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STATE OF WISCONSIN

BEFORE THE DENTISTRY EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY

PROCEEDINGS AGAINST:

HOWARD J. LUBIN, D.D.S.,

FINAL DECISION AND ORDER

RESPONDENT

LS0109053DEN

Division of Enforcement

96 DEN 104; 97 DEN 009; 97 DEN 012; 97 DEN 061

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

Howard J. Lubin, D.D.S.

1400 Lombardi Avenue, Suite D

Green Bay, WI 54304

Wisconsin Dentistry Examining Board

1400 E. Washington Ave.

P.O. Box 8935

Madison, WI 53708-8935

Department of Regulation And Licensing

Division of Enforcement

1400 E. Washington Ave.

P.O. Box 8935

Madison, WI 53708-8935

The Wisconsin Dentistry Examining Board received a Stipulation submitted by the parties to the above-captioned matter. The Stipulation, a copy of which is attached hereto, was executed by Howard J. Lubin, D.D.S., personally, and by his attorney, Tony A. Kordus, and by Gilbert C. Lubcke, attorney for the Department of Regulation and Licensing, Division of Enforcement. Based upon the Stipulation of the parties, the Wisconsin Dentistry Examining Board makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Howard J. Lubin, D.D.S., 1400 Lombardi Avenue, Green Bay, Wisconsin, 54304, was born on 12/4/57 and has been licensed and registered to practice dentistry in the state of Wisconsin since 8/1/83, license #3187.
2. Dr. Lubin is engaged in the practice of general dentistry.
3. Dr. Lubin was previously reprimanded by a Final Decision and Order of the Wisconsin Dentistry Examining Board

dated 5/3/95 for a violation of sec. 447.07(3)(a) and (h), Stats. The Wisconsin Dentistry Examining Board found that Dr. Lubin had failed to completely obturate a canal in tooth #4 leaving the fill of the canal approximately 2 to 3 mm short of the canal length.

COUNT I

4. D.P., the patient herein, was born on 7/10/58 and was Dr. Lubin's patient from 5/30/84 through 8/26/96.

5. On 7/31/95, the patient presented at Dr. Lubin's office with pain associated with tooth #18. Dr. Lubin diagnosed an incomplete fracture of the distal buccal cusp. On 7/31/95, he commenced a crown prep on tooth #18. The patient continued to experience pain and on 8/9/95, Dr. Lubin diagnosed two incomplete fractures of the buccal cusp. On 8/11/95, Dr. Lubin obtained a periapical x-ray and recommended root canal therapy on tooth #18. He commenced the root canal therapy on 8/18/95. During the course of this root canal therapy, Dr. Lubin created a lingual perforation in tooth #18. He did not identify the lingual perforation at the time he created it or at any time thereafter and, therefore, he did not advise the patient of the perforation or perform any procedures to repair it.

6. On 3/25/97, the patient presented at an endodontist's office complaining of pain associated with tooth #18. The endodontist diagnosed failed root canal therapy, inflammation and infection and identified the lingual perforation in tooth #18. The endodontist administered antibiotics, repaired the lingual perforation and performed a root canal therapy retreatment.

COUNT II

7. P.K., the patient herein, was born on 1/2/58 and was Dr. Lubin's patient from 10/3/95 through 10/31/96.

8. The patient presented at Dr. Lubin's office for a general dental examination on 10/3/95. Dr. Lubin diagnosed dental caries in tooth #30 that he believed approached the pulp chamber. On 10/14/95, the patient contacted Dr. Lubin and reported pain associated with tooth #30. On 10/14/95, Dr. Lubin prescribed antibiotics and pain medication and on 10/17/95, he commenced root canal therapy on tooth #30. He instrumented 3 canals and completed the root canal therapy on 10/19/95. During the course of the root canal therapy, Dr. Lubin created a furcation perforation in tooth #30. He did not identify the furcation perforation at the time he created it or at any time thereafter and, therefore, he did not advise the patient of the perforation or perform any procedures to repair it. Dr. Lubin advised the patient that it was important to restore tooth #30 with a post and core and crown promptly after the root canal therapy had been completed. The patient returned to Dr. Lubin's office on 3/5/96 with a fracture of the distal lingual cusp and on 5/10/96 with an additional fracture of the lingual cusp. On 5/10/96, Dr. Lubin also diagnosed a class I furcation associated with tooth #30. Dr. Lubin was of the opinion that the class I furcation had developed sometime between the time that he completed the root canal therapy and when he examined the patient on 5/10/96. The patient did not return to Dr. Lubin's office for preparation for the crown until 5/21/96. Dr. Lubin placed the crown on 5/30/96. The patient returned to Dr. Lubin's office on 9/17/96 and again on 9/19/96 to have the crown recemented because it had come loose. The patient continued to experience problems with tooth #30 thereafter.

9. On 2/6/97, the patient went to an endodontist for further evaluation of tooth #30. She reported pain and discomfort when biting and a bad taste in her mouth. The endodontist noted that the crown was loose, diagnosed dental caries under the crown and identified the furcation perforation. The endodontist was of the opinion that tooth #30 was not restorable and recommended extraction. On 3/27/97, an oral surgeon extracted tooth #30.

COUNT III

10. D.O., the patient herein, was born on 12/14/54 and was Dr. Lubin's patient from 5/15/95 through 8/12/96. D.O. was also employed by Dr. Lubin as a hygienist.

11. On 5/15/95, the patient presented with a complaint of sporadic pain associated with tooth #29. Tooth #29 had previously been treated by root canal therapy by another dentist. Dr. Lubin performed a general examination on 5/15/95 including an examination of tooth #29. As part of his evaluation of tooth #29, he obtained a periapical x-ray of tooth #29. Based upon his clinical examination and the periapical x-ray, Dr. Lubin diagnosed a chronic area of infected bone at the apex of tooth #29. Dr. Lubin was of the opinion that this area of chronic infection was probably the result of a failed root canal therapy. Dr. Lubin recommended and elected to perform an apicoectomy on tooth #29 rather than root canal therapy retreatment. Root canal therapy retreatment was a viable alternative mode of treatment to address the patient's condition.

12. Tooth #29 is located in close proximity to the mental foramen where nerve bundles exit the jaw and enter the soft tissue. An apicoectomy performed on tooth #29 places the patient at substantially increased risk of traumatic injury to the nerve bundles exiting the jaw with resultant temporary or permanent partial paresthesia. Root canal therapy retreatment of tooth #29 creates significantly less risk of paresthesia.

13. On 6/2/95, Dr. Lubin went beyond the normal bounds of his practice and experience by performing an apicoectomy on tooth #29. He removed the infected bone and a small portion of the apex of the root of the tooth. In the process of manipulating the tissue in the vicinity of tooth #29 while performing the apicoectomy, Dr. Lubin caused traumatic injury to the nerve bundles resulting in a persistent paresthesia.

COUNT IV

14. D.O., the patient herein, was born on 12/14/54 and was Dr. Lubin's patient from 5/15/95 through 8/12/96. D.O. was also employed by Dr. Lubin as a hygienist.

15. On 5/31/96, the patient presented with a complaint of sporadic pain associated with tooth #18. Dr. Lubin performed a clinical examination including electrical pulp testing and obtained a periapical x-ray of tooth #18. He diagnosed probable deterioration of the nerve with a lesion on the medial root. Dr. Lubin recommended root canal therapy. Dr. Lubin commenced root canal therapy on tooth #18 on 5/31/96 and concluded the procedure on 6/17/96. During the course of the root canal therapy, Dr. Lubin broke an endodontic file in the mesial lingual root and a portion of the file was retained in the apex of the root. Dr. Lubin did not recognize that he had broken the file and that a portion of the file had been retained in the apex of the mesial lingual root at the time that the event occurred or at any time thereafter. Dr. Lubin did not identify the retained portion of the file on a periapical x-ray that he took on 6/17/96 at the conclusion of the root canal therapy. Dr. Lubin did not advise the patient of the retained file.

16. On 9/12/96, the patient was examined by an endodontist. The endodontist identified the retained file in the apex of the mesial lingual root of tooth #18 and was of the opinion that tooth #18 needed root canal therapy retreatment. The endodontist performed the root canal therapy retreatment on tooth #18 but was unable to remove the retained file. The patient's symptoms resolved following the root canal therapy retreatment.

CONCLUSIONS OF LAW

1. The Wisconsin Dentistry Examining Board has jurisdiction in this proceeding pursuant to sec. 447.07, Stats.
2. The Wisconsin Dentistry Examining Board has the authority to resolve this disciplinary proceeding by stipulation without an evidentiary hearing pursuant to sec. 227.44(5), Stats.
3. Dr. Lubin's conduct as set forth in Count I of the Findings of Fact was conduct that indicates a lack of knowledge of and an inability to apply principles and skills of dentistry contrary to sec. 447.07(3)(h), Stats. in that he failed to identify the lingual perforation in tooth #18 at the time he created it or at any time thereafter, failed to perform any procedure to repair the lingual perforation and failed to advise the patient of the lingual perforation.
4. Dr. Lubin's conduct as set forth in Count II of the Findings of Fact was conduct that indicates a lack of knowledge of and an inability to apply principles and skills of dentistry contrary to sec. 447.07(3)(h), Stats. in that he failed to identify the furcation perforation in tooth #30 at the time he created it or at any time thereafter, failed to perform any procedure to repair the furcation perforation and failed to advise the patient of the furcation perforation.
5. Dr. Lubin's conduct as set forth in Count III of the Findings of Fact was conduct that indicates a lack of knowledge of and an inability to apply principles and skills of dentistry contrary to sec. 447.07(3)(h), Stats. in that he went beyond the normal bounds of his practice and experience by performed an apicoectomy on tooth #29 rather than a root canal therapy retreatment subjecting the patient to a substantially increased risk of paresthesia and, in the process of performing the apicoectomy, caused traumatic injury to the nerve bundles resulting in persistent paresthesia.
6. Dr. Lubin's conduct as set forth in Count IV of the Findings of Fact was conduct that indicates a lack of knowledge of and an inability to apply principles and skills of dentistry contrary to sec. 447.07(3)(h), Stats. in that he failed to recognize at the time that the event occurred or at any time thereafter that an endodontic file broke while he was performing root canal therapy and was retained at the apex of the mesial lingual root of tooth #18 and he failed to advise the patient of the retained file.
7. The Wisconsin Dentistry Examining Board has the authority pursuant to sec. 440.22, Stats., to assess the costs of this proceeding against Dr. Lubin.

ORDER

NOW, THEREFORE, IT IS ORDERED that the Stipulation of the parties is approved.

IT IS FURTHER ORDERED that Howard J. Lubin's license to practice dentistry in the state of Wisconsin is limited under the following terms and conditions:

1. Dr. Lubin will not perform or attempt to perform apicoectomies on any patient on or after the effective date of this Final Decision and Order.

2. Dr. Lubin will not perform or attempt to perform any endodontic procedures in his private practice until he has satisfactorily completed the educational program in endodontics administered by the Marquette University School of Dentistry as hereinafter set forth. Satisfactory completion of the educational program within the meaning of this paragraph will be established by certification of satisfactory completion of the educational program by the Marquette University School of Dentistry filed in writing with the Wisconsin Dentistry Examining Board or its designee. Dr. Lubin will be permitted to continue to perform endodontic procedures under the supervision of his instructors at the Marquette University School of Dentistry to the extent that performing these procedures is necessary to comply with the educational program administered by the Marquette University School of Dentistry.

3. Dr. Lubin will participate in an educational program administered by the Marquette University School of Dentistry under the supervision of William K. Lobb, D.D.S., Dean of the Marquette University School of Dentistry. This educational program will be developed and structured as follows:

a. The Marquette University School of Dentistry will conduct an assessment of Dr. Lubin's skills and knowledge in the practice of endodontics including the diagnosis and treatment of conditions that may require the application of endodontic procedures. The purpose of the assessment is to assist the Marquette University School of Dentistry in developing an educational program for Dr. Lubin that addresses all aspects of the practice of endodontics. The Marquette University School of Dentistry may require Dr. Lubin to produce a specified selection of his patient records, with adequate precautions taken to protect patient confidentiality, to assist in this assessment. The Marquette University School of Dentistry may also utilize records and other documents from the investigative file compiled by the Department of Regulation and Licensing, Division of Enforcement in support of this disciplinary action to assist with the assessment. The Marquette University School of Dentistry may use any additional techniques as the Marquette University School of Dentistry determines to be appropriate to perform this assessment. The assessment will be completed within 90 days of the effective date of this Final Decision and Order.

b. The Marquette University School of Dentistry will develop an educational program in endodontics within 30 days of completion of the assessment and will submit the proposed educational program to the Wisconsin Dentistry Examining Board or its designee for approval prior to implementation of the educational program. The educational program may consist of academic instruction, clinical instruction or both. The educational program will include written and oral examinations to assess Dr. Lubin's performance in the educational program.

c. The Wisconsin Dentistry Examining Board or its designee will notify the Marquette University School of Dentistry in writing of the approval of the educational program.

d. If the Marquette University School of Dentistry is unable to develop an educational program for Dr. Lubin, the Marquette University School of Dentistry will so notify the Wisconsin Dentistry Examining Board and this matter will be returned to the Division of Enforcement for further proceedings.

e. Dr. Lubin will commence the educational program within 60 days of the date on which the Wisconsin Dentistry Examining Board or its designee notifies the Marquette University School of Dentistry in writing of the approval of the educational program. Dr. Lubin will satisfactorily complete the educational program and will demonstrate satisfactory performance on all written and oral examinations administered to him within 18 months of the date of this Final Decision and Order.

f. Upon satisfactory completion of the educational program and satisfactory performance on the oral and written evaluations, the Marquette University School of Dentistry will certify in writing satisfactory completion of the educational program to the Wisconsin Dentistry Examining Board.

g. Dr. Lubin will be responsible for the full costs of the assessment, the educational program and the examinations and will make payment to the Marquette University School of Dentistry in accordance with the payment schedule established by the Marquette University School of Dentistry.

4. If Dr. Lubin fails within 18 months of the date of this Final Decision and Order to satisfactorily complete the educational program and to demonstrate satisfactory performance on the oral and written examinations and the Marquette University School of Dentistry cannot certify in writing satisfactory completion of the educational program, his license will be permanently limited, without further notice or hearing, to prohibit him from engaging in the practice of endodontics at any time in the future.

5. Dr. Lubin's endodontic practice will be monitored for a period of 1 year from the date on which the Wisconsin Dentistry Examining Board receives certification in writing from the Marquette University School of Dentistry that Dr. Lubin has satisfactorily completed the educational program.

- a. The Wisconsin Dentistry Examining Board will select the person to perform the monitor function.
- b. The monitoring will be accomplished by review of Dr. Lubin's dental records including, but not limited to, treatment records, dental x-rays and consultation reports, for patients examined or treated by Dr. Lubin for endodontic problems within the 3 months preceding the date of the review.
- c. The monitor function and record review will be conducted every 3 months commencing 3 months after the Wisconsin Dentistry Examining Board receives the certification in writing from the Marquette University School of Dentistry that Dr. Lubin has satisfactorily completed the educational program.
- d. Dr. Lubin will maintain a list of all patients examined or treated by him for endodontic problems in the 3 months preceding each review and brief descriptions of the presenting dental problems, the treatments administered to each patient and all complications associated with the treatment. Dr. Lubin will provide this list to the person performing the monitor function within a reasonable period of time prior to the record review to permit him or her to select from the list the patient records to review.
- e. The reviews will include a discussion between the person reviewing the records and Dr. Lubin of the diagnoses and treatments rendered by Dr. Lubin and any complications associated with the treatments in each of the cases reviewed.
- f. The person reviewing the records will file a report with the Wisconsin Dentistry Examining Board following each review of the records assessing Dr. Lubin's practice of endodontics and describing the results of the review.
- g. If Dr. Lubin has not performed a minimum of 75 endodontic procedures in the 1 year period over which his practice of endodontics has been monitored, the monitor function will continue at 3 month intervals following the procedures described paragraph 5 of this Order until he has performed a minimum of 75 endodontic procedures. The monitor will include in his or her report notification to the Dentistry Examining Board when Dr. Lubin has performed a minimum of 75 endodontic procedures.
- h. Dr. Lubin will pay the full costs of the monitor function including the professional fees of the person selected by the Wisconsin Dentistry Examining Board to perform the monitor function. Dr. Lubin will make payment in full of the fees associated with the monitor function within 30 days of the date on which the person performing the monitor function submits a statement for professional services and expenses to him.

6. All certifications, reports or other documents required to be filed with the Wisconsin Dentistry Examining Board under the terms of this limited license will be filed with:

Department Monitor
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
1400 East Washington Ave.
Madison, WI 53708-8935

All certifications, reports or other documents required to be filed with the Wisconsin Dentistry Examining Board under the terms of this limited license will be deemed filed with the Wisconsin Dentistry Examining Board upon receipt by the Department Monitor.

IT IS FURTHER ORDERED that Howard J. Lubin, D.D.S., will pay the costs of this proceeding in the amount of \$2500.00 to the Department of Regulation and Licensing, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin, 53708-8935 within 60 days of the date of this Final Decision and Order.

IT IS FURTHER ORDERED that Howard J. Lubin, D.D.S. will appear before the Wisconsin Dentistry Examining Board, as the Wisconsin Dentistry Examining Board directs, after the educational program and the monitor function have been completed to demonstrate to the Wisconsin Dentistry Examining Board full compliance with all of the terms of this Final Decision and Order. If Dr. Lubin has fully complied with the terms of this Final Decision and Order and Dr. Lubin has satisfied all other requirements for licensure, the Wisconsin Dentistry Examining Board will remove all limitations from his license except for the permanent prohibition against performing apicoectomies.

IT IS FURTHER ORDERED that investigative files 96 DEN 104, 97 DEN 009, 97 DEN 012 and 97 DEN 061 shall be, and hereby are, closed and all allegations contained therein are fully resolved by the entry of this Final Decision and Order.

IT IS FURTHER ORDERED that this Final Decision and Order is effective on the date upon which this Final Decision and Order is signed by the Wisconsin Dentistry Examining Board.

The rights of a party aggrieved by this Final Decision and Order to petition the Wisconsin Dentistry Examining Board for rehearing and to petition for judicial review are set forth in the attached "Notice of Appeal Information".

Dated at Madison, Wisconsin, this 5th day of September, 2001.

WISCONSIN DENTISTRY EXAMINING BOARD

Bruce Barrette

Member, Wisconsin Dentistry Examining Board