BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	Case No.: 1A-2011-161
	)	OAH No.: 2013081015
	)	
SUNNY CHEN YOUNG, L.AC.	)	
1745 SARATOGA AVE., #D	)	
SAN JOSE, CA 95129	)	
	)	
Acupuncture License No. AC 5361	)	
	)	
Respondent.	)	
	)	

DECISION AND ORDER

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

This Decision shall become effective on MAY 07 2014.

IT IS SO ORDERED APR 07 2014.

Michael Shi, Chair
Acupuncture Board
Department of Consumer Affairs
State of California

BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	
SUNNY CHEN YOUNG,	Case No. 1A-2011-161
Acupuncture License No. AC 5361,	OAH No. 2013081015
Respondent.	

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, on January 22, 2014, in Oakland, California.

Complainant Terri Thorfinnson, Executive Officer of the Acupuncture Board, was represented by Joshua Templet, Deputy Attorney General.

Respondent Sunny Chen Young was present and was represented by Ann H. Larson, Attorney at Law.

The record was held open to allow complainant to submit evidence of investigative costs, and for respondent to provide a response, if desired. A declaration of investigative costs was received on January 22, 2014, and was marked as Exhibit 10 for identification. Respondent's objection to the declaration, marked as Exhibit C for identification, was received on January 29, 2014. Respondent's objection, which goes more to the weight to be accorded the declaration than its admissibility, is overruled and Exhibit 10 is received in evidence.

The matter was submitted for decision on January 29, 2014.

FACTUAL FINDINGS

1. On July 17, 1996, the Acupuncture Board issued license number AC 5361 to respondent Sunny Chen Young. The license has been renewed through August 31, 2015.

2. On January 16, 2013, respondent was convicted, on her plea of nolo contendere, of a misdemeanor violation of Penal Code section 550, subdivision (a)(6) (knowingly making a false or fraudulent claim for payment of a health care benefit). Upon

conviction, respondent was placed on formal probation for three years on terms that included 90 days in jail (which respondent was permitted to serve on electronic home detention) and payment of restitution of $4,573.87.

3. Respondent's conviction was the result of her having submitted fraudulent insurance claims to Anthem Blue Cross for the treatment of patient R.S. The patient had visited respondent's clinic for acupuncture treatments on one occasion – on March 11, 2011 – incurring costs of $277. Between March 14 and April 18, 2011, respondent submitted to Anthem Blue Cross 38 health insurance claim forms on which she represented she had treated R.S. on 38 dates between October 1, 2010, and April 15, 2011. On these claims, respondent billed Anthem Blue Cross a total of $10,724. In a series of checks issued between March 24 and April 21, 2011, the insurance company paid respondent a total of $4,863.83.

4. The fraudulent claims came to light after R.S. received a quarterly statement from Anthem Blue Cross showing numerous treatments from respondent that the patient had not received. He reported this to the Acupuncture Board in October 2011 and investigations were begun by both the board and the Santa Clara County Office of the District Attorney. As a result, in September 2012, respondent was charged with three felonies – violations of Penal Code section 550, subdivisions (a)(6) (knowingly making a false or fraudulent claim for payment of a health care benefit), (a)(7) (knowingly submitting a claim for health care benefit that was not used), and (a)(8) (knowingly presenting multiple claims for payment of the same health care benefit with the intent to defraud). The subdivision (a)(7) and (a)(8) charges were dismissed when respondent pled nolo contendere to the subdivision (a)(6) charge, which was reduced to a misdemeanor.

5. Board investigator Kevin Dutchover interviewed respondent on April 6, 2012. Respondent said that she first realized there had been a "mistake" in R.S.'s billing when the board contacted her in November 2011 to request the patient's medical records. She said she then contacted Anthem Blue Cross by phone and letter to request an accounting but had not received a reply.[1]

6. Kathleen Swineford, an investigator for the Santa Clara County district attorney's office, interviewed respondent on May 31, 2012. Respondent told the investigator that she did not understand why she was being investigated over a billing error. She said, "It was just a mistake, maybe a computer or billing error, sometimes people make mistakes, it is not uncommon to make mistakes." Respondent said she had already admitted that she was wrong and had made a mistake, and again said she did not understand why she was being investigated. She felt the insurance company was making a big deal over only $4,000 or

---

[1] On November 23, 2011, a week after complying with the board's request for R.S.'s medical records, respondent had written to Anthem Blue Cross: "Enclosed is the correct billing for [R.S.]. The previous billing statements you received [were] incorrect. Please adjust the claim accordingly[.] We will reimburse any overpayments made out to our clinic. Sorry for the inconvenience and thank you for your time."

$5,000. At another point in the interview, respondent attributed the multiple billings to a computer error and said she did not know how it happened. Respondent said she did not intend to defraud the insurance company and wanted to pay back the money.

7. Respondent testified that she was not contesting her "wrongdoing" and believes she should be disciplined by the board for it. When asked what her wrongdoing was, respondent said she "made a mistake." Asked to explain what the mistake was, respondent said she had submitted multiple billings for treatments that had not been rendered, and that she knew that at the time she made the billings. She admitted that her actions were "wrong" and "a criminal matter."

Respondent's Background and Practice

8. Respondent is 64 years old. She came to the United States in 1974 after receiving a bachelor's degree in Nutrition in Taiwan. She obtained a masters degree in Agricultural Science from Fresno State University in 1979. She subsequently received a Ph.D. in Research in Oriental Medicine from Global University and another doctorate in Oriental Medicine from South Baylo University.

9. Respondent has been a licensed acupuncturist since 1996. She used to work full time providing acupuncture and herbal remedies but for the past five years or so she has worked only two or three days a week, depending on her patients' needs. She has never had any malpractice claims filed against her, and there have been no complaints to the board besides this one.

10. Over the last three years, respondent's practice has not been profitable. She submitted Form 1040, Schedule C forms (Profit or Loss from Business) showing her practice barely made a profit in 2010 and 2011, and had a net loss of over $6,600 in 2012. Her gross income from the practice over those three years declined from $21,000 in 2010 to $19,000 in 2011 to $8,000 in 2012. Respondent did not submit any other tax forms.

11. Respondent believes she is an effective and knowledgeable practitioner. She does not want to waste her knowledge and skill and would like to continue helping patients as long as she can.

Rehabilitation

12. As a condition of her criminal probation, respondent was required to make restitution of $4,573.87 to Anthem Blue Cross. She paid that restitution in full on the day she was convicted and placed on probation. Respondent was also required to pay various fees, including electronic detention costs, in an amount not established in this proceeding. She was initially required to repay these fees at a rate of about $119 per month, but this was reduced at her request to $50 per month. Respondent asserts she is currently making these payments.

13. As further evidence of rehabilitation, respondent testified that since her conviction she has changed her billing practices – she is now "very careful" about how she completes and submits claim forms. But it is found that this change in practice does not show rehabilitation at all. Respondent did not submit 38 claim forms to Anthem Blue Cross out of a lack of care. She did so because she was being fraudulent. Her unwillingness or inability to admit this, and her claim that somehow being more "careful" in the future will prevent this from happening again, actually show a lack of rehabilitation.

Remorse, contrition and acceptance are hallmarks of rehabilitation. From the start, respondent was unwilling to admit her fraudulent conduct. While she told the investigators she had made a mistake, she attempted to attribute this to a computer error. And she minimized her wrongdoing, first by explaining that people commonly make mistakes, and then by complaining that the insurance company was overly concerned over $4,000 or $5,000. In the hearing, respondent continued to refer to her wrongdoing as "a mistake" until pressed further, at which time she conceded she knowingly submitted multiple billings and that her actions were "a criminal matter." Although it is recognized that English is not respondent's first language, she has been in the United States for 40 years and has obtained three higher degrees in that time. Respondent's continued characterization of her actions as "a mistake" cannot be attributed to a language issue. Finally, respondent never directly admitted she had committed fraud, never explained why she chose to submit fraudulent billings to an insurance company, and expressed no remorse or contrition for her crime.

Costs

14. Business and Professions Code section 4959 provides that the board may order a licensee found guilty of unprofessional conduct to pay a sum not to exceed the reasonable costs of investigation and prosecution of the case. Complainant is seeking an order that respondent pay $14,975.00 in investigative and prosecution costs. In support of this claim, complainant submitted two documents – a certification of costs/declaration signed by Deputy Attorney General Joshua Templet and a declaration of investigative costs signed by investigator Kevin Dutchover.

15. In the first document, Mr. Templet stated that he was assigned to handle the case on December 12, 2013, and that another deputy attorney general and a paralegal had also provided legal work for which the board was billed. He stated that the Department of Justice's time-keeping program showed that the department had billed or would bill the board $9,657.50 for its work on the case. Although the certification states that the tasks performed included conducting an initial case evaluation; obtaining, reading and reviewing evidence in support of the board's accusation; drafting pleadings, correspondence and other case-related documents; consulting and/or meeting with colleague deputies, supervisory staff and client staff; and preparing the case for hearing, no supporting documentation was presented to show who performed these tasks, how much time was spent on them, or how the cost for providing these services was calculated.

16. In the second document, Mr. Dutchover stated that he had spent 24 hours working on the case in the 2011-2012 fiscal year and 4.5 hours in the 2012-2013 fiscal year;

that his time was billed at $182 per hour in 2011-2012 and $211 per hour in 2012-2013; and that the total investigative costs for which the board had been or would be billed was $5,317.50. Of the total of 28.5 hours, 11 hours were spent on investigation, four on travel, 9.5 on report preparation, and four on court time. Further explanation of each of these general cost categories was included.

17. Respondent objected to both these documents as being conclusionary and lacking sufficient supporting documentation. Respondent also objected that the amount of work shown in the declaration of investigative costs appeared to be excessive, with some categories being duplicative of each other.

18. California Code of Regulations, title 1, section 1042, subdivision (b), provides that costs may be proved by declarations containing "specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs." These declarations "shall describe the general tasks performed, the time spent on each task and the method of calculating the cost." (Subd. (b)(1).)

The certification of the costs billed by the Department of Justice fails to meet this standard. While it contains a general description of tasks performed, it does not include any breakdown of when the tasks were performed, by whom they were performed, how much time was spent on each of them, or how the total of $9,657.50 was calculated. For that reason, there is insufficient evidence upon which to make a finding of reasonableness of these costs and no order can be made requiring respondent to pay any portion of them.

The declaration of investigative costs does comply with the requirements of section 1042, subdivision (b), and provides a sufficient basis on which to make a determination of the reasonableness of the costs. While there may be a small amount of duplication between some of the cost categories listed, and despite respondent's objections, it is found that the amount billed for investigative costs – $5,317.50 – is reasonable.

19. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth various factors that must be considered in determining whether there should be a reduction or elimination of a cost recovery request. One of those factors is whether the licensee has the financial ability to make payments.

Here, there is evidence that respondent's financial ability to pay cost recovery is limited. She submitted portions of her tax returns showing that the income from her practice declined substantially from 2010 to 2012, and that the business operated at a significant loss in that last year. It is recognized that the drop in business in 2012 might well have been due to the fact that respondent was involved with the investigation and the ultimate prosecution of her for three felonies. It is also recognized that submission of only portions of tax returns may not tell the full story – without submission of full 1040 forms it is impossible to determine what other sources of income respondent might have.

But in addition to the tax forms submitted by respondent, there is other evidence of compromised financial circumstances. For one, the criminal court cut the monthly amount

respondent is required to pay as a condition of probation by more than half, from around $119 per month to $50 per month. In addition, during her investigation in 2012, the district attorney's investigator uncovered other facts suggesting respondent was in a troubled financial situation. The investigator found that there were two tax liens on respondent's residence – a federal lien for $23,130 and a state lien for $1,175 – and that Chase Bank had obtained a $30,647 judgment against her.

Taking into consideration all of the foregoing, it is found that on balance the evidence shows respondent has a limited ability to pay cost recovery. It is therefore found that there is cause to reduce her cost recovery obligation by close to half. Respondent shall be required to pay cost recovery of $3,000.

LEGAL CONCLUSIONS

First Cause for Discipline

1. Based upon the matters set forth in Finding 2, cause for disciplinary action against respondent for unprofessional conduct exists under Business and Professions Code sections 4955, subdivision (b), and 4956 in that she was convicted of a crime that is substantially related to the qualifications, functions or duties of an acupuncturist.

Second Cause for Discipline

2. Based upon the matters set forth in Findings 2 and 3, cause for disciplinary action against respondent exists under Business and Professions Code section 4955.1, subdivisions (b) and (c), in that she committed dishonest acts as an acupuncturist.

Penalty Determination

3. Respondent knowingly defrauded an insurance company. She made no attempt to explain why she did so and during the course of the investigation repeatedly attempted to minimize her actions. She continued at the hearing to minimize her conduct and she showed no remorse or contrition. Evidence of rehabilitation was scant and was outweighed by factors tending to show lack of rehabilitation. While respondent had an apparently unblemished record as an acupuncturist for many years before she committed fraud, the serious nature of her wrongdoing and her lack of contrition lead to the conclusion that it would not be in the public interest to permit her to continue to practice, even upon probationary terms and conditions.

Costs

4. Cause exists under Business and Professions Code section 4959 to order respondent to pay a sum not to exceed the reasonable costs of investigation and prosecution of the case. As set forth in Finding 18, the maximum respondent could be required to repay

is $5,317.50. But as set forth in Finding 19, cause exists under *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, to reduce the amount she shall actually be required to pay to $3,000.

ORDER

1. Acupuncture license number AC 5361 issued to respondent Sunny Chen Young is revoked.

2. Respondent shall pay to the board cost recovery of $3,000.

DATED: 2/13/14

MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings