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Before The
State Of Wisconsin
CHIROPRACTIC EXAMINING BOARD

In the Matter of the Disciplinary Proceedings
Against **TY C. WADE, D.C.**, Respondent

FINAL DECISION AND ORDER

Order No. 000377 4

Division of Legal Services and Compliance Case No. 13 CHI 002


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

ORDER

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

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

Dated at Madison, Wisconsin on the 05 day of March, ~~2014~~ 2015


Member
Chiropractic Examining Board



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Disciplinary Proceedings
Against **TY C. WADE, D.C.**, Respondent

DHA Case No. SPS-13-0050
DLSC Case No. 13 CHI 002

PROPOSED DECISION AND ORDER

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

Ty C. Wade, D.C., by

Attorney Bradley C. Fulton
DeWitt, Ross & Stevens, S.C.
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Madison, WI 53703-2865

Wisconsin Chiropractic Examining Board
P.O. Box 8366
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Department of Safety and Professional Services, Division of Legal Services and
Compliance, by

Attorney James E. Polewski
Department of Safety and Professional Services
Division of Legal Services and Compliance
P. O. Box 7190
Madison, WI 53707-7190

PROCEDURAL HISTORY

On January 16, 2014, the Department of Safety and Professional Services, Division of Legal Services and Compliance (Division), served a Complaint on Respondent Ty C. Wade, D.C. The Complaint alleged that Wade practiced chiropractic without a license between December 21 and February 4, 2013, in violation of Wis. Stat. § 446.02(1)(a)¹ and Wis. Admin.

¹ Wisconsin Stat. § 446.02(1)(a) states that "no person may engage in the practice of chiropractic or attempt to do so or hold himself or herself out as authorized to do so, unless such person . . . [i]s licensed by the examining board."

Code § Chir 6.02(25).² The factual foundation for the violation alleged in the Complaint was that on December 21, 2012, Wade's license changed from "active" to "expired" due to his being unable to renew his license because he was delinquent in payment of Wisconsin taxes.³

Following several prehearing conferences, on March 20, 2014, the Division filed a motion for summary judgment. Wade filed a response on May 21, 2014, the Division filed a reply on June 4, 2014, and Wade filed an additional response on June 13, 2014. On July 31, 2014, the undersigned administrative law judge (ALJ) issued a Summary Judgment Order (S.J. Order), granting the Division's motion in part and denying it in part. A contested case hearing was held on the remaining issues of discipline and costs on October 23, 2014.

FINDINGS OF FACT

1. Respondent Ty Wade, D.C., is licensed in the State of Wisconsin as a chiropractor, license number 4012-12. The license was first granted on January 13, 2004. (S.J. Order)

2. Until February 19, 2014, Wade's most recent address on file with the Department was 221 E. Green Bay Avenue, Saukville, Wisconsin 53080. That address of record was changed on February 19, 2014, to 620 E. Green Bay Avenue, Saukville, Wisconsin 53080. (S.J. Order)

3. Pursuant to Wis. Stat. § 440.08(2)(a)23p. (2009-2010), the renewal date for Wade's license was December 15, 2012. Wade's license expired on December 14, 2012. (S.J. Order)

4. Prior to that time, Wade had completed all of the continuing education and other necessary requirements in order to renew his license. He delegated the task of renewing the license to an employee in his clinic responsible for such matters, who had successfully and timely renewed Wade's license and handled all credentialing-related issues in the past. (S.J. Order)

5. Unbeknownst to Wade, the employee forgot to renew his license on or before December 12, 2012. (S.J. Order)

6. On December 21, 2012, the status of Wade's license to practice chiropractic in Wisconsin changed from "active" to "expired" because he had not renewed the license on or before December 14, 2012. (S.J. Order)

² Wisconsin Admin. Code § Chir 6.02(25) defines "unprofessional conduct" by a chiropractor to include "[v]iolating any provision of ch. 446, Stats., or any rule or order of the board." Unprofessional conduct is prohibited under Wis. Stat. § 446.03(5). Thus, technically, the Complaint should have also alleged a violation of Wis. Stat. § 446.03(5).

³ As it turns out, the Division's allegation of practicing without a license was not actually based on delinquent taxes. Rather, it was based on a failure to renew his license in a timely manner. During summary judgment proceedings, the Division argued that after the time period alleged in the Complaint, from February 5-27, 2013, Wade practiced without a license due to delinquent taxes and that this information, while not alleged as a violation, should be taken into account for purpose of discipline and costs. The ALJ rejected this argument in its summary judgment order but informed the Division that it could present additional evidence on the issue of delinquent taxes at the hearing. The Division chose instead to abandon any argument regarding delinquent taxes.

7. In early January, 2013, a representative from ChiroCare, one of the organizations with which Wade is credentialed, informed him that his license on the State of Wisconsin website had not been updated. Wade asked his employee about the matter and was told that she had taken care of his renewal and that it would probably take some time for the website to be updated. (S.J. Order)

8. On January 4, 2013, Wade's employee attempted to renew the license using the Department's on-line renewal system. That attempt to renew the license failed because renewal of the chiropractic license requires current certification of training in cardiopulmonary resuscitation (CPR) and the employee incorrectly checked the box indicating that Wade did not meet that requirement. (S.J. Order)

9. At the time she failed to renew Wade's license, Wade's employee was suffering from mental health issues for which she was hospitalized. She was ultimately terminated from employment with Wade at some point during the third week of January 2013. (Hrg. Tr., pp. 9-11, 31)

10. On January 11, 2013, the Department attempted to notify Wade of the incomplete attempt to renew the license by sending a postcard to his address of record at the Department, but the postcard was returned to the Department on January 22, 2013, undeliverable as addressed and unable to forward. (S.J. Order)

11. On January 14, 2013, Wade was again informed by a ChiroCare representative that the licensing website had not yet been updated. That same day, Wade placed multiple calls to the Department, speaking with various personnel. On four occasions, he also faxed or attempted to fax items to the Department, including proof of the CPR certification. (S.J. Order)

12. As of January 14, 2013, the Department had all the required documentation necessary for Wade's license renewal, including the CPR certification. (Ex. 1.B; Hrg. Tr., pp. 14-15, 74)

13. During his contacts with the Department on January 14, 2013, Wade spoke to a Department employee whose first name he recalls as Cindy. Of the employees he spoke to that day, Cindy became his contact because she appeared to Wade to know what was going on. Cindy informed Wade that he had a grace period,⁴ that everything was just a clerical issue, and that it was just a matter of getting all the information in. She explained that the deadline had just recently moved from January to December, which was causing some issues and that there had been recent structural changes at the Department which made communication between divisions difficult. (Hrg. Tr., p. 15)

⁴ Wisconsin Stat. § 227.51(2) contains what may be referred to as a "grace period" whereby a person's license does not expire until an application for renewal of the licensee has been finally acted upon and the time for seeking review of an adverse decision has expired. However, this provision applies only if the licensee has made a timely and sufficient application for renewal of the license. There is no dispute here that Wade's application for renewal was untimely.

14. Wade did not know during this conversation that his license had ever been expired. Had Wade believed that to be the case, he would have driven to Madison immediately and provided all of the required information and met face to face with Department employees. (Hrg. Tr., pp. 15-16, 34)

15. On January 17, 2013, Wade contacted the Department to make sure staff had received the fax and all of the information they needed. He was assured that he was compliant. (Hrg. Tr., pp. 16-17)

16. At some point between the weeks of January 17, 2013 and February 4, 2013, Wade observed on the computer that there was no change in his status. Concerned, he placed multiple calls to the Department during this time, attempting to determine the status of his renewal. (S.J. Order; Hrg. Tr., pp. 17)

17. On February 4, 2013, Wade spoke with a Department employee again, who he believes was Cindy, and was told that there was a grace period, that it was just a matter of having all of the information, and that he should send another fax showing CPR certification. On that same date, Wade faxed to the Department another copy of the certificate of current CPR training. On February 5 or 6, 2013, he was told by the Department that the matter was resolved. (S.J. Order; Hrg. Tr., pp. 17-18)

18. During the time period from December 15, 2012 to February 4, 2013, Respondent practiced chiropractic. (S.J. Order)

DISCUSSION AND CONCLUSIONS OF LAW

Violation

As previously determined in the July 31, 2014 Summary Judgment Order, Wade practiced chiropractic without a valid license from December 15, 2012 to February 4, 2013 because he failed to renew his license in a timely manner. This conduct constituted a violation of Wis. Stat. § 446.02(1)(a), Wis. Stat. § 446.03(5), and Wis. Admin. Code § Chir 6.02(25).

Discipline

The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Division requests that Wade be reprimanded and that his license be limited to require him to send written notification to individuals and entities he billed for chiropractic services during the period he was unlicensed, December 14, 2012 through February 4, 2013, and inform them that he was not licensed and that he billed for chiropractic services he was not legally authorized to perform during that time. The Division states that this discipline is consistent with the disciplinary objectives set forth in *Aldrich* and is also consistent with prior Board decisions involving unlicensed chiropractors.

Wade asserts that no discipline at all should be imposed and the Complaint should be dismissed as this was a short-term, inadvertent error which he immediately and repeatedly attempted to remedy. He also states that the nine prior Board decisions provided by the Division are distinguishable, and that after his conversations with the Department on January 14, 2013, the fault lay with the Department for not providing accurate information to him and for losing evidence of CPR course completion which he had provided on that date.

In the nine previous Board decisions involving the practice of chiropractic without a license, the Board ordered a reprimand, and, with the exception of one case where the licensee had already provided notification, ordered the notification requirements advocated here. *See In the Matter of Disciplinary Proceedings Against Drew M. Kaminski, D.C.*, Order No. 0001149 (Oct. 6, 2011) (practiced with expired license for one year and five months; licensee also had issues with continuing education, although Board stated he was in “technical compliance” during unlicensed period); *In the Matter of Disciplinary Proceedings Against James Charles Kolbeck, D.C.*, Order No. 0001148 (Oct. 6, 2011) (practiced with expired license for one year and six months); *In the Matter of Disciplinary Proceedings Against John T. Riegleman, D.C.*, Order No. 0000813 (April 27, 2011) (practiced with expired license for approximately three months); *In the Matter of Disciplinary Proceedings Against Danny B. Futch, D.C.*, Order No. 0001452 (March 29, 2012) (practiced with expired license for five months; at all times licensee in “technical compliance” with licensing requirements); *In the Matter of Disciplinary Proceedings Against Russell M. Sherbondy, D.C.*, Order No. 0002014 (Jan. 24, 2013) (practiced with expired license for 11 months due to early lease termination of office space and relocation of practice twice within eight-month period); *In the Matter of Disciplinary Proceedings Against Dale R. Alt, D.C.*, Order No. 0002267 (Jan. 24, 2013) (practiced with expired license on three occasions, for approximately four months, three weeks and three weeks, respectively; at all times while unlicensed, licensee was in compliance with licensing requirements); *In the Matter of Disciplinary Proceedings Against Jeremy J. Fritz, D.C.*, Order No. 0002269 (Jan. 24, 2013) (practiced with expired license for approximately two years and failed to complete continuing education requirements, claiming office manager responsible for renewal suffered from a condition which affected job performance; in addition to reprimand and notification requirements, Board suspended license for two weeks); *In the Matter of Disciplinary Proceedings Against Robert C. Kurtz, D.C.*, Order No. 0000343 (Aug. 12, 2010) (practiced while ineligible for license due to tax delinquency for approximately three months); *In the Matter of Disciplinary Proceedings Against Richard L. Olson, D.C.*, Order No. 0002268 (Jan. 24, 2013) (practiced with expired license for eight months; licensee also short two of required 40 continuing education credits; when licensee discovered he was not in compliance, he immediately stopped seeing patients).

Of these nine cases, five involved a relatively short period of practicing without a valid license, with these short periods ranging between approximately three months and five and a half months. Almost all of these cases involved inadvertent failures to renew, which, when discovered by the licensee, were addressed immediately.

In order to ensure fairness and uniformity, this tribunal generally follows prior Board decisions. I conclude that the above-referenced cases are sufficiently similar to the instant case

and that the factors articulated in *Aldrich* warrant imposition of similar discipline to that imposed in the prior cases. It is true that in the instant case, Wade practiced for only a month and a half without a license, less than that in the prior cases. Moreover, only two weeks of that time, December 14, 2012 through January 14, 2013, can be blamed entirely on Wade because as of January 14, 2013, the Division had what it needed for license renewal but then evidently misplaced the CPR certification and provided Wade with incorrect information regarding a grace period, all of which affected his ability to effectively renew. Given these distinctions and the fact that the violation occurred as a result of errors attributable to Wade's employee on whom he had previously relied, if it were in my authority to impose an administrative warning, I would strongly consider doing so, along with the notification requirements requested, although only through January 14 rather than through the requested date of February 4, 2013.

However, the Division effectively argues that that an administrative warning is unauthorized once a prosecution has commenced and a hearing has been held on the matter. I conclude that provisions of Wis. Admin. Code ch. SPS 8 support this interpretation, particularly Wis. Admin. Code § SPS 8.02(6)(c) and (d), which suggest that administrative warnings occur prior to prosecution, and Wis. Admin. Code § SPS 8.05 and 8.06, which provide procedures for review of administrative warnings which are entirely distinct from those applicable to these proceedings.

Thus, I will impose the least severe discipline warranted by the record and authorized by this tribunal at this juncture, which is a reprimand, along with the limitations on Wade's license related to notification. The limitation requires that, within 30 days of the Final Decision and Order in this matter, Wade shall notify the individuals and entities he billed for chiropractic services from December 14, 2012 through January 14, 2013 that he was unlicensed and that he billed for chiropractic services he was not legally authorized to perform during this time period. In addition, within 60 days of the Board's Final Decision and Order, Wade must file a notarized affidavit with the Department Monitor of his satisfactory notification, with the requirements and supporting documentation set forth in the Order section below.

Costs

The Division has the authority to assess costs pursuant to Wis. Stat. § 440.22. With respect to imposition of costs, factors to consider include: (1) the number of counts charged, contested and proven; (2) the nature and seriousness of the misconduct; (3) the level of discipline sought by the prosecutor; (4) the cooperation of the respondent; (5) any prior discipline; and (6) the fact that the Department is a program revenue agency, funded by other licensees. *See In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI).

Regarding the first factor, I note that one count was alleged, that of practicing chiropractic without a license, and that the Division has prevailed on that count, although on different facts from those alleged in the Complaint. With respect to the nature and seriousness of the misconduct, the Division conceded that "it's not a particularly serious thing in terms of this is going to hurt somebody," but stated that it is serious in the sense that it undermines the licensing scheme which allows only those who are given permission to practice a license. Permission is granted based on competency and the ability to follow standards and requirements governing the

profession. (Hrg. Tr., pp. 51-52) Although the Division's analysis is sound in principal, I note that Wade's errors were that he failed to timely renew his license and provided inaccurate information that he had not completed a CPR course when in fact he had completed it. The errors were inadvertent, were resolved in a very short period of time, and were due to Wade's reliance on his employee who had reliably completed these tasks in the past.

The level of discipline sought by the Division also operates primarily in Wade's favor. The Division sought a reprimand and notification requirements for the period of December 14, 2012 through February 4, 2013. The Division stated at hearing that a reprimand is "the lightest possible discipline allowed by the State of Wisconsin." (Hrg. Tr., p. 52) I agree that in the spectrum of discipline, a reprimand is on the far lower end. With respect to the notification requirements and possible recoupment by payers for Wade's services, the Division's request may be severe in that it may involve a large sum of money;⁵ however, the impact is offset by the fact that any recoupment period represents a short period of time of Wade's overall practice. Moreover, significantly, the entire time period for notification requested by the Division is not granted; rather, it is reduced by approximately half, to run only through January 14, 2013 rather than through February 4, 2013, as requested.

With respect to Wade's cooperation in these proceedings, I note that he has cooperated fully before this tribunal in the sense that he has always provided what was required of him in a timely manner, appeared at all conferences and the hearing, and followed the directives required by law and by this tribunal. The Division argues that Wade did not cooperate because he challenged the allegations and did not admit any culpability until late into the proceedings, when he agreed that his employee did not complete his renewal in a timely or accurate manner. However, assuming a denial of allegations is a proper consideration when analyzing a licensee's level of "cooperation," I note that it was undisputed in this case that Wade did not realize he was ever unlicensed until, at the earliest, he received the Division's proposed stipulation of facts in March of 2014 (Ex. 1.C; Hrg. Tr., pp. 83, 85), approximately two months after the Complaint was filed, or at the latest, when he filed his response to the Division's motion for summary judgment on May 21, 2014. In his May 21, 2014 response, Wade admitted that he had failed to submit his renewal on time. Based on the foregoing, I conclude that Wade cooperated in these proceedings.

The fifth factor unequivocally operates in Wade's favor as he has no prior discipline. The only factor which categorically operates in the Division's favor, which it does in every case, is that if the costs are not borne by Wade, they would be ultimately be borne by members of Wade's profession who have not engaged in any wrongdoing.

Because five of the six enumerated factors related to costs operate either exclusively or primarily in Wade's favor and because the Division arguably prolonged these proceedings by asserting in its Complaint and continuing to advance through summary judgment proceedings, allegations related to tax delinquency which it ultimately abandoned, I conclude that 20 percent of the costs should be imposed on Wade.

⁵ The undisputed testimony was that Wade collects between \$25,000 and \$30,000 per month. (Hrg. Tr., p. 26)

ORDER

For the reasons set forth above, IT IS ORDERED that:

1. Respondent Ty Wade, D.C., is REPRIMANDED.
2. The license to practice chiropractic issued to Ty Wade, D.C., is LIMITED as follows:
 - a. Within 30 days of the date of the Final Decision and Order in this matter, Wade shall provide written notice, via Certified Mail Return Receipt Requested, to medicare, Medicaid, all third party payers and to each patient who personally paid fees for chiropractic services Wade performed during the period from December 15, 2012 through January 14, 2013. The written notice shall explain that Wade was not licensed to practice chiropractic in Wisconsin during that period and was therefore not authorized to practice chiropractic or charge any fee for doing so.
 - b. Within 60 days from the date of the Final Decision and Order in this matter, Wade shall send to the Department Monitor, at the address listed below, a sworn affidavit. The affidavit must identify each person or entity that received notification, and the date of notification. The following documents must be attached to the affidavit: (a) a copy of the letter sent to Medicare and Medicaid; (b) a copy of a representative letter sent to the third party payers; (c) a list of the third party payers to whom the letter was sent; (d) a copy of a representative letter sent to patients; and (e) a list of the patients to whom the letter was sent.
 - c. This limitation shall be removed from Wade's license after Wade satisfies the Board or its designee that he has successfully completed all of the notification requirements in paragraph 2.a. and 2.b. of the Order.
3. Wade shall pay 20 percent of the recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18.
4. The affidavit, and any documents evidencing satisfactory completion of notification requirements, and payment of costs (made payable to the Wisconsin Department of Safety and Professional Services) shall be sent by Wade to the Department Monitor at the address below:

Department Monitor
Division of Legal Services and Compliance
Department of Safety and Professional Services
P.O. Box 7190
Madison, WI 53707-7190
5. Violation of any of the terms of this Order may be construed as conduct imperiling public health, safety and welfare and may result in a summary suspension of Wade's license

without further notice or hearing, until Wade has complied with the terms of this Order. The Board in its discretion may, in the alternative, impose additional conditions and limitations or other additional discipline for a violation of any of the terms of this Order.

6. The terms of this Order are effective the date the Final Decision and Order is signed by the Board.

Dated at Madison, Wisconsin on December 8, 2014.

STATE OF WISCONSIN
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By: 

Jennifer E. Nashold
Administrative Law Judge