

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

BEAU B. KIM, L.Ac.

Respondent.

Case No.: 1A-2009-144

OAH No.: 2012020040

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Acupuncture Board as its Decision in the above-entitled matter.

This Decision shall become effective

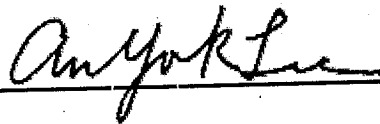
FEB 22 2013

IT IS SO ORDERED

JAN 23 2013

ACUPUNCTURE BOARD
STATE OF CALIFORNIA

By



BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

BEAU KIM,

Acupuncture License No. AC 5000,

Respondent.

Case No. 1A-2009-144

OAH No. 2012020040

PROPOSED DECISION

This matter was heard by Administrative Law Judge Deena Ghaly on September 12, 2012, in Los Angeles, California. Complainant was represented by Michel Valentine, Deputy Attorney General. Beau Kim (Respondent) was present and was represented by Edward Lee, Attorney at Law.

Evidence regarding the facts underlying the charges within the Accusation, as set forth in the Factual Findings below, and causes for discipline, as set forth in Legal Conclusions 3 through 7 below, were established solely through a stipulation (stipulation) entered into between the parties prior to the commencement of the hearing. Under its terms, Respondent stipulated to the truth of the Accusation in its entirety. The record was closed, and the matter was submitted for decision on September 12, 2012.

FACTUAL FINDINGS

1. On June 22, 2009, Complainant, Janelle Wedge, filed the Accusation while acting in her official capacity as the Executive Officer of the Acupuncture Board (Board), Department of Consumer Affairs, State of California.
2. On September 30, 1994, the Board issued Acupuncture License No. AC5000 to Respondent. The license was in full force and effect at all relevant times, and was scheduled to expire on March 31, 2012, unless renewed. The evidence did not establish whether the license was renewed. However, if the license was not renewed, the Board retains jurisdiction over this matter pursuant to Business and Professions Code section 118, subdivision (b).

3. The disciplinary charges that are the subject of the instant action arose from Respondent's treatment and care of two patients, M.O.K.¹ and J.W. The circumstances of their experiences are set forth below.

Patient M.O.K.

4. In March 2009, M.O.K. saw an advertisement placed by Respondent in a Korean newspaper, which claimed that his acupuncture treatment could cure a number of eye problems, including glaucoma and redness of the eye.

5. Later that month, M.O.K. began acupuncture treatment with Respondent for glaucoma, redness and excessive tearing of her eyes. M.O.K. received 21 acupuncture treatments for these conditions from Respondent from March 28, 2009 through May 21, 2009.

6. Respondent used "botanical needles" (wooden needles) in the acupuncture treatment of M.O.K. during all treatment from March 28, 2009 through May 21, 2009.

7. M.O.K. described the treatments by Respondent as "very painful" and involving "poking and pressing her inner eye lids with a small wooden stick." M.O.K. stated that on March 31, 2009, Respondent "hit" her inner eye lids with a small wooden stick. She also stated that on April 10, 2009, Respondent "hit" M.O.K. with a needle in her left cornea. M.O.K. developed an infection following these treatments. On June 6, 2009, M.O.K. independently and not at Respondent's recommendation sought treatment at the Cerritos Eye Medical Center for "an infection of the cornea of her left eye." Upon examination it was determined by the Cerritos Eye Medical Center that M.O.K.'s injury to her left cornea was "consistent with injuries that occurred anytime within one (1) month to a year previous."

8. On September 2, 2010, Respondent admitted, during an interview with a Senior Investigator with the Department of Consumer Affairs, that he "collects" the wooden needles from a "secret tree" and that he attempts to sterilize the needles at his office.

Patient J.W.

9. On or about July 16, 2009, J.W. sought out Respondent's services with a complaint of chronic dry eyes. Patient J.W. found out about Respondent's treatment methods from both written advertisements and through a Korean language radio talk show during which J.W. heard the Respondent describe that he had a "guaranteed cure rate for dry eyes at 100%."

¹ Patients are identified by their initials to protect their privacy.

10. On July 16, 2009, J.W. informed Respondent that he was at that time using prescription eye drops for his dry eyes. Respondent advised him to stop using the prescription eye drops, and provided J.W. with "special water" to use in his eyes as drops instead. Respondent told J.W. that he "makes the water himself and that it was a secret."

11. From July 16, 2009 through September 9, 2009, J.W. underwent 18 treatments and procedures from Respondent. During all of these visits, Respondent used a small wooden stick which he inserted in J.W.'s upper eyelids. After several of the treatments performed by Respondent, J.W. would complain of extreme and prolonged pain in his eyes. Each time, Respondent would again advise J.W. not to use the prescription eye drops and to only use Respondent's "special water" eye drops. The 18 procedures did not correct J.W.'s chronic dry eyes, as guaranteed by Respondent.

12. Respondent then recommended another 12 procedures to J.W., to which he agreed. During all these visits, Respondent used a small wooden stick which he inserted in J.W.'s upper eyelids. The additional 12 procedures still did not correct J.W.'s chronic dry eyes. Respondent recommended yet another series of treatments, which J.W. refused to undergo. J.W. demanded a refund of the amount he had paid for the treatments up to that point, \$2,000. Respondent refused to refund the fees.

Factor in Aggravation

13. In January 2009, Respondent received an administrative citation for inappropriate advertising (using the word "cure" in an advertisement) and using wooden needles. After an informal hearing in which Respondent initially appealed the citation, Respondent agreed to remove the advertisement from circulation and stop using wooden needles. He also paid a \$1,000 fine.

14. At the hearing, Respondent testified that he has discontinued the practices that injured M.O.W. and J.K. and is willing to take such steps as the Board may order to further assure it of his commitment to safe practices such as taking continuing education classes. However, he also reiterated his belief and faith in the procedures used on M.O.K and J.W. His demeanor and attitude belie a true appreciation of the magnitude of the harm he had caused or a clear understanding of his obligations as a licensed professional to practice safely and within the bounds of applicable laws and regulations.

Respondent's Financial Circumstances.

15. Respondent is married with a 15 year-old son. He is the sole breadwinner for his family. Although he continues to practice, he is in dire financial straits and recently declared bankruptcy. In addition to his business and personal expenses, Respondent has been paying off a \$30,000 settlement stemming from M.O.W.'s malpractice suit.

The Board's Costs

16. The Bureau seeks reimbursement of the enforcement and prosecution costs it has incurred, and certified that it has incurred legal fees in the amount of \$14,875. These amounts are reasonable and have not been contested by Respondent.

LEGAL CONCLUSIONS

1. The goal of administrative proceedings concerning licensure is the prevention of future harm and the improvement and rehabilitation of the licensee. It is far more desirable to impose discipline before a licensee harms any patient than after harm has occurred. (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 772.)

2. The standard of proof with respect to the charging allegations is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 583.) This means the burden rests on Complainant to establish the charging allegations by proof that is clear, explicit and unequivocal--so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind. (*In re Marriage of Weaver* (1990) 224 Cal.App.3d 478.)

3. Cause exists to discipline Respondent's acupuncture license in that his care and treatment of patients M.O.K. and J.W. constituted gross negligence pursuant to Business and Professions Code section² 4955.2 as established by the stipulation

4. Cause exists to discipline Respondent's acupuncture license in that he guaranteed a 100% success rate in his advertisements in violation of section 4955 prohibiting false or misleading advertising as established by the stipulation

5. Cause exists to discipline Respondent's acupuncture license in that he failed to comply with infection control guidelines by using needles in the practice of Acupuncture that were not labeled "for single use only" as established by the stipulation

6. Cause exists to discipline Respondent's acupuncture license in that he failed to refer M.O.K. immediately to a physician after M.O.K. experienced complications arising out of the acupuncture treatments Respondent performed in violation of California Code of Regulations, title 16, section 1399.451, subdivision (e), as established by the stipulation

7. Cause exists to discipline Respondent's acupuncture license in that he committed repeated acts of negligence in the practice of acupuncture in violation of section 4955.2 as established by the stipulation

² All statutory references are to the Business and Professions Code unless otherwise indicated.

8. California Code of Regulations, title 16, section 1399.469 provides as follows: "In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.), the Acupuncture Board shall consider the disciplinary guidelines entitled "Department of Consumer Affairs, Acupuncture Board 'Disciplinary Guidelines' 1996" which are hereby incorporated by reference. Deviation from these guidelines and orders, including the standard terms of probation is appropriate where the Acupuncture Board in its sole discretion determines that the facts of the particular case warrant such a deviation -for example: the presence of mitigating factors; the age of the case; evidentiary problems."

9. Under the Acupuncture Board's Disciplinary Guidelines (Guidelines), the penalty for improper advertising is 5 years' probation; the penalty for gross negligence resulting to substantial harm to patients is revocation; and the penalty for repeated negligent acts resulting in substantial harm to patients is revocation. The Guidelines do not address penalties for failing to use sterile equipment and for failing to refer patients for medical treatment.

10. Given the totality of the circumstances, in particular the pain and danger Respondent's patients underwent as the result of his treatments, revocation of Respondent's license is the only order consistent with the public safety. Respondent has been warned before about using wooden needles yet he went on not just to use them, but to advertise their efficacy. He did not show concern or restraint on his own even when it became clear that his patients were not improving and, in fact, caused additional pain as a result of his treatment. M.O.K. and J.W. experienced substantial, not minimal harm. Respondent is taking some responsibility for his actions by paying restitution to M.O.K. but the issue here is whether he is likely to continue with these practices and the record does not support a finding that he has changed his ways and fully understands his errors at this time.

11. Section 125.3 provides that the Board may request the Administrative Law Judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. Where, as here, the Board has made such a request, the Administrative Law Judge is to make a proposed finding of the reasonable costs of investigation and prosecution of the case. (§ 125.3, subd. (d).) The Board's reasonable costs of investigation and enforcement are \$14,875.00 (Factual Finding 16.) However, in light of the order below and the evidence of Respondent's financial condition (see, *Zuckerman v. State Bd of Chiropractic Examiners* (2002) 29 Cal. 4th 32 (respondent's financial capacity to make payments must be considered in determining cost recovery)), it would be inappropriate and overly punitive to direct Respondent to pay the costs of investigation and enforcement at this time. As set forth in the Order, Respondent will be responsible for paying the costs of investigating and prosecuting this matter only if and when the Board reinstates his license at some future time.

ORDER

Acupuncture License No. AC 5000, issued to Respondent Beau Kim, is revoked. In the event that the Board determines to reissue the license, Respondent must pay \$14,875.00 for costs incurred in the course of investigating and prosecuting this matter in any manner or payment schedule deemed appropriate by the Board.

DATED: November 14, 2012

A handwritten signature in black ink, appearing to read "Deena Ghaly", is written over a horizontal line.

DEENA GHALY
Administrative Law Judge
Office of Administrative Hearings