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Final Order No. DOH-12-0476-^{FOF}
FILED DATE - ^{-MQA} MAR 06 2012
Department of Health

**STATE OF FLORIDA
DEPARTMENT OF HEALTH**

Angelo Sanders
County Agent

**DEPARTMENT OF HEALTH,
BOARD OF CHIROPRACTIC MEDICINE,**

Petitioner,

vs.

**DOAH Case No.: 11-0722PL
DOH Case No.: 2007-37566
License No.: CH 5756**

PAUL KEVIN CHRISTIAN, D.C.

Respondent.

DIVISION OF
ADMINISTRATIVE
HEARINGS

2012 MAR -7 A 10:51

FILED

FINAL ORDER

THIS MATTER came before the Board of Chiropractic Medicine (hereinafter "Board") pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on February 17, 2012, in Orlando, Florida for the purpose of considering the Administrative Law Judge's Recommended Order (a copy is attached hereto as Exhibit A) in the above-styled cause. Petitioner was represented by Tari Rossito-Van Winkle, Assistant General Counsel. Respondent was present with counsel, Michael R. Lowe and Jack T. Cook, Attorneys at Law.

Respondent timely filed exceptions to the Recommended Order and Petitioner timely filed a response to the exceptions.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULINGS ON RESPONDENT'S EXCEPTIONS

The Board reviewed and considered Respondent's Exceptions and ruled as follows:

1. FIRST EXCEPTION: Respondent filed an exception to the findings of fact contained in paragraph 7 of the Recommended Order. The Board found that the exception is asking the Board to re-weigh the evidence and credibility of the witnesses; which the Board may not do. *Heifetz v. Department of Business Regulation*, 475 So.2d 1277, 1281 (Fla.1st DCA 1985). The Board found that the factual findings in paragraph 7 are based on competent substantial evidence in the record. Therefore, the Board voted to deny Respondent's first exception.

2. SECOND EXCEPTION: Respondent filed an exception to the findings of fact contained in paragraph 8 of the Recommended Order. The Board found that the exception is asking the Board to re-weigh the evidence and credibility of the witnesses; which the Board may not do. *See Heifetz*. The Board found that the factual findings in paragraph 8 are based on competent substantial evidence in the record. Therefore, the Board voted to deny Respondent's second exception.

3. THIRD EXCEPTION: Respondent filed an exception to the findings of fact contained in paragraph 9 of the Recommended Order. The Board voted to amend the findings of fact contained in paragraph 9 of the Recommended Order but not on the grounds articulated by Respondent in his exception. Respondent argued that the finding of fact was based on the Administrative Law Judge's reliance on testimony from a rebuttal witness for Petitioner. The Board rejected this ground for taking exception to the finding of fact in paragraph 9. *See Heifetz*. The Board voted to modify the finding of

fact in paragraph 9 based upon the records of the examination found on page 112 of Petitioner's Exhibit 1. The Board's substituted finding of fact is:

9. In his examination records of either April 26, 2006, or May 24, 2006, Dr. Christian noted that there was "R [circled] Visual Acuity Diff." M.M.'s mother was present during the examination and observed Dr. Christian testing M.M.'s vision on April 26, 2006.

The Board found that the remaining factual findings in paragraph 9 are based on competent substantial evidence in the record and denied Respondent's exception.

4. FOURTH EXCEPTION: Respondent filed an exception to the findings of fact contained in paragraph 10 of the Recommended Order. The Board found that the exception is asking the Board to re-weigh the evidence and credibility of the witnesses; which the Board may not do. *See Heifetz*. Respondent argued that the findings of fact were based on the Administrative Law Judge's reliance on testimony from a rebuttal witness for Petitioner and asked the Board to modify the finding of fact in paragraph 10 on the grounds that the Administrative Law Judge erred in allowing the testimony of the rebuttal witness. The determination of whether a witness is permitted to testify is a legal question and not one that falls within the statutory authority of the Board. *Barfield v. Department of Health, Board of Dentistry*, 805 So.2d 1008 (Fla. 1st DCA 2001). Therefore, the Board voted to deny Respondent's fourth exception.

Paragraph 10 of the Recommended Order contains a scrivener's error. The Board voted to correct the error. The first sentence of paragraph 10 is changed to read:

"Dr. Christian testified that he first tested M.M.'s vision on May 24, 2006".

The remainder of paragraph 10 remains as set forth in the Recommended Order.

The Board found that the factual findings in paragraph 10 are based on competent substantial evidence in the record and denied Respondent's fourth exception.

5. FIFTH EXCEPTION: Respondent filed an exception to the conclusions of law listed in paragraph 44 of the Recommended Order on the grounds that Petitioner failed to prove its case by clear and convincing evidence. The determination of whether Petitioner met its burden of proof is an evidentiary issue that does not fall within statutory authority of the Board. *See, Barfield.* In his oral argument, Respondent argued that the Board can modify findings of fact or conclusions of law if the Board finds that the proceeding does not comply with the essential requirements of law. However, a determination of whether the violations alleged in the Administrative Complaint were properly pled does not fall within the substantive jurisdiction of the Board. *See, Barfield.* Therefore, the Board voted to deny Respondent's fifth exception.

6. SIXTH EXCEPTION: Respondent filed an exception to the conclusion of law listed in paragraph 45 of the Recommended Order on the grounds that Petitioner failed to prove its case by clear and convincing evidence. In its review of the exceptions to the findings of fact, the Board found that the ALJ's findings were based on competent substantial evidence.

In his exception, Respondent argued that the Board can modify findings of fact or conclusions of law if the Board finds that the proceeding does not comply with the essential requirements of law and argued that the violation found by the Administrative Law Judge was not specifically pled in the Administrative Complaint. The Board found

that the determination of whether the violations alleged in the Administrative Complaint were properly pled does not fall within the substantive jurisdiction of the Board.

Respondent referenced his exceptions to paragraphs 7 and 8 as a basis for modifying or substituting the ALJ's conclusion of law in paragraph 45. Because the Board found that the findings of fact contained in paragraphs 7 and 8 were based on competent substantial evidence, the Board did not accept Respondent's exception. Based on the Board's finding that the findings of fact which resulted in the conclusion of law that found Respondent in violation were based on competent substantial evidence, and that the Board does not have substantive jurisdiction over determining whether an Administrative Complaint is properly pled, the Board voted to deny Respondent's sixth exception.

7. SEVENTH EXCEPTION: Respondent filed an exception to the conclusion of law listed in paragraph 46 of the Recommended Order on the grounds that Petitioner failed to prove its case by clear and convincing evidence. In its review of the exceptions to the findings of fact, the Board found that the ALJ's findings were based on competent substantial evidence.

The Board did not accept Respondent's grounds for rejecting the Conclusion of Law found in paragraph 46. The Board voted to modify the first sentence in paragraph 46. The Board stated that a chiropractor does not need to document changes in vision when the chiropractor has referred the patient to eye specialists. The Board's interpretation of its statute and rules is as reasonable or more reasonable than that of the Administrative Law Judge. The remainder of paragraph 46 was not changed.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order, as amended above, 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, as amended above, 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 be accepted.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that:

1. **Fine.** The Board shall impose an administrative fine in the amount of **two thousand five hundred dollars (\$2,500.00)** to be paid by Respondent by March 31, 2014.
2. **Probation.** Respondent's license shall be placed on probation for a period of **one (1) year**. Within the initial **thirty (30) days** of the probationary period, the monitor shall present at Respondent's office for the initial visit.

The probationary terms are:

- a. **Supervision:** During probation, Respondent shall practice under the indirect supervision of a Board-approved chiropractic physician, hereinafter referred to as the "monitor." Respondent shall allow the monitor access to

Respondent's medical records, calendar, patient logs or other documents necessary for the monitor to supervise Respondent's practice. The monitor shall be physically present at Respondent's office when the records and practice review occur.

b. **Monitor's Responsibilities:**

1. After the initial visit, the monitor shall review the records once every three months, a minimum of **five (5)** files or 100% review (if fewer than five active patients) of Respondent's active patient records for the purpose of ascertaining whether proper care and treatment is provided and proper documentation is maintained. The monitor shall randomly select the patient files to review.

2. Reports. During the entire probationary period, after each monitoring session/review, the monitor shall submit a report, in affidavit form, which shall include:

- a. A brief statement of why Respondent is on probation;
- b. A description of Respondent's practice (type and composition);
- c. A statement addressing Respondent's compliance with the terms of probation;
- d. A brief description of the monitor's relationship with Respondent;
- e. A statement advising the Board of any problems that have arisen;
- f. A summary of the dates the monitor went to Respondent's office, the number of records reviewed, the overall quality of the records reviewed, and the dates Respondent contacted the

monitor; and

- g. A statement addressing the issues outlined in the monitoring questionnaire sent to the monitor from the Compliance Officer/Disciplinary Compliance Chairman.

More detailed information regarding the content of the monitoring report shall be provided to the monitor by the Board's Compliance Officer or the Department's Compliance unit. The monitor will be expected to utilize the forms and comply with the guidelines contained in these materials.

3. **Obligation to report.** The monitor is required to report immediately to the Board any violations by Respondent of Chapters 456 or 460, Florida Statutes, or the rules promulgated pursuant thereto.

4. **Appearances.** The monitor shall appear before the Board at any time requested by the Board to answer any questions that the Board may have about Respondent. It is Respondent's responsibility to ensure that Respondent's monitor appears as requested or directed by the Board. If Respondent's approved monitor inexcusably fails to appear as requested by the Board, **Respondent shall immediately cease practicing chiropractic medicine until such time as Respondent's approved monitor or alternate monitor appears before the Board, unless the monitor's failure to appear was beyond the control of the monitor or Respondent.**

5. **Change in Monitor.** In the event that Respondent's monitor is unable or unwilling to fulfill the responsibilities of a monitor, Respondent shall immediately notify the Board office. Respondent shall obtain another Board approved monitor within **two weeks (fourteen days)** of the cessation of supervision by the previous monitor. In

the event that Respondent has difficulty obtaining a Board approved monitor because of a lack of monitors in his area, Respondent shall contact the Board office who will notify the chair of the Disciplinary Compliance Committee. The Board staff or Committee Chair will seek additional monitors. Regardless of the circumstances, Respondent agrees to refrain from practice in the event that he is without a monitor for more than one month. Respondent may resume practice once he obtains another Board approved monitor.

c. **Other Obligations/Requirements of Probation**

1. **Appearance Requirements:** Respondent is required to appear before the Board at any time upon request or direction of the Board. Board staff shall notify Respondent of the date, time, and place of the Board meeting at which Respondent's attendance is required. Inexcusable failure of Respondent to appear as requested or directed shall be considered a violation of the terms of this Order and may subject Respondent to disciplinary action, unless Respondent's appearance was excused in advance by the Board or the failure to appear was beyond Respondent's control.

2. If the Board or the Disciplinary Compliance Committee Chairman determines that Respondent or the monitor reports are unacceptable or do not conform to the above-listed requirements, the Board retains the authority to extend the probationary period.

d. **Continuity of Practice**

1. **Tolling Provisions.** In the event that Respondent leaves the State of Florida for a period of **thirty (30) days** or more or otherwise does not engage in the active practice of chiropractic medicine in the State of Florida, the following probationary provisions shall be tolled and shall remain tolled until

Respondent returns to the active practice of chiropractic medicine in the State of Florida:

- a. The time period of probation;
- b. The indirect supervision, including the file review and submission of quarterly monitor reports; and
- c. Preparation of investigative reports detailing compliance with the probationary terms.

During any time period when Respondent's probation is tolled, Respondent shall continue to submit reports to the Compliance Officer in the manner directed by the Compliance Officer.

2. **Active Practice.** In the event that Respondent leaves the active practice of chiropractic medicine for a period of **one (1) year** or more, the Board may require that Respondent appear before the Board and demonstrate his ability to practice chiropractic medicine with skill and safety to patients prior to resuming the practice of chiropractic medicine in Florida.

e. **Petition for early termination.** Respondent may petition for termination of the probationary period after successful completion of **two (2) visits** by the monitor. Respondent shall submit a petition to the Board for termination. Respondent and his monitor may be required to appear at the Board meeting when the petition is considered.

3. **Continuing Education.** By March 31, 2014, Respondent shall complete **six (6) hours** of additional Board approved continuing education in the area of recordkeeping, documentation, and coding. Within **ten (10) days** of completion of the

course(s) and/or receipt of the certificate(s) of completion, Respondent shall mail a copy of the continuing education certificates of completion to the Chiropractic Medicine Compliance Officer. These continuing education hours are in addition to the hours required for license renewal and must be obtained from a formal, live lecture format program.

COSTS

Upon agreement of the parties, the determination of costs shall be deferred until a later date. The Board expressly retains jurisdiction to impose costs.

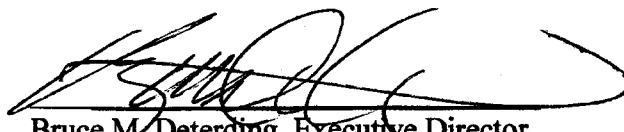
RESPONDENT'S MOTION FOR STAY OF PENALTY

Upon completion of consideration of the recommended order in this matter, Respondent's legal counsel made an ore tenus motion for stay of the penalty in anticipation of an appeal of the Final Order. Upon consideration of the motion and being duly advised on the premises, the Board granted the motion and stayed the penalty throughout the pendency of all review proceedings in Florida courts until a mandate issues. If Respondent fails to file a timely notice of appeal, the stay shall be automatically lifted upon the 31st day after the filing 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 5th day of March, 2012.

BOARD OF CHIROPRACTIC MEDICINE


Bruce M. Deterding, Executive Director
on behalf of Rod Jones, 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, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE FLORIDA APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF THE FILING DATE 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 **certified U.S. Mail** to: **Paul Christian, D.C.**, by sending same to his counsel of record, **Michael R. Lowe, Michael R. Lowe, P.A.**, 2180 West S.R. 434, Suite 1124, Longwood, Florida 32779; and by interoffice mail to: **Tari Rossito-Van Winkle**, Assistant General Counsel, Department of Health, Prosecution Services Unit, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399; and **Deborah Bartholow Loucks**, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; 3265; and by regular US Mail to **Susan Belyeu Kirkland**, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060, on March 6, 2012.

Angel Sanders
Deputy Agency Clerk

Paul Christian, D.C.