

STATE OF FLORIDA
DEPARTMENT OF HEALTH

Final Order No. DOH-07-2483-FOEMQA
FILED DATE - 11-15-07
Department of Health
By: [Signature]
Deputy Agency Clerk

DEPARTMENT OF HEALTH,

Petitioner,

vs.

ROBERT WHITNEY, D.C.,

Respondent.

COPY

DOH Case No.: 2001-12975
DOAH Case No.: 07-1153PL

FINAL ORDER

THIS CAUSE came before the Board of Chiropractic Medicine (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on November 2, 2007, in Orlando, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Respondents' Exceptions to the Recommended order, and Petitioner's Response to Respondent's Exceptions to Recommended Order (copies of which are attached hereto as Exhibits A, B, and C) in the above-styled cause. Petitioner was represented by Cecelia Jefferson, Assistant General Counsel. Respondent was represented by W. Jeff Barnes, Attorney at Law. Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in these cases, the Board makes the following findings and conclusions.

RULINGS ON RESPONDENT'S EXCEPTIONS

The Board reviewed and considered Respondent's Exceptions and Petitioner's Response to Respondent's Exceptions and rules as follows:

1. FIRST EXCEPTION: Respondent filed an exception to the Administrative Law Judge's granting of Petitioner's Motion for Official Recognition of previously filed Final Orders of the Board of Chiropractic Medicine. The Board does not have substantive authority over evidentiary issues and denies Respondent's exception on that ground. *Barfield v. Department of Health, Board of Dentistry*, 805 So.2d 1008 (Fla. 1st DCA 2001).

2. SECOND EXCEPTION: Respondent filed an exception to the conclusions of law listed in paragraph 26 of the Recommended Order. Respondent takes exception to the Administrative Law Judge's finding that Respondent acquiesced in the dissemination of the misleading advertising. The Board denied this exception on the grounds that the findings of fact were based on competent substantial evidence, that the Administrative Law Judge's conclusion of law was appropriate and on the grounds set forth in Petitioner's Responses to Respondent's Exceptions.

3. THIRD EXCEPTION: Respondent filed an exception to the conclusions of law set forth in the Recommended Order, wherein the Administrative Law Judge found that Respondent acquiesced in the dissemination of the misleading advertising. To the extent that these paragraphs contained findings of fact, the Board denies this exception because there is competent substantial evidence in the record to support the Administrative Law Judge's findings of fact. To the extent that this exception sets forth conclusions of law, the Board denied the exception because it concurs with the Administrative Law Judge's conclusion that Respondent acquiesced in the dissemination of

misleading advertising when he was posed for photographs in front of the sign. The Board denies Respondent's third exception on the grounds that the Administrative Law Judge's findings of fact were based on competent substantial evidence, that the Administrative Law Judge's conclusion of law was appropriate, and on the grounds set forth in Petitioner's Responses to Respondent's Exceptions.

4. EXCEPTION FOUR: Respondent's fourth exception is based upon the argument that there were no findings of fact that prove that Respondent had the requisite intent to be guilty of false, deceptive, or misleading advertising. The Board denies Respondent's fourth exception on the grounds that the Administrative Law Judge's findings of fact were based on competent substantial evidence, that the Administrative Law Judge's conclusion of law was appropriate, and on the grounds set forth in Petitioner's Responses to Respondent's Exceptions.

5. FIFTH EXCEPTION: Respondent's fifth exception relates to the Administrative Law Judge's findings of fact and conclusions of law that Respondent disseminated or caused the dissemination of the advertising. To the extent that this paragraph contains findings of fact, the Board denies this exception because the Board finds that there is competent substantial evidence in the record to support the Administrative Law Judge's findings of fact. To the extent that this exception sets forth conclusions of law, the Board concurs with the Administrative Law Judge's conclusion that Respondent acquiesced to the dissemination of misleading advertising when he was posed for photographs in

front of the sign. Based on the findings that there is competent substantial evidence to support the findings of fact, that the Board concurs with the conclusions of law stated by the Administrative Law Judge, and for the reasons stated in Petitioner's Response to Respondent's Exceptions, Respondent's fifth exception is denied.

6. SIXTH EXCEPTION: Respondent's filed an exception to paragraph 26 of the Recommended Order, specifically, the finding that there was clear and convincing evidence that Respondent disseminated or caused the dissemination of false, misleading, or deceptive advertising. The Board denies this exception on the grounds that there is competent substantial evidence in the record to support the Administrative Law Judge's findings of fact, the Board agrees with the Administrative Law Judge's conclusions of law, and for the reasons set forth in Petitioner's Response to Respondent's Exceptions.

7. SEVENTH EXCEPTION: Respondent takes exception to paragraph 26 of the Recommended Order to the extent that the Administrative Law Judge's finding that Respondent acquiesced to the dissemination of the false, deceptive, or misleading advertisement modifies or expands the applicable statute. To the extent that this is an exception to a Conclusion of Law, the Board denies the exception because it agrees with the Administrative Law Judge's conclusion and for the reasons set forth in Petitioner's Response to Respondent's Exceptions.

8. EIGHTH PARAGRAPH: Paragraph 8 of Respondent's Exceptions sets forth the provisions of 16A CMR 1.02(2) of the Administrative Code.

which lists the aggravating and mitigating factors for deviating from the disciplinary guidelines. To the extent that this is an exception to the Recommended Order, the Board voted to deny the exception on the grounds there is competent substantial evidence in the record to support the Administrative Law Judge's findings of fact, the Board agrees with the Administrative Law Judge's conclusions of law, and for the reasons set forth in Petitioner's Response to Respondent's Exceptions.

9. NINTH EXCEPTION: Respondent filed an exception to the recommended penalty. The penalty recommended by the Administrative Law Judge was a fine of \$500 and a letter of concern. Respondent objected to the penalty because he did not believe that disciplinary action should be imposed. Because the Board believes that a violation occurred and that disciplinary action is warranted, the Board denies the exception and accepts the penalty recommendation of the Administrative Law Judge.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated by reference herein.
2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 460, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated by reference herein.

PENALTY

Upon a complete review of the record in this case, the Board determines that the penalty recommended by the Administrative Law Judge is ACCEPTED. WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that

1. Respondent violated Section 460.413(1)(d), Florida Statutes, by false, misleading or deceptive advertising.
2. For the above-stated violation, Respondent shall receive a letter of concern and a fine of **five hundred dollars (\$500)**. The fine shall be paid within **ninety (90) days** of the filing date of this Final Order.

MOTION TO ASSESS COSTS

On October 29, 2007, the Department filed an Amended Motion to Assess Costs. Respondent had filed objections to the original Motion to Assess Costs filed by the Department. Counsel for Respondent stated that he had received the Amended Motion to Assess Costs the morning of the meeting, but because the Department had amended its motion to exclude the legal fees, he had no additional objection. Based on the discussion of the parties, the Board voted to impose costs in the amount of **nine hundred sixty-four dollars and ninety-three cents (\$964.93)**. The costs shall be paid within **ninety (90) days** of the filing date of this Final Order.

This Final Order shall take effect upon being filed with the Clerk of the Department of Health.

DONE AND ORDERED this 14^x day of Nov, 2007.

BOARD OF CHIROPRACTIC MEDICINE




Joe Baker, Jr., Executive Director
on behalf of Salvatore LaRusso D.C., CHAIR

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to: **Robert Whitney, D.C.**, Post Office Box 800247, Miami, Florida 33280-0247, his counsel of record, **W. Jeff Barnes**, Attorney at Law, 1515 North Federal Highway, Atrium Building, Suite 300, Boca Raton, Florida 33432; **Patricia M. Hart**, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice mail to: **Deborah Bartholow Loucks**, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; and **Cecelia Jefferson**, Assistant General Counsel, Department of Health, Prosecution Services Unit, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3265, on this 15th day of November, 2007.



Deputy Agency Clerk