

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
CHIROPRACTIC MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 07-1153PL
)
ROBERT WHITNEY, D.C.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on June 1, 2007, in Miami, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Cecelia D. Jefferson, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-5
Tallahassee, Florida 32399-3265

For Respondent: William Jeff Barnes, Esquire
1515 North Federal Highway
Atrium Building, Suite 300
Boca Raton, Florida 33432

STATEMENT OF THE ISSUES

Whether the Petitioner committed the violation alleged in the Administrative Complaint dated April 2006, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an Amended Administrative Complaint dated March 30, 2006, the Department of Health, Board of Chiropractic Medicine ("Department"), charged Robert Whitney, D.C., with having committed false, deceptive, or misleading advertising, in violation of Section 460.413(1)(d), Florida Statutes (2001).¹ This charge was based on the factual allegations that Dr. Whitney's name was included on a sign for Williston Orthopedic Clinic as the "Medical Director" but that he was not identified on the sign as a chiropractic physician. Dr. Whitney timely requested a formal administrative hearing, and the Department forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on June 1, 2007.

At the hearing, the Department presented the testimony of Dr. Whitney, and Petitioner's Exhibits 1 through 4 were offered and received into evidence. Dr. Whitney testified in his own behalf but did not offer any exhibits into evidence. On the Department's motion and over the objection of Dr. Whitney, official recognition was taken of several final orders issued by the Board of Chiropractic Medicine ("Board") in which penalties were assessed against chiropractic physicians found guilty of false, deceptive, or misleading advertising.

The transcript of the proceeding was filed with the Division of Administrative Hearings on June 25, 2007, and the parties timely filed proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency charged with the responsibility for investigating and prosecuting complaints against persons holding licenses in the health professions and occupations, including chiropractic physicians. See § 456.073, Fla. Stat. The Board of Chiropractic Medicine ("Board") is the entity charged with the responsible for imposing penalties against chiropractic physicians for violations of Section 460.413(1), Florida Statutes. See § 460.413(2), Fla. Stat.

2. At the times material to this proceeding, Dr. Whitney was a chiropractic physician licensed to practice chiropractic medicine in Florida, having been issued license number CH 4840.

3. Dr. Whitney's address of record is 1011 North Federal Highway, Unit 106, Hallandale Beach, Florida 33009.

4. Dr. Whitney has been a licensed chiropractic physician in Florida since January 1985 and has never had disciplinary action taken against his license.

5. On or about September 7, 2001, Williston Orthopedic Rehab, Inc. ("Clinic"), opened in Williston, Florida. Dr. Whitney was the medical director of the Clinic; Robert Andrews was the owner of the Clinic. Mr. Andrews had worked with Dr. Whitney in his chiropractic practice for more than 10 years.

6. A sign was erected in front of the Clinic identifying the facility and the services provided. Dr. Whitney's name, "Dr. Robert Whitney," was prominently shown on the sign, and he was identified as "Medical Director."

7. The services provided by the Clinic, as shown on the sign, were as follows:

- Automobile Accidents - Injuries
- Work Related Injuries
- Physical Therapy
- Alternative Medicine
- Chiropractic Care
- Massage

8. On or about September 7, 2001, several photographs were taken of Dr. Whitney and others standing in front of the sign. The photographs appeared in the September 13, 2001, edition of both The Williston Pioneer newspaper and of the Williston Sun

Suwannee Valley News newspaper, together with articles about the new Clinic, its staff, and the services offered.

9. Dr. Whitney was identified in one article as a "Doctor of Chiropractic," and Mr. Andrews was identified in the same article as the "practice administrator."

10. Dr. Whitney had no ownership interest in the Clinic and had no role in the administration of the Clinic. His primary duty as medical director was to review charts, and he worked at the Clinic part-time.

11. Mr. Andrews ordered the sign that was placed in front of the Clinic, and Dr. Whitney was not consulted about the information that was to be placed on the sign or asked to approve the contents of the completed sign.

12. Dr. Whitney did not see the sign prior to arriving at the Clinic on or about September 7, 2001, to have his photograph taken for the newspaper stories.

13. As soon as Dr. Whitney saw the sign, he notified Mr. Andrews that it failed to identify him as a chiropractic physician. Dr. Whitney immediately told Mr. Andrews to have the sign modified to include the designation "D.C." after his name.

14. Mr. Andrews agreed to modify the sign, but he failed to have the sign corrected. The sign remained in front of the Clinic for several weeks before it was removed.

15. Dr. Whitney left his position at the Clinic several weeks after he asked Mr. Andrews to correct the sign.

16. The sign in front of the Clinic was misleading in that it did not, in any manner, identify Dr. Whitney as a chiropractic physician. He was identified only as "Dr. Robert Whitney," the "Medical Director" of the Clinic. The inclusion of "chiropractic care" among the services provided at the Clinic is not sufficient, standing alone, to provide notice to the public that Dr. Whitney is a chiropractic physician.

17. Although Dr. Whitney did not disseminate or cause the dissemination of the misleading information in the sign, the sign remained outside the Clinic for several weeks with his apparent acquiescence.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

19. In its Amended Administrative Complaint, the Department seeks to impose penalties against Dr. Whitney that include suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, it has the burden of proving by clear and convincing evidence that Dr. Whitney committed the violation alleged in the Amended

Administrative Complaint. 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).

20. The Department has charged Dr. Whitney with "[f]alse, deceptive, or misleading advertising," which is one ground on which disciplinary action against chiropractic physicians may be imposed. § 460.413(1)(d), Fla. Stat.

21. Florida Administrative Code Rule 64B2-15.001, which implements Section 460.413(1)(d), Florida Statutes, sets forth the definition of deceptive and misleading advertising in pertinent part as follows:

(2) No chiropractor shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive or misleading. Any advertisement or advertising shall be deemed by the Board to be fraudulent, false, deceptive, or misleading if it:

* * *

(f) Fails to conspicuously identify the chiropractor or chiropractors referred to in the advertising as a chiropractor or chiropractors; . . .

22. "Advertisement" and "advertising" are defined in Florida Administrative Code Rule 64B2-15.001(3) as

any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or

indirectly, of selling professional services, or offering to perform professional services, or inducing members of the public to enter into any obligation relating to such professional services. The terms advertisement or advertising shall include the name under which professional services are performed.

23. Based on the findings of fact herein and the definition in Rule 64B2-15.001(3), the sign erected outside the Clinic is an advertisement or advertising, and, as proscribed in Section 460.413(1)(d), Florida Statutes, it must not be false, deceptive, or misleading.

24. Based on the findings of fact herein and the provisions of Rule 64B2-15.001(1)(f), the sign erected outside the Clinic must be deemed misleading because it fails to identify Dr. Whitney as a chiropractic physician.

25. Dr. Whitney argues that he should not be disciplined for the contents of the sign because he did not "disseminate or cause the dissemination" of the misleading advertising, as required by Florida Administrative Code Rule 64B2-15.001(2): He was not involved in procuring the sign; he was not consulted regarding the information to be included on the sign; and, immediately upon seeing the sign, he advised Mr. Andrews that the sign must be changed to indicate that he was a chiropractic physician.

26. Based on the findings of fact herein, Dr. Whitney acquiesced in the dissemination of the misleading advertising, even though he did not directly disseminate it or directly cause its dissemination, by posing for photographs in front of the sign. This action is sufficient to establish that Dr. Whitney is guilty of "misleading advertising," and the Department has, therefore, proven by clear and convincing evidence that Dr. Whitney violated the prohibition in Section 460.413(1)(d), Florida Statutes, against misleading advertising by a chiropractic physician.

27. Disciplinary guidelines applicable to chiropractic physicians are set forth in Florida Administrative Code Rule 64B2-16.003. Rule 64B2-16.003(1)(1) provides that, for the first violation of Section 460.413(1)(d), Florida Statutes, the Board shall impose an administrative fine ranging from a minimum of \$1,000.00 to a maximum of \$7,500.00 and sanctions ranging from a letter of concern to one year's probation.

28. Florida Administrative Code Rule 64B2-16.003(2) provides as follows:

The Board may take into consideration the following factors in determining the appropriate disciplinary action to be imposed and in going outside of the disciplinary guidelines:

(a) The danger to the public;

- (b) The number of unrelated and distinct offenses;
- (c) The actual damage, physical or otherwise, to the patient(s);
- (d) The length of time since the date of the last violation(s);
- (e) The length of time the licensee has practiced his or her profession;
- (f) Prior discipline imposed upon the licensee;
- (g) The deterrent effect of the penalty imposed;
- (h) The effect of the penalty upon the licensee's livelihood;
- (i) Rehabilitation efforts of the licensee including remorse, restitution, and corrective actions;
- (j) Efforts of the licensee to correct or stop violations or failure of the licensee to correct or stop violations;
- (k) Related violations against the licensee in another state, including findings of guilt or innocence, penalties imposed and penalties served;
- (l) The actual negligence of the licensee pertaining to any violation;
- (m) Any other mitigating or aggravating circumstances.

29. Having considered the findings of fact herein, the Board would be justified in imposing a lesser penalty for Dr. Whitney's violation than the minimum penalty provided in Florida Administrative Code Rule 64B2-16.003(1)(1). The

Department failed to prove that the misleading information on the sign in front of the Clinic posed a danger to the public, given Dr. Whitney's limited duties as Medical Director, or caused any actual damage; the violation occurred almost six years ago; Dr. Whitney has been in practice in Florida for more than 20 years and has never been disciplined by the Board; and, immediately upon seeing the sign, Dr. Whitney requested that the sign be modified to show that he was licensed as a chiropractic physician.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Chiropractic Medicine enter a final order finding Robert Whitney, D.C., guilty of having violated Section 460.413(1)(d), Florida Statutes, and imposing a penalty consisting of a \$500.00 administrative fine and a letter of concern.

DONE AND ENTERED this 31st day of July, 2007, in
Tallahassee, Leon County, Florida.



PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of July, 2007.

ENDNOTE

¹ All references to the Florida Statutes herein are to the 2001 edition unless otherwise indicated.

COPIES FURNISHED:

William Jeff Barnes, Esquire
1515 North Federal Highway
Atrium Building, Suite 300
Boca Raton, Florida 33432

Cecelia D. Jefferson, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

Dr. Ana M. Viamonte Ros, Secretary
Department of Health
4052 Bald Cypress Way, Bin A00
Tallahassee, Florida 32399-1701

Josefina M. Tamayo, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

Joe Baker, Jr., Executive Director
Board of Chiropractic Medicine
Department of Health
4052 Bald Cypress Way
Tallahassee, Florida 32399-1701

R. S. Power, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

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.