993, Patient KAK sought treatment from respondent. As part of the diagnostic process, respondent obtained radiographic films showing A-P and lateral views of the lumbar area of Patient KAK's spine.

23. The radiographic films that respondent obtained from Patient KAK were of such poor quality that they could not be used for diagnostic purposes nor could they reveal any pathology.

24. Respondent did not obtain another set of radiographic films.

25. Respondent provided an adjustment to Patient KAK on December 13, 1993.

Count VI

26. On October 18, 1993, Patient SZ sought treatment from Dr. Esenberg. As part of the diagnostic process, respondent obtained radiographic films showing A-P and lateral views of the lumbar area of Patient SZ's spine.

27. The radiographic films that respondent obtained from Patient SZ were of such poor quality that they could not be used for diagnostic purposes nor could they reveal any pathology.

28. Respondent did not obtain another set of radiographic films.

29. Respondent did not perform an adequate examination of Patient SZ in order to assess Patient SZ's condition.

30. Respondent provided an adjustment to Patient SZ on December 13, 1993.

31. On or about October 20, 1993, respondent submitted a claim to Patient SZ's insurance carrier, in pertinent part, in the amount of $66.00 for an examination of Patient SZ. Respondent did not perform the examination for which he billed Patient SZ's insurer.

CONCLUSIONS OF LAW

1. The Chiropractic Examining Board has jurisdiction in this matter pursuant to s. 446.03, Wis. Stats.

2. Respondent's conduct, as described herein in Findings of Fact #4 and 5, constitutes a violation of s. 446.03 (3), Stats., and s. Chir 6.02 (24), Wis. Adm. Code.

3. Respondent's conduct, as described herein in Findings of Fact #6-11, constitutes a violation of s. 446.03 (4), Stats., and s. Chir 6.02 (14), Wis. Adm. Code.

4. Respondent's conduct, as described herein in Findings of Fact #12-16, constitutes a violation of s. 446.03 (5), Stats., and s. Chir 6.02 (19), Wis. Adm. Code.

5. Respondent's conduct, as described herein in Findings of Fact #18-20, constitutes a violation of ss. 446.02 (1) (a), 446.02 (8), and 446.03 (5), Stats, and ss. Chir 3.07 and 6.02 (25), Wis. Adm. Code.

6. Respondent's conduct, as described herein in Findings of Fact #22-25, constitutes a violation of s. 446.03 (5), Stats., and s. Chir 6.02 (3), Wis. Adm. Code.

7. Respondent's conduct, as described herein in Findings of Fact #26-31, constitutes a violation of s. 446.03 (4) and (5), Stats., and s. Chir 6.02 (3), (9) and (14), Wis. Adm. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that effective upon the date of issuance of this Order, the license of Richard D. Esenberg to practice as a chiropractor, be and hereby is, REVOKED FOR A MINIMUM PERIOD OF ONE YEAR.

IT IS FURTHER ORDERED THAT:

1. The Board shall not consider a petition or application for relicensure by the Respondent until after one year following the date of this Order of revocation of license.

2. Should Respondent petition or apply for relicensure, the Board may impose conditions for consideration of relicensure, and/or impose conditions or limitations on relicensure, as it deems necessary and appropriate in its discretion for protection of the health, welfare and safety of the public, to determine and assure that Respondent is rehabilitated from

his criminal conduct, to assure that Dr. Esenberg's condition of manic depression and/or bipolar disorder, however denominated, is adequately controlled to enable him to practice in compliance with the law and with safety to the public, and that he is competent to practice chiropractic. In conjunction with any petition or application by Dr. Esenberg for relicensure, at a minimum, Dr. Esenberg shall provide and demonstrate evidence satisfactory to the Board of compliance with all terms and conditions of his criminal probation; a written report from his treating physician of a complete evaluation within 30 days of any petition or application for relicensure, including diagnosis and recommendations for treatment concerning Dr. Esenberg's condition of manic depression and/or bipolar disorder; fulfillment of all continuing education requirements as applicable; retraining satisfactory to the Board in the taking and developing of clinically sufficient radiographs; and satisfactory proof of professional liability insurance coverage in compliance with the statutes and rules applicable to the practice of chiropractic in the state of Wisconsin.

3. Pursuant to s. 440.22, Stats., the costs of this proceeding shall be and hereby are assessed against Respondent.

This order is effective on the date on which it is signed by a designee of the Chiropractic Examining Board.

EXPLANATION OF VARIANCE

The Findings of Fact and Conclusions of Law were agreed to by the parties by stipulation. The only issue that remained for decision is the discipline to be imposed based upon the record of violations stipulated by the parties. The ALJ recommended a one year suspension of Dr. Esenberg's license, to be reduced by the period of time that Dr. Esenberg's license was subject to the summary suspension order dated October 24, 1995. The Division of Enforcement filed objections to the proposed order of discipline, arguing for revocation of license, presumably permanent, as the only adequate discipline to protect the public based upon the multiple and varied violations in this matter. On the other hand, Dr. Esenberg, in his response to the Division's Objections, argues that the recommended order for a one year suspension of license, reduced by the time period in which his license was summarily suspended, is the appropriate measure of discipline to be imposed and should be adopted by the Board. Dr. Esenberg contends that he has a record of safe, competent and lawful practice of chiropractic for some 12 years up to 1993, and that a difficult divorce and problems with manic depression contributed to his violations of record in this case.

Based upon the entire record in this matter and the arguments of the parties following the proposed decision, the Board has modified the proposed order of discipline recommended by the Administrative Law Judge. Based upon the violations in this case, and the fact of prior discipline imposed by the Board upon Respondent for practice after expiration of his registration to practice, the Board views the discipline recommended by the ALJ as inadequate for the purposes of protection of the public, deterrence of similar conduct by this licensee and others in the

profession and rehabilitation. The Board is persuaded by the analysis and argument of the Division of Enforcement in its Objections to the Proposed Decision that the discipline recommended by the ALJ is insufficient to serve the purposes of discipline. The Board views the record of violations in this case as very serious, and combined with the record of prior discipline of Dr. Esenberg, believes that a revocation of license for a minimum period of one year is the minimally appropriate discipline. In order to assure protection of the public and Dr. Esenberg's rehabilitation, the Board included provisions that it may impose appropriate conditions for consideration of a petition for reinstatement or conditions or limitations upon his relicensure, and has specified minimum elements that should accompany any such petition for reinstatement.

Dr. Esenberg contends, as the ALJ recommended, that he should be given credit in this disciplinary order for the time his licensed remained suspended under the Order of Summary Suspension dated October 24, 1995. The Board agrees with the position advanced by the Division of Enforcement, that reinstatement of his license was essentially in Dr. Esenberg's hands under the terms of that Order. It was by his choice that he did not undertake to satisfy conditions for reinstatement of his license and provide proof of professional liability insurance as required under the terms of that order, and obtain reinstatement of his license to practice. Accordingly, the Board does not agree that Dr. Esenberg should be given such credit against this disciplinary order for the time his license remained summarily suspended.

Dr. Esenberg was previously disciplined by the Board. On January 13, 1994, the Board issued a Final Decision and Order imposing a reprimand upon Dr. Esenberg for practicing chiropractic after his registration had expired on December 31, 1992.

In this case, Dr. Esenberg again practiced chiropractic while his registration to practice was expired. In addition, Dr. Esenberg's violations include submitting 14 fraudulent insurance claim forms in which he represented that he was currently licensed to practice chiropractic, for which conduct he was criminally convicted, having submitted a fraudulent insurance claim for a service he did not render, having practiced without malpractice insurance coverage as required by law, in two instances having treated a patient without first obtaining clinically sufficient x-rays, and refusing to comply with a valid request by the Division of Enforcement to produce patient records in a matter in which Dr. Esenberg was successfully sued for malpractice by the patient.

While admitting these violations, Dr. Esenberg contends that they occurred at a time in which he was undergoing a difficult divorce and during which time he was also suffering the effects of uncontrolled manic depression. However, Dr. Esenberg's testimony is unclear about the exact time period he suffered these effects of uncontrolled manic depression, exactly when his condition was brought under control, and exactly what effects the uncontrolled manic depression had on his ability to distinguish right from wrong, to conform his conduct to the requirements of the law, and to respond to the Division's request for patient records. Besides this lack of clarity in Dr. Esenberg's testimony, there is also a lack of any other evidence in the record that may shed light on the timing and effects of Dr. Esenberg's uncontrolled manic depression on his conduct.

The Board is not unsympathetic to the possible burdens or effects of Dr. Esenberg's personal circumstances or medical condition on his professional responsibility and practice, but the record is not at all clear, nor persuasive, of any such effects on Dr. Esenberg's accountability for his violations in this case. It its worthy of note that the ALJ was apparently likewise unpersuaded as the Proposed Decision does not discuss Dr. Esenberg's medical condition as a factor in the formulation of recommended discipline. Accordingly, the Board affords little weight to this contention as a mitigating factor. The Board, however, would be concerned that his condition of manic depression and/or bipolar disorder, however denominated, be under adequate medical control and management at such time as Dr. Esenberg may seek reinstatement of his license. Accordingly, the Board has included in the Order a requirement that Dr. Esenberg submit a report to the Board to this effect at the time he seeks reinstatement.

As argued by the Division, Dr. Esenberg's record of conduct in this matter is not only serious, but also raises serious question that he has rehabilitated himself, or may be able to rehabilitate himself. First, Dr. Esenberg was reprimanded in January 1994 for having practiced in 1993 after he failed to renew his registration to practice at the end of 1992. As argued by the Division, one would expect Dr. Esenberg to have learned and appreciated the imperative and necessity to renew his registration before practicing again. However, Dr. Esenberg again committed the same violation in 1995.

In late 1992 and early 1993, Dr. Esenberg had treated a patient who later sued Dr. Esenberg for malpractice. At that time Dr. Esenberg did not have professional liability insurance, nor was it required by law. The patient obtained a judgment in the amount of over $275,000, which Dr. Esenberg faced having to satisfy from his personal finances. On June 1, 1994, the Board promulgated sec. Chir 3.07, Wis. Adm. Code, pursuant to sec. 446.02(8), Stats., requiring every chiropractor practicing in the state of Wisconsin to carry professional liability insurance. Despite his experience with the malpractice suit, and despite the requirement of the law, Dr. Esenberg nevertheless failed to obtain professional liability insurance in compliance with the law and engaged in chiropractic practice in July 1995 without such coverage. In view of the enactment of the requirement in the law for every chiropractor practicing in this state to maintain professional liability insurance, and indeed, as evidenced by the Board's Summary Suspension Order of October 24, 1995, the Board considers this conduct a serious threat to the welfare of the public as it exposed the patient to the risk of injury from treatment without the financial backup of insurance, as required by law, from which to recover damages if malpractice would be proved. This conduct demonstrates disregard by Dr. Esenberg for both the welfare of his patients and the requirements of the law governing the practice of chiropractic.

In addition to practicing a second time after expiration of his registration, for which he had been previously disciplined, and practicing without professional liability insurance, Dr. Esenberg had also engaged in fraudulent insurance billing, involving 14 claims for payment in which he misrepresented that he was currently registered to practice chiropractic, and one in which he made a claim for a service he did not provide. Dr. Esenberg was criminally convicted in connection with these fraudulent claims and sentenced to 30 days in jail and 4 years probation.

The Board has consistently viewed fraud as very serious unprofessional conduct evidencing dishonesty and injurious to the welfare of the public, warranting stern discipline for deterrence of similar conduct by other licensees.

Moreover, Dr. Esenberg demonstrated incompetence in his practice by having undertaken to treat two patients without having obtained clinically sufficient x-rays upon which he could adequately diagnose the patients condition or determine other pathology that may contraindicate chiropractic adjustment. As admitted by Dr. Esenberg, this exposed the patients to an unacceptable risk of harm, and such conduct demonstrates again incompetence and a disregard for the safety and welfare of his patients.

Finally, Dr. Esenberg demonstrated disregard for the authority of the Board in his failure to comply with a lawful request to produce patient treatment records in connection with the Board's investigation of his treatment of a patient. This again is a disregard for his professional responsibility under the law and the authority of the Board, and impairs and impedes the Board's responsibility to protection of the public in the investigation of possible unprofessional conduct or incompetent practice.

Based upon this record of multiple and varying violations of the laws governing the practice of chiropractic in this state, ranging from practicing without a current registration, practicing without professional liability insurance, fraud, failure to obtain clinically sufficient x-rays prior to chiropractic adjustment, and failure to comply with a request for patient records, Dr. Esenberg has demonstrated a disregard of the law, a disregard for the health, safety and welfare of the public, incompetent practice and disregard of the authority of the Board. Accordingly, only a revocation of license, for a minimum period of one year is the appropriate measure of discipline to adequately serve the deterrence and public protection purposes of discipline. During this period of revocation, the rehabilitation interests of Dr. Esenberg may also be served and demonstrated by his compliance with the terms and conditions of his probation, fulfillment of continuing education credits as may be required, and completion of training for proficiency in the taking and developing of clinically useful radiographs.

Dated this 14th day of November, 1996.

Wisconsin Chiropractic Examining Board

Terry K. Freitag, DC

Terry K. Freitag, D.C., Chair

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
BEFORE THE CHIROPRACTIC EXAMINING BOARD

In the Matter of the Disciplinary Proceedings Against

Richard D. Esenberg, D.C.,

Respondent.

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
)
COUNTY OF DANE)

I, Kate Rotenberg, having been duly sworn on oath, state the following to be true and correct based on my personal knowledge:

1. I am employed by the Wisconsin Department of Regulation and Licensing.

2. On November 18, 1996, I served the Final Decision and Order dated November 14, 1996, LS9510241CHI, upon the Respondent Richard D. Esenberg, D.C.'s attorney by enclosing a true and accurate copy of the above-described document in an envelope properly stamped and addressed to the above-named Respondent's attorney and placing the envelope in the State of Wisconsin mail system to be mailed by the United States Post Office by certified mail. The certified mail receipt number on the envelope is P 213 148 695.

Andrew R. Griggs, Attorney
136 Hospital Drive
P.O. Box 436
Watertown WI 53094-0436

Kate Rotenberg

Kate Rotenberg
Department of Regulation and Licensing
Office of Legal Counsel

Subscribed and sworn to before me

this 15th day of November, 1996.

Robert T. Gauch

Notary Public, State of Wisconsin
My commission is permanent.

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.

Serve Petition for Rehearing or Judicial Review on:

STATE OF WISCONSIN CHIROPRACTIC EXAMINING BOARD

1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708.

The Date of Mailing this Decision is:

November 18, 1996

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)

FILE COPY

STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BORAD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	ORDER FIXING COSTS
	:	Case #LS9510241CHI
RICHARD D. ESENBERG, D.C., RESPONDENT.	:	

On November 14, 1996, the Chiropractic Examining Board filed its Final Decision and Order in the above-captioned matter by which the board ordered that pursuant to sec. 440.22, Wis. Stats., 100% of the costs of this proceeding be assessed against respondent. Pursuant to sec. RL 2.18 (4), Wis. Adm. Code, on or about November 21, 1996, the board received the *Affidavit of Costs* in the amount of $2,967.32, filed by Attorney Peter Sammataro. On or about November 19, 1996, the board received the *Affidavit of Costs of Office of Board Legal Services* in the amount of $672.15, filed by Administrative Law Judge Ruby Jefferson-Mooore. The board considered the affidavits on January 23, 1997, and orders as follows:

ORDER

NOW, THEREFORE, IT IS ORDERED that pursuant to sec. 440.22, Wis. Stats., the costs of this proceeding in the amount of $3,639.47, which is 100% of the costs set forth in the affidavits of costs of Ruby Jefferson-Moore and Peter Sammataro, which are attached hereto and made a part hereof, are hereby assessed against Richard D. Esenberg, D.C., and shall be payable by him to the Department of Regulation and Licensing. **Failure of respondent to make payment on or before February 22, 1997, which is the deadline for payment established by the board, shall constitute a violation of the Order unless respondent petitions for and the board grants a different deadline.** Under sec. 440.22 (3), Wis. Stats., the department or board may not restore, renew or otherwise issue any credential to the respondent until respondent has made payment to the department in the full amount assessed.

To ensure that payments for assessed costs are correctly receipted, the attached *"Guidelines for Payment of Costs and/or Forfeitures"* should be enclosed with the payment.

Dated this 23 day of January, 1997

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

g:\bdls\costs1

Department of Regulation & Licensing

State of Wisconsin

P.O Box 8935, Madison, WI 53708-8935
(608)
TTY# (608) 267-2416 hearing or speech
TRS# 1-800-947-3529 impaired only

GUIDELINES FOR PAYMENT OF COSTS AND/OR FORFEITURES

On November 14, 1996, the Chiropractic Examining Board took disciplinary action against your license. Part of the discipline was an assessment of costs and/or a forfeiture.

The amount of the costs assessed is: $3,639.47 Case #: LS9510241CHI

The amount of the forfeiture is: _____ Case # _____

Please submit a check or a money order in the amount of $ 3,639.47

The costs and/or forfeitures are due: February 22, 1997

NAME: Richard D. Esenberg, D.C. LICENSE NUMBER: 1695

STREET ADDRESS: 106 East Riverview Drive

CITY: Jefferson STATE: WI ZIP CODE: 53549

Check whether the payment is for costs or for a forfeiture or both:

X COSTS _____ FORFEITURE

Check whether the payment is for an individual license or an establishment license:

X INDIVIDUAL _____ ESTABLISHMENT

If a payment plan has been established, the amount due monthly is:

_____

For Receipting Use Only

Make checks payable to:

DEPARTMENT OF REGULATION AND LICENSING
1400 E. WASHINGTON AVE., ROOM 141
P.O. BOX 8935
MADISON, WI 53708-8935

#2145 (Rev. 9/96)
Ch. 440.22, Stats.
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STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST

AFFIDAVIT OF COSTS
LS9510241CHI

RICHARD D. ESENBERG, D.C.,
RESPONDENT.

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Ruby Jefferson-Moore, being first duly sworn on oath deposes and states:

1. That affiant is an attorney licensed to practice law in the State of Wisconsin, and is employed by the Wisconsin Department of Regulation and Licensing, Office of Board Legal Services.

2. That in the course of affiant's employment she was appointed administrative law judge in the above-captioned matter. That to the best of affiant's knowledge and belief, the costs for services provided by affiant are as follows:

ACTIVITY	DATE	TIME
Preparation and Hearing	01/09/96	2 hrs./30 min.
Review record/draft decision	04/22/96	4 hrs./30 min.
Review of record	04/23/96	2 hrs.
Draft proposed decision	04/25/96	4 hrs.

Total costs for Administrative Law Judge: $ 352.95.

3. That upon information and belief, the total cost for court reporting services provided by Magne-Script is as follows: $319.20.

Total costs for Office of Board Legal Services: $ 672.15.

Ruby Jefferson-Moore
Ruby Jefferson-Moore
Administrative Law Judge

Sworn to and subscribed to before me
this 19th day of November, 1996

Donald R. Rittel
Notary Public
My Commission: is permanent

STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST	:	AFFIDAVIT IN SUPPORT OF MOTION FOR COSTS
Richard Esenberg, D.C. RESPONDENT	:	CASE NUMBERS: 91 CHI 2 et al LS 9510241 CHI

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Peter Sammataro, being duly sworn, deposes and states as follows:

1. That Peter Sammataro is an attorney licensed in the state of Wisconsin and is employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement:

2. That in the course of those duties Peter Sammataro was assigned as a prosecutor in the above-captioned matter; and

3. That set out below are the costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter.

PROSECUTING ATTORNEY EXPENSE

Date	Activity	Time Spent
1-24-95	Contact Lincoln Co. D.A.	0.25 hrs
10-13-95	Draft papers for summary suspension	3.0 hrs
10-23-95	Prepare for summary suspension hearing	0.75 hr
10-24-95	Prepare for summary suspension hearing	1.5 hrs
10-24-95	Attend summary suspension hearing	0.25 hrs
10-25-95	Arrange Service of Order	0.25
10-26-95	Copy of Order to Respondents' attorney	
11-8-95	Assemble & review documents for release to Respondent's attorney	3.0 hrs
11-13-95	Contact Respondent's attorney	0.25 hr
11-22-95	Review Respondent's Answer to Complaint	0.25 hr
12-1-95	Participate in prehearing conference; discuss Stipulation afterward with Respondent's attorney	0.5 hr
12-5-95	Assemble records for Respondent's attorney, draft letter to attorney, re-write letter	0.75 hr

12-11-95	Draft a re-draft Stipulation & Findings of Fact et.al.	3.50 hrs
12-12-95	Legal research re admissibility of old conviction	0.25 hr
12-28-95	Prepare Witness list	1.5 hrs
1-2-96	Prepare for hearing	4.0 hrs
1-3-96	Prepare for hearing	4.0 hrs
1-4-96	Prepare for hearing	4.0 hrs
1-5-96	Prepare for hearing	4.5 hrs
1-7-96	Prepare for hearing	2.0 hrs
1-8-96	Prepare for hearing; obtain copies of newspaper	3.0 hrs
1-9-96	Prep for hearing	1.0 hr
1-9-96	Attend hearing	2.0 hrs
4-29-96	Draft Objections	5.5 hrs
4-30-96	Review transcript	0.5 hrs
4-30-96	Legal research	0.75 hrs
5-1-96	Re-draft objections	4.0 hrs
5-2-96	Final draft of objections & submission	3.0 hrs
5-19-96	Prepare for Oral Argument	1.0 hrs
5-20-96	Prepare for Oral Argument	2.0 hrs
5-21-96	Prepare for Oral Argument	1.75 hrs
5-22-96	Prepare for Oral Argument	2.0 hrs.
5-23-96	Prepare for Oral Argument	2.0 hrs

INVESTIGATOR EXPENSE FOR JOAN GAMMETER

Date	Activity	Time Spent
4-7-92	Called attorney Sclerback and left number	0.10 hr
4-9-92	Letter to attorney Sclerback-not sent	0.5 hr
4-13-92	Call from Attorney Sclerback	0.10 hr
4-14-92	Picked up deposition	1.0 hr
5-20-92	Letter to Respondent for records	0.5 hr
5-27-92	Call from Respondent	0.25 hr
6-29-92	Second request for records	0.2 hr
8/4/92	Review records	0.5 hr
9-16-92	Sent to Board Advisor	1.0 hr

INVESTIGATOR EXPENSE FOR SUE SCHAUT

Date	Activity	Time Spent
7-26-94	Phone call; Memo; E-mail	0.5 hr
8-1-94	Meeting with Investigator Russ Streuer	1.0 hr
9-27-94	Field contact	1.0 hr
9-29-94	Field Interview	2.0 hrs
10-28-94	Pick up x-rays, etc.	3.0 hrs
11-10-95	To Jefferson to survey respondent's residence	0.5 hr

INVESTIGATOR EXPENSE FOR STEVE ROHLAND

Date	Activity	Time Spent
1-4-96	Serve Bleecker subpoena	0.5 hrs

Total attorney expense for Peter Sammataro 63 hours and 0 minutes at $41.00 per hour (based upon average salary and benefits for Division of Enforcement attorneys) equals:	$2,583.00
Total investigator expense for Joan Gammenter 4 hours and 9 minutes at $20.00 per hour (based upon average salary and benefits for Division of Enforcement investigators) equals:	$ 83.00
Total investigator expense for Sue Schaut 8 hours and 0 minutes at $20.00 per hour (based upon average salary and benefits for Division of Enforcement investigators) equals:	$ 160.00
Total investigator expense for Steve Rohland 0 hours and 30 minutes at $20.00 per hour (based upon average salary and benefits for Division of Enforcement investigators) equals:	$ 10.00

EXPERT WITNESS FEES

1. Harvey T. Storm, D.C. $ 75.00

WITNESS FEES

1. Detective Gary Bleecker $ 19.00

MISCELLANEOUS DISBURSEMENTS

1. Certified copy of Judgment Chady v. Esenberg (94 CV 58) $ 12.50
2. Service of Order Granting Summary Suspension $ 24.82

TOTAL ASSESSABLE COSTS **$2967.32**

Peter Sammataro
Attorney

Subscribed and sworn to before me
this 12 day of Sept., 1996.

James E. Polewah
Notary Public
My commission is permanent

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
BEFORE THE CHIROPRACTIC EXAMINING BOARD

In the Matter of the Disciplinary Proceedings Against

Richard D. Esenberg, D.C.,

Respondent.

AFFIDAVIT OF MAILING

STATE OF WISCONSIN)
)
COUNTY OF DANE)

I, Kate Rotenberg, having been duly sworn on oath, state the following to be true and correct based on my personal knowledge:

1. I am employed by the Wisconsin Department of Regulation and Licensing.

2. On January 24, 1997, I served the Order Fixing Costs dated January 23, 1997, LS9510241CHI, upon the Respondent Richard D. Esenberg's attorney by enclosing a true and accurate copy of the above-described document in an envelope properly stamped and addressed to the above-named Respondent's attorney and placing the envelope in the State of Wisconsin mail system to be mailed by the United States Post Office by certified mail. The certified mail receipt number on the envelope is P 201 377 273.

Andrew R. Griggs, Attorney
136 Hospital Drive
P.O. Box 436
Watertown WI 53094-0436

Kate Rotenberg
Kate Rotenberg
Department of Regulation and Licensing
Office of Legal Counsel

Subscribed and sworn to before me

this 24th day of Jan, 1997.

Robert T. Grauch
Notary Public, State of Wisconsin
My commission is permanent

State of Wisconsin \ DEPARTMENT OF REGULATION & LICENSING

Tommy G Thompson
Governor

Marlene A Cummings
Secretary

1400 E WASHINGTON AVENUE
P O BOX 8935
MADISON, WISCONSIN 53708-8935
(608) 266-2112

November 25, 1996

ANDREW R. GRIGGS, ATTORNEY
NEUBERGER, LORENZ, GRIGGS & SWEET
136 HOSPITAL DRIVE
P.O. BOX 436
WATERTOWN WI 53094-0436

RE: In The Matter of Disciplinary Proceedings Against Richard D. Esenberg, D.C., Respondent, LS9510241CHI, Assessment of Costs

Dear Mr. Griggs:

On November 14, 1996, the Chiropractic Examining Board issued an order involving the license to practice chiropractic of Richard D. Esenberg, D.C. The order requires payment of the costs of the proceedings.

Enclosed please find the Affidavits of Costs of the Office of Board Legal Services and the Division of Enforcement in the above captioned matter. The total amount of the costs of the proceedings is $3,639.47.

Under sec. RL 2.18, Wis. Adm. Code, objections to the affidavits of costs shall be filed in writing. Your objections must be received at the office of the Chiropractic Examining Board, Room 174, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before December 14, 1996. After reviewing the objections, if any, the Chiropractic Examining Board will issue an Order Fixing Costs. Under sec. 440.23, Wis. Stats., the board may not restore or renew a credential until the holder has made payment to the department in the full amount assessed.

Thank you.

Sincerely,

Pamela A Haack

Pamela A. Haack
Office of Board Legal Services

Enclosures

cc: Chiropractic Examining Board
Department Monitor

STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	NOTICE OF FILING PROPOSED DECISION LS9510241CHI
RICHARD D. ESENBERG, D.C., RESPONDENT.	:	

TO: Andrew R. Griggs, Attorney
Neuberger, Lorenz, Griggs & Sweet
P.O. Box 436
Watertown, WI 53094-0436
Certified Z 091 396 869

Peter Sammataro, 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, Ruby Jefferson-Moore. 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. If your objections or argument relate to evidence in the record, please cite the specific exhibit and page number in the record. Your objections and argument must be received at the office of the Chiropractic Examining Board, Room 174, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before May 6, 1996. 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, the Chiropractic Examining Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 26th day of April, 1996.

Ruby Jefferson-Moore
Ruby Jefferson-Moore
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST

PROPOSED DECISION
Case No. LS-9510241-CHI

RICHARD D. ESENBERG, D.C.,
RESPONDENT.

PARTIES

The parties in this matter under § 227.44, Stats., and for purposes of review under § 227.53, Stats., are:

Richard D. Esenberg, D.C.
106 East Riverview Drive
Jefferson, WI 53549

Chiropractic Examining Board
P.O. Box 8935
Madison, WI 53708-8935

Department of Regulation & Licensing
Division of Enforcement
P.O. Box 8935
Madison, Wisconsin 53708

This matter was commenced by the filing of a Notice of Hearing and Complaint on October 24, 1995. An Amended Complaint was filed October 31, 1995. A hearing was held in the above-captioned matter on January 9, 1996. Atty. Peter Sammataro appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. Dr. Esenberg appeared in person and by Atty. Andrew R. Griggs, Law Offices of Neuberger, Lorenz, Griggs & Sweet.

Based upon the record herein, the Administrative Law Judge recommends that the Chiropractic Examining Board adopt as its final decision in this matter, the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The respondent is Richard D. Esenberg, D.C. Dr. Esenberg's most recent address on file with the Department of Regulation and Licensing is P.O. Box 201, Jefferson, Wisconsin 53549. Respondent's current address is 106 East Riverview Drive, Jefferson, Wisconsin 53549. Dr. Esenberg was born on September 28, 1934.

2. Respondent was licensed as a chiropractor in the state of Wisconsin on November 12, 1981, under license #1695.

3. On October 24, 1995, the Chiropractic Examining Board, by its designee, issued an order summarily suspending respondent's license. This order took effect on October 24, 1995, and has remained in effect since that time.

Count I

4. On May 28, 1995, Jefferson County Circuit Court, Branch 2, found Dr. Esenberg guilty of presenting or causing to be presented false or fraudulent insurance claims in violation of s. 943.395 (1) (a), Stats. Respondent submitted these claims in order to receive payment for chiropractic services that he had provided.

5. The court withheld sentence, placed Dr. Esenberg on probation for four years and, as a condition of probation, ordered that respondent serve a jail sentence of thirty days.

Count II

6. Dr. Esenberg's registration to practice chiropractic expired on December 31, 1992.

7. Respondent knew as of October 12, 1993, that his registration had expired. Respondent had not renewed his registration as of November 17, 1993.

8. Between October 28, 1993, and November 12, 1993, respondent caused fourteen claim forms to be submitted to Blue Cross & Blue Shield United of Wisconsin ("Blue Cross") on behalf of individuals insured by Blue Cross. These claim forms were requests for payment from Blue Cross for chiropractic services respondent provided to the insureds between July 12, 1993, and November 5, 1993. The total amount of these claims was $1, 397. Blue Cross made payments in the amount of $1, 054 for thirteen of these claims.

9. All of the claim forms submitted to Blue Cross required the signature of Dr. Esenberg as the service provider along with an indication of his degree or credentials.

10. None of the claim forms that Dr. Esenberg caused to be submitted to Blue Cross indicated that his registration had expired. The claim forms submitted to Blue Cross appeared to have been submitted by another chiropractor whose registration was current.

11. None of Blue Cross's contracts for insurance authorized payment for services provided by unlicensed health care providers. If Blue Cross had known that Dr. Esenberg's registration had expired, Blue Cross would not have paid the claims that he submitted.

Count III

12. Between early December 1992 and January 27, 1993, Dr. Esenberg provided chiropractic care to Patient RC.

13. Patient RC alleged that he had suffered physical injury as a result of the chiropractic care provided by respondent. Patient RC sued respondent for damages he suffered as a result of this injury.

14. On June 5, 1995, Jefferson County Circuit Court, Branch 1, entered judgment in favor of Patient RC and against Dr. Esenberg in the amount of $275,605.91.

15. On July 10, 1995, an investigator with the Department of Regulation and Licensing, Division of Enforcement, sent to respondent via United States mail a request for copies of Patient RC's treatment records. A form signed by Patient RC that authorized respondent to release these records accompanied the investigator's request.

16. Dr. Esenberg did not provide Patient RC's treatment records to the investigator as requested.

17. For the sole purpose of determining the discipline to be imposed, Dr. Esenberg did not have in effect malpractice insurance that would have satisfied, at least in part, Patient RC's judgment against him.

Count IV

18. Dr. Esenberg's chiropractic registration expired on December 31, 1994. Respondent had not renewed his registration as of October 27, 1995.

19. On July 22, 1995, respondent provided chiropractic care to Patient MAG in the form of a chiropractic adjustment.

20. Dr. Esenberg did not have in effect on July 22, 1995, malpractice insurance that would have satisfied, at least in part, any malpractice judgment Patient MAG might obtain against him.

21. For the sole purpose of determining the discipline to be imposed, the Chiropractic Examining Board reprimanded Dr. Esenberg on January 13, 1994, for practicing after his registration had expired.

Count V

22. On December 13, 1993, Patient KAK sought treatment from respondent. As part of the diagnostic process, respondent obtained radiographic films showing A-P and lateral views of the lumbar area of Patient KAK's spine.

23. The radiographic films that respondent obtained from Patient KAK were of such poor quality that they could not be used for diagnostic purposes nor could they reveal any pathology.

24. Respondent did not obtain another set of radiographic films.

25. Respondent provided an adjustment to Patient KAK on December 13, 1993.

Count VI

26. On October 18, 1993, Patient SZ sought treatment from Dr. Esenberg. As part of the diagnostic process, respondent obtained radiographic films showing A-P and lateral views of the lumbar area of Patient SZ's spine.

27. The radiographic films that respondent obtained from Patient SZ were of such poor quality that they could not be used for diagnostic purposes nor could they reveal any pathology.

28. Respondent did not obtain another set of radiographic films.

29. Respondent did not perform an adequate examination of Patient SZ in order to assess Patient SZ's condition.

30. Respondent provided an adjustment to Patient SZ on December 13, 1993.

31. On or about October 20, 1993, respondent submitted a claim to Patient SZ's insurance carrier, in pertinent part, in the amount of $66.00 for an examination of Patient SZ. Respondent did not perform the examination for which he billed Patient SZ's insurer.

CONCLUSIONS OF LAW

1. The Chiropractic Examining Board has jurisdiction in this matter pursuant to s. 446.03, Wis. Stats.

2. Respondent's conduct, as described herein in Findings of Fact #4 and 5, constitutes a violation of s. 446.03 (3), Stats., and s. Chir 6.02 (24), Wis. Adm. Code.

3. Respondent's conduct, as described herein in Findings of Fact #6-11, constitutes a violation of s. 446.03 (4), Stats., and s. Chir 6.02 (14), Wis. Adm. Code.

4. Respondent's conduct, as described herein in Findings of Fact #12-16, constitutes a violation of s. 446.03 (5), Stats., and s. Chir 6.02 (19), Wis. Adm. Code.

5. Respondent's conduct, as described herein in Findings of Fact #18-20, constitutes a violation of ss. 446.02 (1) (a), 446.02 (8), and 446.03 (5), Stats, and ss. Chir 3.07 and 6.02 (25), Wis. Adm. Code.

6. Respondent's conduct, as described herein in Findings of Fact #22-25, constitutes a violation of s. 446.03 (5), Stats., and s. Chir 6.02 (3), Wis. Adm. Code.

7. Respondent's conduct, as described herein in Findings of Fact #26-31, constitutes a violation of s. 446.03 (4) and (5), Stats., and s. Chir 6.02 (3), (9) and (14), Wis. Adm. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Richard D. Esenberg to practice as a chiropractor, be and hereby is, SUSPENDED FOR A PERIOD OF ONE YEAR.

IT IS FURTHER ORDERED THAT:

1. The one year suspension of respondent's license imposed above shall be reduced by the amount of time respondent's license has been suspended pursuant to the Order Granting Summary Suspension issued by the Chiropractic Examining Board on October 24, 1995.

2. Pursuant to s. 440.22, Stats., the cost of this proceeding shall be and hereby is assessed against respondent.

This order is effective on the date on which it is signed by a designee of the Chiropractic Examining Board.

OPINION

On October 24, 1995, the Chiropractic Examining Board issued an order summarily suspending Dr. Esenberg's license. The Order took effect on October 24, 1995, and has remained in effect since that date. This matter was commenced by the filing of a Notice of Hearing and Complaint on October 24, 1995. An Amended Complaint was filed on October 31, 1995. A hearing was held on January 9, 1996. At the hearing, the parties filed a Stipulation relating to the proposed Findings of Fact and Conclusions of Law. *Exhibit #4*. The remaining issue which requires determination is what discipline, if any, should be imposed.

I. Review of Evidence

(A) In general

Dr. Esenberg was licensed as a chiropractor in the state of Wisconsin on November 12, 1981. He has practiced in Jefferson, Wisconsin for approximately 14 years. During that time period he has seen approximately 5,000 to 6,000 patients. Prior to December 31, 1992, there is not evidence that Dr. Esenberg failed to maintain a current chiropractic registration or that he violated any statutes or rules relating to the practice of chiropractic.

(B) Fraudulent representations

On December 31, 1992, Dr. Esenberg's certificate of registration expired. He knew as of October 12, 1993 that his registration had expired. As of November 17, 1993, his registration had not been renewed. *Findings of Fact #6-7.*

On October 28, 1993 and November 12, 1993, Dr. Esenberg caused 14 claim forms to be submitted to Blue Cross on behalf of individuals insured by Blue Cross. These claim forms were requests for payment from Blue Cross for chiropractic services he provided to the insureds between July 12, 1993 and November 5, 1993. The total amount of these claims was $1,397. Blue Cross made payments in the amount of $1,054 for thirteen of these claims.

All of the claim forms submitted to Blue Cross required Dr. Esenberg's signature as the service provider along with an indication of his degree or credentials. None of the claim forms which he submitted to Blue Cross indicated that his registration had expired. The claims forms appeared to have been submitted by another chiropractor whose registration was current. None of Blue Cross's contracts for insurance authorized payment for services provided by unlicensed health care providers. If Blue Cross had known that Dr. Esenberg's registration had expired, Blue Cross would not have paid the claims that he submitted.

In addition, the evidence establishes that on or about October 20, 1993, Dr. Esenberg submitted a claim to Patient SZ's insurance carrier, in pertinent part, in the amount of $66.00 for an examination of Patient SZ. Respondent did not perform the examination for which he billed Patient SZ's insurer.[1] *Findings of Fact #31.*

(C) Criminal conviction

On May 28, 1995, Dr. Esenberg was found guilty in Jefferson County Circuit Court, Branch 2, of presenting or causing to be presented false or fraudulent insurance claims in violation of s. 943.395 (1) (a), Stats.[2] His sentence was withheld and he was placed on probation for 4 years. As a condition of probation, he was ordered to serve a 30 day jail sentence.

The criminal complaint relating to Dr. Esenberg's conviction is not included in the record. Based upon Dr. Esenberg's testimony, the conviction stems from his submission of claim forms to Blue Cross. *Transcript p. 36, lines 1-15; p. 66, lines 4-8.* Therefore, it can be reasonably inferred from the evidence that the conduct which forms the basis of the conviction is the same as that described above relating to the claims forms submitted to Blue Cross in October and November of 1993.

(D) Patient care

On October 18, 1993, Patient SZ sought treatment from Dr. Esenberg. As part of the diagnostic process, he obtained radiographic films showing A-P and lateral views of the lumbar area of Patient SZ's spine. The radiographic films that he obtained from Patient SZ were of such poor quality that they could not be used for diagnostic purposes nor could they reveal any pathology. He did not obtain another set of radiographic films. He also did not perform an adequate examination of Patient SZ in order to assess Patient SZ's condition. Dr. Esenberg provided an adjustment to Patient SZ on December 13, 1993. *Findings of Fact #26-30.*

On December 13, 1993, Patient KAK sought treatment from Dr. Esenberg. As part of the diagnostic process, he obtained radiographic films showing A-P and lateral views of the lumbar area of Patient KAK's spine. The radiographic films that he obtained from Patient KAK were of such poor quality that they could not be used for diagnostic purposes nor could they reveal any pathology. He did not obtain another set of radiographic films. Dr. Esenberg provided an adjustment to Patient KAK on that date. *Findings of Fact #22-25.*

1. It is not clear from the evidence whether the insurance carrier referred to in this instance is Blue Cross nor whether the conduct was included in the criminal complaint which resulted in Dr Esenberg's conviction.

2. Section 943.395 (1) (a), Stats., provides, in part, that whoever, knowing it to be false or fraudulent, "presents or causes to be presented a false or fraudulent claim, or any proof in support of such claim, to be paid under any contract or certificate of insurance" may be penalized as provided under s. 943.395 (2), Stats.

(E) Practice without current registration and insurance

Dr. Esenberg's registration to practice chiropractic expired on December 31, 1992. He had not renewed his registration as of November 17, 1993. On January 13, 1994, the Chiropractic Examining Board reprimanded him for practicing after his registration had expired.[3] On December 31, 1994, his chiropractic registration expired again. He had not renewed his registration as of October 27, 1995.

On July 22, 1995, he provided chiropractic care to Patient MAG in the form of a chiropractic adjustment. Dr. Esenberg did not have in effect on July 22, 1995, malpractice insurance that would have satisfied, at least in part, any malpractice judgment Patient MAG might obtain against him.

(F) Refusal to cooperate with board investigation

Between early December, 1992 and January 27, 1993, Dr. Esenberg provided chiropractic care to Patient RC. Patient RC alleged that he had suffered physical injury as a result of the chiropractic care provided by respondent. Patient RC sued respondent for damages he suffered as a result of this injury. On June 5, 1995, Jefferson County Circuit Court, Branch 1, entered judgment in favor of Patient RC and against Dr. Esenberg in the amount of $275,605.91. Dr. Esenberg did not have in effect malpractice insurance that would have satisfied, at least in part, Patient RC's judgment against him.[4]

On July 10, 1995, an investigator with the Department of Regulation and Licensing, Division of Enforcement, sent to respondent via United States mail a request for copies of Patient RC's treatment records. A form signed by Patient RC that authorized respondent to release these records accompanied the investigator's request. Dr. Esenberg did not provide Patient RC's treatment records to the investigator as requested.

3 Dr. Esenberg provided treatment to Patient RC in January, 1993, to insureds of Blue Cross between July 12, 1993 and November 5, 1993, and to Patient SZ in October, 1993. *Findings of Fact #8,12,16* It is not clear from the evidence whether these services formed the basis for the Board's Order

4. Section 446.02 (8), Stats., states that "Every practicing chiropractor shall have in effect professional liability insurance. The examining board shall promulgate rules establishing the minimum amount of insurance required under this subsection". This provision was enacted by 1993 Wis. Act 31, which became effective on April 1, 1994. The rule adopted by the Board became effective on June 1, 1994. *s. Chir 3.07, Wis. Adm. Code.*

II. Discipline

The Chiropractic Examining Board is authorized under s. 446.03, Stats., to reprimand a licensee or limit, suspend or revoke the license of any licensee if it finds that the licensee has engaged in conduct described under that section.

Having found that Dr. Esenberg violated ch. 446, Stats., and rules relating to the practice of chiropractic, a determination must be made regarding what type of discipline, if any, should be imposed. The Administrative Law Judge recommends that Dr. Esenberg's license be suspended for a period of one year and that such time period be reduced by the amount of time he has been suspended under the Board's October 24, 1995, Summary Suspension Order. This measure is designed to assure protection of the public and to deter other licensees from engaging in similar misconduct.

The purposes of discipline by occupational licensing boards are to protect the public, deter other licensees from engaging in similar misconduct and to promote the rehabilitation of the licensee. State v. Aldrich, 71 Wis. 2d 206, 237 N.W. 2d 689 (1976). Punishment of the licensee is not a proper consideration. State v. McIntyre, 41 Wis. 2d 481, 164 N.W. 2d 235 (1969).

The Division of Enforcement recommends that Dr. Esenberg's license be revoked. The respondent states that an appropriate order in this case would be to mandate that he: 1) carry malpractice insurance; 2) follow the terms of his probation; 3) reinstate his registration; 4) provide proof of all continuing education credits, and 5) provide proof that he is able to take good x-rays by providing copies of quality x-rays or demonstrating competence in using his x-ray machine to another licensed chiropractor in good standing in the profession. Dr. Esenberg states that if any suspension is ordered, it be stayed until he is over 65, so that he can at least practice to the point where he can collect full social security benefits. He is now age 61. *Transcript, p. 65, lines 1-2; 68, lines 15-25; 70, lines 17-25.*

Factors which were taken into consideration in recommending the one year suspension period, include the fact that Dr. Esenberg was on notice in July, 1995, of the Board's position relating to practice without a current registration. He had been reprimanded by the Board in January, 1994 for the same conduct. Yet he provided services to Patient MAG in July of 1995, after the expiration of his registration in December, 1994. In addition, he knew at the time that he submitted the claims to Blue Cross for payment that his registration had expired.

Finally, Dr. Esenberg's failure to obtain a second set of x-rays for Patient KAK and SZ, and his failure to perform an adequate examination of Patient SZ in order to assess her condition reflects his lack of competence to practice in a manner which safeguards the interests of the patients and the public. *Findings of Fact #22-30; Transcript, p. 55-58.*

Suspension of Dr. Esenberg's license, rather than revocation, is being recommended for several reasons. First, there is no evidence that Dr. Esenberg failed to maintain a current registration or that he violated any statute or rule relating to the practice of chiropractic from the time of his initial licensure on November 12, 1981 to the time of the expiration of his registration on December 31, 1992.

Second, the conduct which forms the basis of the Findings of Fact relating to fraudulent representations and the criminal conviction is the same. Although the conduct constitutes two separate violations, for purposes of considering appropriate measure to assure protection of the public, it should be viewed as one set of facts.

Third, except for the 14 claims submitted to Blue Cross which resulted in the criminal conviction, the occurrences of the violations in this case are not numerous in light of the total licensure period. The conduct involved one violation relating to failure to maintain current registration; one violation relating to failure to obtain malpractice insurance; one violation relating to failure to cooperate with the Board investigation; one additional violation relating to billing for an examination which he did not perform and two violations relating to patient care. In reference to the 14 claims submitted to Blue Cross, the evidence does establish that the services billed for were in fact provided by Dr. Esenberg. *Transcript, p. 36, lines 9-18.*

Based upon the record herein, the Administrative Law Judge recommends that the Chiropractic Examining Board adopt as its final decision in this matter, the proposed Findings of Fact, Conclusions of Law and Order as set forth herein.

Dated at Madison, Wisconsin this 26th day of April, 1996.

Respectfully submitted,

Ruby Jefferson-Moore

Ruby Jefferson-Moore
Administrative Law Judge