

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
BOARD OF DENTISTRY,)
)
Petitioner,)
) Case No. 07-0974PL
vs.)
)
JENNY DAVENPORT, D.D.S.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Notice was provided and on May 2 and 3, 2007, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (2006). The hearing location was the offices of the Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida. The hearing commenced at 9:00 a.m. on each day. The hearing was held before by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Jamie Ito, Esquire
Wayne Mitchell, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Mary K. Simpson, Esquire
Katherine B. Chapman, Esquire
Guilday, Tucker, Swartz & Simpson, P.A.
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STATEMENT OF THE ISSUE

Should discipline be imposed against Respondent's license to practice dentistry for violation of Section 466.028(1)(x), Florida Statutes (2004)?

PRELIMINARY STATEMENT

On July 24, 2006, in Case No. 2005-67102, before the Board of Dentistry (the Board), the Department of Health (DOH) brought an Administrative Complaint against Respondent accusing her of a violation of the statute referred in the Statement of the Issue. The Administrative Complaint was premised upon the care Respondent allegedly provided Patient L.E. on tooth number thirty-one.

As a consequence Respondent is alleged to have violated Section 466.028(1)(x), Florida Statutes (2004), in that:

- a. Respondent failed to completely obturate the canals of tooth number 31 on or about June 28, 2004, and/or December 13, 2004;
- b. Respondent proceeded to perform a buildup on tooth number 31 before retreatting the inadequately filled root canal on or about July 6, 2004;
- c. Respondent seated a final crown on a poorly filled root canal tooth number 31 after the June 28, 2004 root canal;

d. Respondent failed to record that she cemented the final crown, or the date she cemented the final crown on tooth number 31 after the June 28, 2004 root canal; and/or

e. Respondent failed to record what instrumentation took place, how much longer the canals were instrumented or what was removed during root canal therapy on or about December 13, 2004.

Respondent was provided several options in addressing the Administrative Complaint by executing an Election of Rights form. She chose the third option. That option was to dispute the allegations of fact contained in the Administrative Complaint and the legal conclusions drawn from the factual allegations. Respondent asked that she be heard in accordance with Section 120.569(2)(a) and 120.57(1), Florida Statutes (2006), by an administrative law judge to resolve the dispute.

On February 23, 2007, DOH forwarded the case to the Division of Administrative Hearings (DOAH), to assign an administrative law judge to conduct a hearing in accordance with Respondent's request for formal hearing. The assignment was made by Robert S. Cohen, Director and Chief Judge of DOAH in reference to DOAH Case No. 07-0974PL. The assignment was to the present administrative law judge.

On March 8, 2007, Respondent filed a Response to Administrative Complaint detailing her perception concerning Patient L.E.'s care and treatment.

On April 5, 2007, Petitioner filed a Motion to Take Official Recognition of Section 466.028(1)(x), Florida Statutes (2004), and Florida Administrative Code Rules 64B5-13.005 and 64B5-17.004. A timely response to the motion was not filed. On April 16, 2007, the motion was granted. On April 18, 2007, Respondent filed an Objection to Petitioner's Motion to Take Official Recognition. On that same date Petitioner filed a Motion to Strike Respondent's untimely objection to Petitioner's Motion to Take Official Recognition. The objection and motion to strike are moot.

On April 25, 2007, Respondent filed Motions in Limine regarding the adequacy of the dental reports pertaining to the Patient L.E.; regarding telephone calls, and regarding Met-Life records. On that same date Petitioner filed responses to each of the Motions in Limine. The motions were disposed of as explained in the hearing transcript.

Consistent with an Order of Prehearing Instructions, the parties filed information concerning, among other subjects, a stipulation of facts. Those factual stipulations arrived at in the prehearing submissions and upon discussion at hearing are reported in the Findings of Fact to this Recommended Order.

Petitioner presented Patient L.E., Respondent, Mikki Bates and Harold Haering, D.D.S., as its witnesses. Petitioner's Exhibits numbered 2, 3, composite 4, and 5 were admitted.

Petitioner's Exhibits numbered 1, 6, 7, and 8 were denied admission. Respondent testified in her own behalf and presented the testimony of Geoffrey Weihe, D.D.S. Respondent's Exhibits numbered 1a, 3, 3a, 3b, 3c, 8 and 11 were admitted.

Respondent's Exhibit numbered 11 is the deposition transcript of Reid Hines, D.D.S. All exhibits admitted and denied are transmitted with this record.

On May 18, 2007, a three-volume hearing transcript was filed. On May 29, 2007, the parties filed Proposed Recommended Orders. The Proposed Recommended Orders have been considered in preparing the Recommended Order.

FINDINGS OF FACT

Stipulated Facts

1. Petitioner is the state department charged with the regulation of the practice of dentistry pursuant to Section 20.43, Florida Statutes, and Chapters 456 and 466, Florida Statutes.

2. Respondent is Jenny Davenport, D.D.S.

3. Respondent is a licensed dentist in the state of Florida, having been issued license DN 13321.

4. Respondent's mailing address of record is 7955 Dawsons Creek Drive, Jacksonville, Florida 32222.

5. On or about June 17, 2004, Patient L.E. presented to the Respondent complaining of pain associated with tooth number thirty-one. The Respondent performed a comprehensive examination, took an X-ray, removed existing intermediate restorative material, placed a cavit, prescribed an antibiotic and pain medication, and scheduled Patient L.E. for root canal treatment.

6. The Respondent provided root canal treatment to Patient L.E. on or about June 28, 2004.

7. Patient L.E. returned to the Respondent on or about July 6, 2004, for crown preparation of tooth number thirty-one, which the Respondent performed.

8. On or about July 28, 2004, Patient L.E. presented to Respondent for seating of the final crown; however, the Respondent was dissatisfied with the permanent crown; therefore, she seated the crown with temporary cement and instructed the lab to fabricate a new permanent crown.

9. On or about November 16, 2004, Patient L.E. presented to the Respondent for a prophylaxis and complained of pain in the lower right side of her mouth.

Care and Treatment of Patient L.E.: The Patient's Recollection

10. As established by the patient's testimony, when first seen by Respondent, Patient L.E. was not experiencing pain. When the patient returned for a visit it was determined that she

needed to have a root canal performed on tooth number thirty-one. The procedure was performed. The patient was left with a temporary crown and an appointment made to have a permanent crown seated.

11. Upon the next visit the permanent crown did not fit well. Respondent left the patient with a temporary solution.

12. The patient returned in November 2004 for a cleaning, and she recalls, that at the time of the appointment, the crown on tooth number thirty-one had been set, as she refers to it, or seated. In November 2004 the patient was of the opinion that tooth number thirty-one had a permanent crown. At the November 2004 appointment the patient was experiencing sensitivity in tooth number thirty-one. However, before going to her November 16, 2004 appointment for cleaning, the patient had not complained of sensitivity in tooth number thirty-one. The nature of the sensitivity was a response to cold. She describes the nature of the discomfort as other than "really pain" [sic]. According to the patient, Respondent decided that tooth number thirty-one needed to be retreated. The patient was not certain why that was necessary. As the patient recounts the conversation, Respondent explained that she was going to retreat tooth number thirty-one because of the sensitivity, in particular that she was going to retreat the root canal.

13. The patient returned on December 13, 2004, and the root canal on tooth number thirty-one was retreated. The patient has no recollection of an appointment being set for a later date. She realized that there was a necessity for a permanent crown to be "set again," referring to the need to seat a new permanent crown. The patient recalls Respondent's taking another permanent crown off before retreatment. When the patient left Respondent's office on that date, the area where treatment was performed felt numb. She left the office with the understanding that the treatment had been concluded, with the exception of the need to replace the crown. The patient assumed that the retreatment had been completed on December 13, 2004, but no one told her that specifically, to her recollection.

14. Over time she began to experience pain that got worse with the passage of time.

15. The pain that the patient was eventually experiencing was described by her as "absolutely unbearable." It was constant in nature, a "throbbing pain."

16. The patient tried to contact Respondent's office several times. She explained to someone within the Respondent's office that the pain killer prescribed, Vicodin, was not working. The patient describes people answering the Respondent's office telephone but without providing an adequate

response to her needs. The patient left messages with the front desk. She was advised to take Advil.

17. Around the time that the patient was having problems with pain after the December 13, 2004 retreatment, she recalls having a conversation with Respondent on the telephone but not the specifics of their discussion.

18. Patient L.E. contacted Dr. Reid Hines, a dentist in Pace, Florida, who had treated her before. That dentist saw her and addressed her problem by relieving the pain and redoing the root canal.

19. When the patient saw Dr. Hines on December 16, 2004, he relieved her pain and then she returned to receive further treatment, as she recalls.

20. Patient L.E. picked up a crown from Respondent's office, that she believed was necessary to be carried to her appointment with Dr. Hines. At the time she picked up the crown, she also obtained her patient records from Respondent's office. After that she did not return to Respondent's office. The patient remembers signing a form releasing the Respondent from providing future treatment and reminding the patient, that if the crown that she had picked up were to be destroyed, she would have to pay for another. The form referred to the fact that the treatment had not been completed.

Respondent Explains the Treatment

21. The Respondent attended the University of Puerto Rico for her undergraduate education. She attended dental school at Rutgers University and received her D.D.S. in 1992. Respondent is licensed to practice dentistry in New Jersey, as well as Florida.

22. During her practice Respondent has performed as many as five-to-six root canals a week.

23. Respondent recalls seeing Patient L.E. on April 29, 2004, for a consultation. The nature of the complaint was discomfort or sensitivity in the lower right side. The patient wanted a complete examination and X-rays.

24. The patient was seen for prophylaxis (cleaning) on May 13, 2004.

25. The patient returned on June 17, 2004. At that time preexisting intermediate restorative material was removed and temporary material was placed on tooth number thirty-one. The diagnosis was "hot tooth, hyper-sensitivity." This meant that the tooth, even under anesthesia had symptoms of either pain or temperature. The recommendation for future treatment was a root canal.

26. On June 28, 2004, the root canal treatment was provided. The patient was anesthetized. A clamp and a rubber dam were placed prior to the provision of anesthesia. The tooth

was opened up to allow access to the pulp. That section of the tooth was removed. Files were used to locate the root canals. An X-ray was taken to ascertain the extent to which the files had reached within the roots. The length(s) of the canal(s) was determined with the use of an apex locator. The tooth was irrigated. Using a series of files from the smallest, to wider files in width, the canals were flared from the top of the tooth to the apex of the tooth. A cone(s) was placed and another X-ray taken to confirm the measurements within the cone. Cones were placed at each canal with cement and laterally condensed by using heat. Then buildup material was used, a resin, to compensate for loss of tooth structure and enamel.

27. In combination, the matter of determining the length of canals was associated with radiographic measurements with a file and by use of an apex locator. The starting point for this process is the coronal part of the tooth, the top portion. Each file has a rubber stopper on it to provide a guideline for measurement. The endpoint of the measurement is the apex. The calibration for measurement is in millimeters.

28. These procedures were utilized by Respondent to treat Patient L.E. The measurements for Patient L.E. were the distal canal 15 millimeters; the mesial buccal canal 16 millimeters and the mesial lingual canal 16 millimeters.

29. In looking at a postoperative X-ray to determine if the root canal treatment was adequate, Respondent looks at the length of the fill in proportion to the length of the root. She also looks at any radiolucency around the root. If found, this is an indication of infection around the tooth. Based upon what a textbook says, Respondent believes that fill material placed in a root canal that is 0.5 millimeters short of the apex would be considered acceptable.

30. Looking at the X-ray depicting the postoperative condition after providing the endodontic treatment on June 28, 2004, Respondent expressed the opinion that the fill material in each root extended all the way to the radiographic apex. When referring to the apex of the root, she means by that the end of the root. In this context Respondent mentioned the overlap of two roots, in tooth number thirty-one.

31. In reference to the June 28, 2004 postoperative X-ray, Respondent acknowledges that she can visualize where the roots end but the apex cannot be seen.

32. The patient returned on July 6, 2004. Tooth number thirty-one was prepared for fabrication of a permanent crown. The impression was taken. A shade was selected and the impression then sent to the laboratory. The patient was left with a temporary crown.

33. On July 28, 2004, the patient returned. Respondent was not satisfied with the fit of the permanent crown that had been fabricated. An impression was made to prepare a new permanent crown. In the interim this first permanent crown was used as a temporary. It was not permanently cemented.

34. On November 16, 2004, Respondent saw the patient again. Prophylaxis, (cleaning) was done and two periapical X-rays were taken. Respondent reviewed the X-rays. The X-rays revealed the crown that was placed July 28, 2004 cemented with temporary cement and the root canal treatment that had been provided earlier on tooth number thirty-one were normal, according to Respondent. Based upon the patient's complaint Respondent had ordered the X-rays. Although the X-rays appeared normal, the patient was not satisfied, as Respondent recalls. Respondent gave the patient the option to retreat the root canal at no cost. This offer to retreat the root canal when the X-ray appeared normal was not a common practice by Respondent. On this date, explaining the patient's condition, the Respondent told her that the tooth was going to be sensitive for a time and she would have to await the outcome. The patient was not satisfied with that explanation and wanted something done about it, as Respondent contends. The only other choice was retreatment.

35. The patient returned on December 13, 2004. At that time the crown was removed, one of the canals was opened and a retrieval of the material in the roots commenced. The work was not completed. What was left to be done, according to the patient record, was referred to as RCTIII, which Respondent explains means that the canals would be filled and sealed at another time. The reason for putting off the treatment was that Respondent was concerned with "the patient's state of mind, as far as she felt at the moment. She was not comfortable." This refers to the lack of comfort on the part of the patient. Respondent goes on to say "her body language indicated to me that she would not want me to proceed with what I was doing." There is no recollection by Respondent that the patient was asked if the patient preferred Respondent to proceed or not. Instead Respondent recalls "the anxiety" by appearance and lack of comfort by the patient. Respondent told the patient that she was not going to retrieve the root canal and that the next time (next visit), the goal would be to complete everything. Respondent is not clear on when the patient was to return for the balance of the treatment. Respondent did not anticipate that the patient would be relieved of symptoms following the December 13, 2004 appointment.

36. More specifically, during the December 13, 2004 visit, after removing the crown, Respondent opened up the pulp area and started removing the gutta-percha from the mesial buccal and mesial lingual canals.

37. After December 13, 2004, the intention was that at the next appointment, all the remaining gutta-percha would be retrieved and then the canals refilled.

38. Respondent remembers speaking to the patient on the telephone at a time before the retrieval process began on December 13, 2004. What was said is not provided.

39. Respondent prepared what she describes as a letter, to be signed by Patient L.E., that identified the status of care. That correspondence said:

I L.E., have decided not to continue my current treatment with Dr. Jenny Davenport. I have declined to see Dr. Davenport regarding my treatment although she has advised me that my treatment has not been completed and she would like to complete the treatment. I hereby agree that any costs incurred in the completion of this treatment are my sole responsibility and I will not make Dr. Davenport responsible for these costs. I have agreed to complete the payment of the treatment with Dr. Davenport and take possession of my crown to complete treatment with the dentist of my choice.

This disclaimer, which refers to the second permanent crown, was signed by Patient L.E. on January 20, 2005, when she retrieved

the second crown and her patient records from Respondent's office.

Office Staff

40. Sonya Mikki Bates worked in Respondent's office while Patient L.E. was being treated. She remembers receiving a call from the patient saying that the patient was in excruciating pain. The witness does not recall what she did in response.

Dr. Hines

41. Dr. Hines, who took over Patient L.E.'s care, earned a bachelor's degree from the University of Mississippi in 1990. He later attended the University of Mississippi dental school earning a doctor's degree. He has been licensed to practice dentistry in Florida since 1994. He performs root canals on a daily basis.

42. As mentioned, Dr. Hines had treated Patient L.E. prior to December 16, 2004. She had become his patient in June of 1998. For that reason, in his care and treatment of the patient, he was familiar with tooth number thirty-one before the patient was seen on December 16, 2004.

43. When Dr. Hines saw Patient L.E. on December 16, 2004, it was on an emergency basis. The patient had pain and swelling and tooth number thirty-one was very mobile. The purpose of the care provided on that date was to try to address the patient's pain and allow the condition to heal to some extent. The

patient had trismus in the jaw which prohibited her from being able to open her mouth completely. X-rays taken on that date revealed traces of gutta-percha or filling material inside tooth number thirty-one. There were limited areas that had been cleaned out in the tooth and others in which gutta-percha remained. Dr. Hines' impression was that retreatment of the tooth had been commenced. In the treatment provided that date, Dr. Hines removed a temporary crown that had been placed on the tooth. To address the pain, he gave the patient a dexamethasone injection, an anti-inflammatory steroid. He reduced the tooth out of occlusion.

44. When Dr. Hines saw Patient L.E. on December 16, 2004, he did not observe anything in her condition related to tooth number thirty-one which he believed reflected a departure from the standard of care by Respondent in providing treatment before that date.

45. In describing the patient's condition on December 16, 2004, Dr. Hines indicates that the patient more than likely had recurring infection in the tooth that would push the tooth out of the socket and make it occlude. Dr. Hines proceeded on the assumption that Respondent was trying to allow infection to be removed out of the tooth. But he did not have certain knowledge concerning Respondent's intentions. Dr. Hines had no discussion with Respondent concerning Patient L.E.'s care and treatment.

Dr. Hines did not find it appropriate to fill tooth number thirty-one and replace the restoration on December 16, 2004. He did this later.

46. In observing the X-rays he took on December 16, 2004, the remaining material in the root canals that he observed was found in the mesial buccal canal and possibly the mesial lingual canal.

47. Dr. Hines proceeded with the patient on December 16, 2004, with the belief that the Respondent had begun the retreatment for tooth number thirty-one but did not finish because the patient was on Christmas break.

48. By comparison to Respondent, when Dr. Hines does a root canal, to determine if the obturation is the right length, he looks for indications with a pulp tester, basically allowing him to establish the length of the canal internally. Verification is achieved by use of a radiograph. Once the root canal obturation is finished, the (postoperative) X-ray allows the determination of the length and density of the fill material. It would not be within the standard of care in Dr. Hines' opinion if the dentist failed to completely obturate and fill the canals of the tooth to the radiographic ends.

Expert Opinion

49. Harold John Haering, Jr., is licensed to practice dentistry in Florida, Kentucky and Tennessee. He received his training in dentistry at the University of Kentucky. He has practiced since 1982. He is a general dentist who provides endodontic treatment. He performs root canals. He has also had experience reviewing endodontic treatment performed by other dentists, by examining a patient's X-ray following a patient who has had a root canal. He was received as an expert in general dentistry with an emphasis, as a general dentist, on endodontics.

50. In Dr. Haering's opinion the distinction between a tooth that can be treated without a root canal and one where a root canal is indicated, is a tooth that is exposed in the dentin where a filling will suffice, as contrasted with a tooth involving the pulp, as to the depth of decay or a fracture in apical tissues around the roots. In the latter circumstances a root canal is appropriate.

51. In providing root canal treatment Dr. Haering places a rubber dam to isolate the tooth following the provision of anesthesia. Generally, a preoperative X-ray will be performed. That X-ray is to gain a measurement of the tooth as to its length. The coronal portion of the tooth is accessed with a burr down into the pulp to gain access to the canal. Patency with the apex of the tooth, the end of the root, must be

established. This is done with a small file. A radiograph is used in that process or the dentist may use an apex locator or a combination of both. Once the apex has been identified, instrumentation proceeds to the apical foramen. This process involves the removal of pulp, bacteria, and decay while creating access to obturate the canal. To place the obturating material, a cone of material, gutta-percha is seated to a predetermined length. After this is accomplished a postoperative radiograph is used to evaluate the obturation.

52. In trying to establish the correct length in the procedure, it is a matter of clinical judgment and for some clinicians the use of X-rays assists in determining the proper length. Observation of the obturation postoperatively reveals the density of fill. The standard that is acceptable, according to Dr. Haering, is to approximate 0.5 millimeters from the apex radiographically when considering the fill in the canal. Dr. Haering's opinion concerning the proper root canal obturation and the proximity to the apical foramen is one in which some U.S. schools accredited by the American Dental Association teach the measurement at approximately 1 millimeter as acceptable but most schools say that obturation should approximate 0.5 millimeters in relation to the apex. To confirm the outcome a postoperative X-ray is needed in Dr. Haering's opinion. The proper placement cannot be determined by tactile

means, given the nature of the material that constitutes the fill and other material in the canal that are forms of constriction.

53. In treating the tooth, separate and apart from the root canal work, is the need for restoration. The restoration is necessary but is a different procedure.

54. According to Dr. Haering the proper standard for performing a root canal is that the fill is radiopaque, that is that it is without voids, that it follows the anatomy of the tooth and the root canal and that the obturation approximates the apical foramen, within 0.5 millimeters.

55. A root canal that is poorly obturated can cause pain in the patient, in Dr. Haering's opinion. In the apex area there is no vascularization. If there is a void beneath the fill, above the apex, it is susceptible to a buildup in bacteria, pulp and debris. In this anaerobic condition, problems can occur. Depending on the patient's health status it can occur slowly or quickly, resulting in pain.

56. In preparing himself to comment on Respondent's care and treatment provided Patient L.E., Dr. Haering looked at the patient's charts, Dr. Hines' records and other materials provided to the parties on the subject.

57. Dr. Haering expressed the opinion that the Respondent violated the standard of care in the root canal performed on

Patient L.E. on June 28, 2004, by not readdressing the root canal before proceeding with other work done on the patient that commenced July 6, 2004.

58. Dr. Haering expressed the opinion that Respondent failed to completely obturate the canals on June 28, 2004.

59. When a short fill occurs the obligation by the dentist is to take out that filling and refill it to the proper length, in Dr. Haering's opinion.

60. In Dr. Haering's review of the X-ray taken by Respondent on June 28, 2004, when she performed the root canal on Patient L.E., he measured the fill with an instrument designed to address the length and by that process determined that it was 5 millimeters short of the apex. The calibration of the length of fill was done with use of a micro-ruler. This short fill created a void leading to necrotic breakdown byproducts in the canal that could affect the apical bone eventually.

61. Based upon his review of the patient records, Dr. Haering was persuaded that a permanent crown was seated on the patient's tooth number thirty-one. In this belief he is wrong.

62. When the patient returned on November 16, 2004, and the decision was made by Respondent to retreat tooth number thirty-one, that was not a decision criticized by Dr. Haering.

63. In Dr. Haering's opinion, on December 13, 2004, when Respondent saw the patient, the treatment records and X-ray taken confirmed his expectation of an endodontic fill that was left short. When Dr. Hines saw the patient with a swollen condition and a mobile tooth on December 16, 2004, this indicated to Dr. Haering that the patient was getting infection from a canal that was not completely reinstrumented.

64. Dr. Haering does not believe that Respondent met the standard of care on December 13, 2004. The patient had complained a month earlier about pain. To address the tooth, it must be taken out of occlusion. With a short fill in the root canal, the area will be susceptible to a buildup of bacteria and other noxious materials that needs to be reinstrumented. The reinstrumentation would be insufficient without reaching the apex and cleaning it out. It was not appropriate to obturate the canals on December 13, 2004, because they were not ready for that procedure. It would violate the standard of care to obturate the canals at that time, according to Dr. Haering.

65. On December 13, 2004, Respondent failed to conclude reinstrumentation of the canals visible on the radiograph, leaving two of them with debris, according to Dr. Haering.

66. In would be a violation of the standard of care in the treatment on December 13, 2004, if Respondent did not instrument the canals to the apex, to include areas where the canals had

not been obturated, unless the patient was made aware that she might have a lot of problems and was provided Respondent's contact telephone number. If the canals were not fully reinstrumented that would not have gotten the patient out of pain in the treatment of December 13, 2004.

67. In relation to the December 13, 2004 treatment, Respondent was obligated to remove the fill to offer any therapeutic value to the patient.

68. In Dr. Haering's opinion the determination of the appropriateness of fill by length and density is the only proper method. Patient comfort at the moment, leaving the prospect of infection over time would not suffice.

69. J. Geoffrey Weihe, D.D.S., has practiced general dentistry since 1968. He graduated from Emory University in that year. He is licensed in Florida.

70. He was accepted as an expert in general dentistry, in the analysis of root canals and the performance of root canals.

71. He performed root canals on a consistent basis between 1970 and 2002. At present he regularly reviews radiographs of endodontically treated teeth. He views the root canals and the radiographic evidence after the referral of the patients for endodontic treatment and their return for restorative work which he performs.

72. In relation to the standard of care for providing root canal treatment, Dr. Weihe expressed the opinion that the tooth should be treated in a way that the organic material or the majority of the organic material down to the apical third of the tooth and including the proximity to the apex is removed. The canals are shaped and sterilized, an inert material is introduced that is not affordable to growth of bacteria. This process is to be done to the dentist's ability and to allow healing of the surrounding tissue, if necessary. The concept of "best of the dentist's ability" would vary from dentist to dentist, according to Dr. Weihe. Concerning the filling of the canals to the point of the apex, there would be variation in the judgment based upon the clinician. Dr. Weihe is aware of some literature suggesting fill to the apex, some within a half-millimeter of the apex, and some within two millimeters of the apex. In his opinion the fill could be several millimeters short of the apex and still be a successful fill. In determining the optimal apex fill and its attainment, Dr. Weihe stated that the optimal clinical success occurs with the lack of infection, lack of pain, and long-term use of the tooth, comfort to the patient over a long term, and the prospect of the availability of the tooth to use as an abutment for a crown, a bridge abutment or whatever is needed in restorative dentistry.

73. Dr. Weihe believes that a radiograph is not the only available tool to evaluate the adequacy of a root canal. He indicated that the success of a root canal will tell with the passage of time. Circumstances that develop after the procedure, these considerations, in addition to the X-ray findings, enter into the determination of the adequacy of the root canal performed.

74. Dr. Weihe agreed that the best way to determine where the optimal fill has been achieved in a root canal treatment is with a radiograph. Optimal length of the fill relates to the position of the apex of the canal that cannot be seen on an X-ray. An apex locator can be used as well. Files or reamers can be used to make these determinations on optimal fill while the patient is undergoing treatment. In his opinion an experienced operator, clinician, can sense the apex with his or her fingers with the file in hand.

75. To arrive at his opinion concerning Respondent's care of Patient L.E., Dr. Weihe reviewed the charts and X-rays provided from Respondent, the charts and X-rays from Dr. Hines, the deposition of Dr. Haering, the deposition of Patient L.E., a deposition of Respondent and the in-hearing testimony of the Patient L.E. Based upon this information, Dr. Weihe believes that Respondent met the minimum standards of performance and diagnosis and treatment when measured against generally

prevailing peer performance. This opinion applies to the treatment and care rendered by Respondent on June 28, 2004, and December 13, 2004, and any records and radiographs maintained by Respondent in treating Patient L.E.

76. Based upon the postoperative radiograph from June 28, 2004, and the radiograph obtained on November 16, 2004, Dr. Weihe believes that the canals were appropriately filled in compliance with minimum standards of performance and diagnosis and treatment, when measured against generally prevailing peer performance in the treatment Respondent provided Patient L.E.

77. Dr. Weihe believes it was appropriate for Respondent to retreat tooth number thirty-one in Patient L.E.

78. Dr. Weihe's examination of the X-ray taken on December 16, 2004, by Dr. Hines, does not lead him to the conclusion that Respondent failed to meet minimum standards of performance in diagnosis and treatment when measured against generally prevailing peer performance.

79. Dr. Weihe does not believe that it was inappropriate to begin the instrumentation of the canals in treatment of Patient L.E. on December 13, 2004, and continuing that instrumentation at a later time. To do so would not violate performance standards in diagnosis and treatment measured against generally prevailing peer performance.

80. In Dr. Weihe's opinion a poorly obturated canal can eventually result in pain.

81. Having considered the expert opinion testimony by Drs. Haering and Weihe, in relation to the allegations in the Administrative Complaint, Dr. Haering's opinion is more compelling. It is accepted to the extent that he expressed the belief that Respondent had not met the minimum standards in performance and diagnosis and treatment measured against generally prevailing peer performance. In particular, his opinion that Respondent failed to completely obturate the canals in tooth number thirty-one on June 28, 2004, is persuasive, as is his opinion concerning the failures in the treatment provided on December 13, 2004. In addition, Dr. Haering's opinion that Respondent proceeded with the treatment of tooth number thirty-one on July 6, 2004, without retreating the inadequately filled root canal(s) is accepted. This determination is made in deference to the opinion that the fill in the root canal in length compared to the apex in tooth number thirty-one missed the acceptable approximation by a significant margin. A range of 0.5 millimeters to 1 millimeter would have been acceptable. A difference of 5 millimeters is not acceptable in the view of any witness. By contrast, Dr. Weihe's equivocal description of what would be acceptable, awaiting the outcome where the patient experienced difficulties, is unpersuasive. Finally, the remarks

by Dr. Hines that he found nothing about the treatment performed by the Respondent that concerned him when he treated Patient L.E. on December 16, 2004, was premised upon certain assumptions about the arrangements between the patient and Respondent concerning additional treatment by the Respondent that were not established in the facts. Moreover, the emphasis placed by Dr. Hines was the more immediate concern for relieving the patient's symptoms, something Respondent had not done. Dr. Haering's viewpoint was based upon a more detailed assessment of Respondent's performance before the patient was seen by Dr. Hines on December 16, 2004.

Records Keeping

82. The Administrative Complaint accuses Respondent of failing to record that she had cemented the final crown or the date that it was cemented pertaining to tooth number thirty-one after the June 28, 2004 root canal had been performed and/or that Respondent failed to record what instrumentation took place, how much longer the canals were instrumented or what was removed when therapy was provided on December 13, 2004. It has not been found that the crown was cemented on tooth number thirty-one after the June 28, 2004 procedure. Records on that subject and the use of instrumentation, and how much longer the canals were instrumented, taken to mean, in relation to the

length of the canals and what was removed during the therapy on December 13, 2004, is not meaningful.^{1/}

CONCLUSIONS OF LAW

83. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding in accordance with Sections 120.569, 120.57(1) and 456.073(5), Florida Statutes (2006).

84. Respondent is a licensed dentist in Florida, license number DN13321.

85. Through the Administrative Complaint, Respondent has been accused of:

. . . incompetence or negligence by failing to meet the minimum standards of performance in diagnosis and treatment when measured against generally prevailing peer performance, including, but not limited to, the undertaking of diagnosis and treatment for which the dentist is not qualified by training or experience or being guilty of dental malpractice.

86. The manner of the alleged violation is that Respondent fell below the standard for performance in that:

- a. Respondent failed to completely obturate the canals of tooth number 31 on or about June 28, 2004, and/or December 13, 2004;
- b. Respondent proceeded to perform a buildup on tooth number 31 before retreating the inadequately filled root canal on or about July 6, 2004;

- c. Respondent seated a final crown on a poorly filled root canal tooth number 31 after the June 28, 2004 root canal;
- d. Respondent failed to record that she cemented the final crown on tooth number 31 after the June 28, 2004 root canal and/or
- e. Respondent failed to record what instrumentation took place, how much longer the canals were instrumented on what was removed during root canal therapy on or about December 13, 2004.

87. As a consequence, Respondent is alleged to have violated Section 466.028(1)(x), Florida Statutes (2004), which states in pertinent part:

(1) The following acts constitute grounds for . . . disciplinary action, as specified in s. 456.072(2):

* * *

(x) Being guilty of incompetence or negligence by failing to meet the minimum standards of performance in diagnosis and treatment when measured against generally prevailing peer performance, including, but not limited to, the undertaking of diagnosis and treatment for which the dentist is not qualified by training or experience or being guilty of dental malpractice. . . . As used in this paragraph, "dental malpractice" includes, but is not limited to, three or more claims within the previous 5-year period which resulted in indemnity being paid, or any single indemnity paid in excess of \$25,000 in a judgment or settlement, as a result of negligent conduct on the part of the dentist.

88. This is a disciplinary case. For that reason Respondent bears the burden of proof. That proof must be sufficient to sustain the allegations in the Administrative Complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The term clear and convincing evidence is explained in the case In re: Davey, 645 So. 2d 398 (Fla. 1994), quoting, with approval from Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).

89. The Administrative Complaint must provide reasonable notice to Respondent of the conduct that would warrant the imposition of discipline. See Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996). Respondent was noticed concerning the care provided Patient L.E. in 2004. The Administrative Complaint refers to Section 466.028(1)(x), Florida Statutes (2004), pertaining to the standard of care. It makes no mention of Section 466.028(1)(m), Florida Statutes (2004)^{2/}, concerning the records necessary to justify the treatment of the patient.

90. Any allegations concerning recordkeeping cannot properly be subsumed within alleged violations associated with Section 466.028(1)(x), Florida Statutes (2004). See Barr, supra. Therefore, Petitioner may not proceed against Respondent

for matters set forth in paragraphs 19d. and e. to the Administrative Complaint accusing Respondent of failures in recordkeeping.

91. Given the penal nature of this case, Section 466.028(1)(x), Florida Statutes (2004), has been strictly constructed. Any ambiguity favors the Respondent. See State v. Pattishall, 99 Fla. 296 and 126 So. 147 (Fla. 1930), and Lester v. Department of Professional and Occupational Regulation, State Board of Medical Examiners, 348 So. 2d 923 (Fla. 1st DCA 1977).

92. As referred to previously, the discipline that may be imposed should Respondent be found in violation of Section 466.028(1)(x), Florida Statutes (2004), is set forth in Section 456.072(2), Florida Statutes (2004), which states:

(2) When the board . . . finds any person guilty . . . of any grounds set forth in the applicable practice act, . . . it may enter an order imposing one or more of the following penalties:

* * *

(b) Suspension or permanent revocation of a license.

(c) Restriction of practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or

any other restriction found to be necessary for the protection of the public health, safety, and welfare.

(d) Imposition of an administrative fine not to exceed \$10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the board, or the department if there is no board, must impose a fine of \$10,000 per count or offense.

(e) Issuance of a reprimand or letter of concern.

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

(g) Corrective action.

(h) Imposition of an administrative fine in accordance with s. 381.0261 for violations regarding patient rights.

(i) Refund of fees billed and collected from the patient or a third party on behalf of the patient.

(j) Requirement that the practitioner undergo remedial education.

In determining what action is appropriate, the board, . . . must first consider what sanctions are necessary to protect the public or to compensate the patient. Only after those sanctions have been imposed may the disciplining authority consider and include in the order requirements designed to rehabilitate the practitioner. All costs

associated with compliance with orders issued under this subsection are the obligation of the practitioner.

93. Clear and convincing evidence was presented to show that Respondent failed to appropriately obturate the canals on tooth number thirty-one in Patient L.E. in the procedure performed on June 28, 2004. She then proceeded to restore the tooth on July 6, 2004, without correcting the inadequate fill in the root canal. On December 13, 2004, when Patient L.E. presented, the root canals were not adequately addressed, such as to provide relief from the discomfort that the patient was experiencing at that time. Eventually the pain became extreme within the three-day period before the patient was seen by Dr. Hines on December 16, 2004. If Respondent believed that the patient was overly anxious on December 13, 2004, as Respondent claims, Respondent should have made the patient aware of the potential consequences of not completing the retrieval in the root canals. Respondent neglected to do this, leaving matters unresolved, to include, a specific appointment date for the patient's return to finish the treatment.

94. The circumstances on the several dates described lead to the conclusion that Respondent is guilty of incompetence or negligence, by failing to meet the minimum standards in performance and diagnosis and treatment when measured against

generally prevailing peer performance in violation of Section 466.028(1)(x), Florida Statutes (2004).

95. Florida Administrative Code Rule 64B5-13.005 in effect at the time of the violation establishes disciplinary guidelines for a violation of Section 466.028(1)(x), Florida Statutes (2004). These guidelines are in addition to the authority in Section 456.072(2), Florida Statutes (2004).

96. When discussing the disciplinary guidelines under the aforementioned Rule they state:

64B5-13.005 Disciplinary Guidelines

(1) Unless relevant mitigating factors are demonstrated the Board shall always impose a reprimand and an administrative fine of \$10,000.00 per count or offense when disciplining a licensee for any of the disciplinary grounds listed in subsection (2) or (3) of this rule. The reprimand and administrative fine is in addition to the penalties specified in subsections (2) and (3) for each disciplinary ground.^[3/]

* * *

(3) When the Board finds an applicant or licensee whom it regulates under Chapter 466, F.S., has committed any of the acts set forth in Section 466.028, F.S., it shall issue a Final Order imposing appropriate penalties within the ranges recommended in the following disciplinary guidelines:

* * *

(bb) Being guilty of incompetence. The usual action of the Board shall be to impose a period of probation, restriction of practice, suspension, and/or revocation.

. . .

(cc) Being guilty of negligence or dental malpractice. The usual action of the Board shall be to impose a period of probation, restriction of practice, and/or suspension.

. . .

97. Florida Administrative Code Rule 64B5-13.005(4) sets forth factors of aggravation and mitigation where it states:

(4) Based upon consideration of aggravating and mitigating factors, present in an individual case, the Board may deviate from the penalties recommended in subsections (2) and (3) above. The Board shall consider as aggravating or mitigating factors the following:

- (a) The danger to the public;
- (b) The length of time since the violation;
- (c) The number of times the licensee has been previously disciplined by the Board;
- (d) The length of time the licensee has practiced;
- (e) The actual damage, physical or otherwise, caused by the violation and the reversibility of the damage;
- (f) The deterrent effect of the penalty imposed;
- (g) The effect of the penalty upon the licensee's livelihood;
- (h) Any efforts of rehabilitation by the licensee;
- (i) The actual knowledge of the licensee pertaining to the violation;
- (j) Attempts by the licensee to correct or stop the violation or refusal by the licensee to correct or stop violation;

(k) Related violations against the licensee in another state including findings of guilt or innocence, penalties imposed and penalties served;

(l) Penalties imposed for related offenses under subsections (2) and (3) above;

(m) Any other relevant mitigating or aggravating factor under the circumstances.

98. No danger was presented to the overall public by the violation. It has been more than two years since the violation. Respondent has not been previously disciplined by the Board, and Respondent has practiced for more than a dozen years. There was the need for additional treatment on Patient L.E. following Respondent's care. The condition was not beyond reversal. Matters of deterrence and the position of the Respondent's livelihood are considered in deciding the recommendation for punishment. Respondent is by virtue of the circumstances knowledgeable of the accusation, to include a formal hearing to address the subject. Attempts to correct the problem pertaining to potential harm to other patients was not described. It is not assumed that there were additional problems with other patients of a similar nature. There are no related violations in another state.

RECOMMENDATION

Based upon the findings of facts and the conclusions, it is

RECOMMENDED:

That a final order be entered finding Respondent in violation of Section 466.028(1)(x), Florida Statutes (2004), issuing a letter of reprimand, imposing an administrative fine of \$5,000.00, and requiring Respondent to undergo additional training pertaining to endodontic treatment of patients, to be completed within one year and restricting Respondent from providing endodontic treatment until that training has been completed.

DONE AND ENTERED this 22nd day of June, 2007, in Tallahassee, Leon County, Florida.



CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 2007.

ENDNOTES

1/ This case involves an alleged violation of standard of care under Section 466.028(1)(x), Florida Statutes (2004). It is not a documentation case under Section 466.028(1)(m), Florida Statutes (2004). For that reason problems associated with documentation may not be considered. See Barr v. Department of Health, Board of Dentistry, 32 Fla. L. WeeklyD923, 1st DCA of Fla., opinion filed April 11, 2007.

2/ (1) The following acts constitute grounds for . . . disciplinary action, as specified in s. 456.072(2):

* * *

(m) Failing to keep written dental records and medical history records justifying the course of treatment of the patient including, but not limited to, patient histories, examination results, test results, and X rays, if taken.

3/ At present, under Florida Administrative Code Rule 64B5-13.005(1)(x), the administrative fine ranges from \$500 to \$8,000 for a first offense.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.