BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	Case No.: 1A-2013-92
	)	OAH No.: 2014030544
STEVEN CHEN JING XIA	)	
	)	
Acupuncture License No. AC 8907	)	
	)	
Respondent.	)	
	)	

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Acupuncture Board, Department of Consumer Affairs, State of California, as the Decision in the above-entitled matter.

This Decision shall become effective on NOV 27 2014.

IT IS SO ORDERED OCT 28 2014.

Michael Shi, L.Ac, 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: STEVEN CHEN JING XIA, Acupuncturist License No. AC 8907 Respondent.	Case No. 1A-2013-92 OAH No. 2014030544

PROPOSED DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, State of California, heard this matter on August 21, 2014, in Oakland.

Deputy Attorney General Joshua M. Templet represented Terri Thorfinnson, Executive Officer, Acupuncture Board, Department of Consumer Affairs, State of California.

Attorney at Law Brian J. Thornton represented respondent Steven Chen Jing Xia, who appeared at the hearing. In order for respondent Steven Chen Jing Xia to understand and participate in the proceeding, he was aided during the hearing by certified Cantonese language interpreter Ms. Carmen Li.

On August 21, 2014, the matter was submitted for decision and the record closed.

FACTUAL FINDINGS

1. On March 6, 2003, the Acupuncture Board issued Acupuncture License Number AC 8907 to respondent Steven Chen Jing Xia (respondent). The license was in full force and effect at all times relevant to the allegations set out in the Accusation in this matter.

2. On March 3, 2014, Complainant Terri Thorfinnson (Complainant), in her official capacity as the Executive Officer of the Acupuncture Board, Department of Consumer Affairs, the State of California, made the Accusation against respondent.

Complainant seeks to discipline respondent's acupuncture license on the grounds: (1) that he was convicted of a crime that is substantially related to the qualifications, functions, or duties of acupuncture licensee; and, (2) that he engaged in fraudulent or dishonest acts that were substantially related to the qualifications, functions, or duties of acupuncture licensee.

Respondent timely filed on March 12, 2014, a Notice of Defense, pursuant to Government Code section 11506. On March 14, 2014, the Notice of Hearing was dispatched. The matter proceeded to hearing on the date set forth above.

Respondent's Criminal Conviction

3. On May 2, 2013, in case number 446636-A, the California Superior Court for Alameda County convicted respondent, on a plea of no contest, under one count of violating Penal Code section 550, subdivision (b)(1) (knowingly assisting or conspiring to present a fraudulent statement in support of a claim for payment under an insurance policy), a felony.

4. The crime of knowingly assisting or conspiring to present a false statement in support of a false insurance claim with the intent to defraud an insurer is substantially related to the qualifications, functions and duties of an Acupuncture Board licensee.

5. On September 11, 2012, a criminal complaint, under Case Number 446636-A, was filed in the California Superior Court for Alameda County, Hayward Hall of Justice, against both respondent and a corrupt lawyer. The complaint named respondent in seven of the eight counts and alleged his commission of felony insurance fraud under both Penal Code section 550, subdivision (a)(1) (knowingly presenting and causing to present a false and fraudulent claim for payment of a loss under a contract of insurance) and Penal Code section 550, subdivision (b)(1).

Due to a plea bargain arrangement, as reached during May 2013, respondent was determined by the superior court to be guilty, on his plea of no contest, to violation of only one felony count violation of Penal Code section 550, subdivision (b)(1).

6. As a consequence of the plea bargain agreement and the resultant May 2013 felony conviction, the superior court suspended the imposition of sentence for respondent and granted him formal probation for a five-year period under specific terms and conditions.

The terms and conditions of formal probation included an order that respondent spend three days in county jail, with credit given for three days previously served. The court further ordered respondent to spend an additional weekend period of incarceration in the Santa Rita Jail, which was to be followed by a required 30-day term of confinement in the Sheriff's Alternative Work Program. Further, respondent was directed to immediately report to the Alameda County Probation Office and to present a "financial declaration" to the assigned probation officer so that the amount of restitution to the crime victim, the California State Automobile Association (AAA or CSAA), could be determined. (In a subsequent court record dated June 13, 2013, the superior court issued an order that directed respondent to pay

restitution in the amount of $7,231.25 to the crime victim, CSAA. Further at the later proceeding, the superior court ordered respondent to pay $280 as a fine into the state's Restitution Fund. And respondent was also directed to pay $710 as a Probation Investigation fee, $30 as a Criminal Conviction Assessment and $40 as a Court Operations Assessment.)

At the proceeding on May 2, 2013, the superior court noted that respondent was "not [to] practice Acupuncture unless properly licensed." Further the court directed respondent to neither "submit claims nor collect money from any insurance company for services rendered during [the] first year of probation."

Respondent's Fraudulent or Dishonest Acts

7. The State of California Department of Insurance, Fraud Division (DOI), Report of Investigation, dated August 15, 2012, best describes the facts and circumstances regarding respondent's criminal acts that resulted in respondent's felony conviction for making, assisting or conspiring to make fraudulent insurance claims.

The DOI report shows that over the period between March 1, 2011, and August 30, 2012,[1] respondent submitted fraudulent claims to insurance companies whereby he wrongfully sought compensation for the provision of acupuncture services that were never provided by him. Also the subject state agency's investigative report shows that respondent made false entries in medical reports with regard to no less than four individuals, including two special investigators who used fictitious names during undercover operations. The four cases, which were depicted in the DOI report, establish respondent's deceitful and unlawful practices as summarized below:

RESPONDENT'S FRAUDULENT ACTS INVOLVING CONSUMERS

CONSUMER B.H.

Beginning on March 1, 2011, respondent interacted with an individual identified as B.H., who claimed that he had been in an automobile collision on February 13, 2011. Respondent saw B.H. in his office on 18 occasions. The last visit between respondent and B.H. occurred on April 29, 2011. By reason of the 18 office visits by B.H., respondent billed CSAA for acupuncture treatments for each visit. Respondent's billing statement to the insurance company described his provision of: acupuncture with electrical stimulation, 15 minutes each session; acupuncture with electrical stimulation, 15 minutes each session as well as massage, cupping and infrared treatment. However, a special investigator for the insurance company received a statement from B.H., wherein the supposed patient asserted

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[1] The alleged final date (August 15, 2012) of respondent's criminal conduct was derived from the felony complaint as filed in the superior court on September 11, 2013. While the alleged first date (March 1, 2011) of respondent's felony conduct was established in the Department of Insurance Report of Investigation, which noted ("3/1/11") as the first date of respondent's treatment of the consumer identified as B.H.

that he never received from respondent acupuncture treatment sessions involving needles. B.H. acknowledged that he had only received infrared treatment, and "some adjustments" but never did he receive acupuncture therapy from respondent. (And the DOI detective's analysis of billing records by respondent corroborated the account given by B.H.) With respect to the case of B.H., the investigators determined that respondent billed CSAA $2,628 for acupuncture treatment sessions that were never provided.

In an interview on December 8, 2011, by a DOI investigator, B.H. confirmed that he never received acupuncture treatment from respondent. And the patient told the government employee that respondent never asked the supposed patient "if he wanted acupuncture treatment," even though the acupuncture licensee billed an insurance company for non-existence treatment.

CONSUMER J.L.

Beginning on March 16, 2011, respondent interacted with an individual identified as J.L., who was involved in a rear-end automobile collision, so as to sustain "a minor back injury" on February 24, 2011. Respondent saw J.L. in his office on 20 occasions. The last visit between them occurred on April 30, 2011. By reason of the 20 office visits by J.L., respondent billed CSAA for acupuncture treatment for each visit. Respondent falsely reported that he provided J.L with the range of acupuncture services as in a way as to mirror the range of therapy supposedly rendered to patient B.H. But, on September 24, 2011, J.L. was interviewed by a special investigator for CSAA and he told the investigator that he never received any form of acupuncture treatment involving needles from respondent. With regard to the case of J.L, the investigators determined that respondent billed CSAA $2,920 for acupuncture treatment sessions that were never provided.

In an interview on December 19, 2011, by a DOI investigator, J.L. confirmed that he never received acupuncture treatment from respondent. The supposed patient represented that respondent primarily administered "massage treatments" during the office visits.

UNDERCOVER OPERATIONS BY THE CALIFORNIA DEPARTMENT OF INSURANCE

As a result of the findings and determinations reached through the investigation into the cases of consumer B.H. and consumer J.L., with regard to instances of respondent's false claims to an insurance company in order to wrongfully collect money through fraudulent insurance claims, DOI began undercover operations. Those undercover operations included detailed work by two detectives employed by DOI.

DETECTIVE TSUI USING THE ASSUMED IDENTITY OF JASON CHAN

On February 1, 2012, DOI Detective Jason Tsui, using the assumed identity of Jason Chan (DOI Detective Tsui), first went to respondent's office for treatment for injuries supposedly sustained in an automobile collision, which never occurred. After DOI Detective Tsui gave respondent a fictitious account of an imaginary automobile accident, respondent

performed a physical examination of the supposed patient and then the licensed acupuncturist announced that the patient's right side was stiff. But DOI Detective Tsui stated that his left shoulder hurt as a result of the automobile collision. And DOI Detective Tsui specifically informed respondent that he did not wish to receive any acupuncture treatment. Respondent performed 33 minutes of massage, 30 seconds of manipulations, and approximately one minute of fire cupping, which is a treatment technique using hot bulbs and fire. Respondent performed no form of acupuncture with needles upon DOI Detective Tsui during the first office visit.

On the second office visit on February 7, 2012, DOI Detective Tsui received from respondent: 47 minutes of massage, 30 seconds of manipulations and three minutes of fire cupping. Respondent performed no form of acupuncture with needles upon DOI Detective Tsui during the second office visit.

On February 9, 2012, DOI Detective Tsui went to respondent's office for a third visit. The putative patient informed respondent that he no longer wished to undergo either fire cupping or any form of acupuncture treatment. Thus, respondent gave the undercover detective 47 minutes of massage and 30 seconds of manipulations. During the office visit, DOI Detective Tsui asked respondent whether the patient should secure a lawyer, to which respondent answered in the affirmative and told the undercover detective that the acupuncture licensee would contact a lawyer for the patient. Respondent promised to give the supposed patient on a later date the name of a lawyer who could prosecute a claim in an attempt to collect insurance money.

On 13 distinct dates between February 14, 2012, and April 14, 2012, respondent administered manipulations and massage therapy as treatment for the non-existence injury of DOI Detective Tsui. On those dates, respondent did not provide either acupuncture with needles or fire cupping treatments for the undercover detective.

Respondent billed California Casualty Insurance Company in an amount of $3,052 for acupuncture and infrared treatment sessions that he never performed with regard to DOI Detective Tsui. And the detective's review of the medical records, which made by respondent to support his charges, revealed respondent's false and deceitful statements regarding the conditions and treatments supposedly involving services rendered to DOI Detective Tsui.

DETECTIVE THURBER USING THE ASSUMED IDENTITY OF NANCY LOY

On March 8, 2012, DOI Detective Nancy Thurber, using the assumed identity of Nancy Loy (DOI Detective Thurber), first went to respondent's office. The undercover detective told respondent that she had been a passenger in the vehicle operated by her supposed brother-in-law, namely undercover DOI Detective Tsui. But, DOI Detective Thurber pointedly informed respondent that at the time of the collision she had been asleep and that she was not injured. More important, DOI Detective Thurber clearly told respondent that she had no pain during the course of their initial meeting. And in her

undercover operative's role, DOI Detective Thurber expressed to respondent that she had come to respondent's office with the sole aim of gaining records of treatment in order to collect insurance money as she hoping to secure an insurance settlement. Despite the assertions by DOI Detective Thurber, respondent embarked upon an examination of the undercover detective, who repeatedly told respondent she did not experience any pain. Yet, respondent stated to DOI Detective Thurber he found that the putative patient's right side "was abnormal," and that "she was very tight," and in particular her "neck muscles and tendons were very tight." DOI Detective Thurber told respondent that she would not accept "cupping" or acupuncture as services from respondent. On the first visit, respondent administered 20 minutes of massage treatment.

Between March 13, 2012, and April 26, 2012, DOI Detective Thurber visited respondent's office on 10 distinct dates. Respondent only provided the undercover detective with massage treatments. DOI Detective Thurber never received any form of acupuncture with needles or fire cupping treatment. And during those office visits, respondent never inquired of the supposed patient whether she was experiencing pain or discomfort for which treatment might be beneficial.

Respondent billed California Casualty Insurance Company the amount of $2,902 for acupuncture and infrared treatment that he never performed with regard to DOI Detective Tsui. And the detective's review of the medical records, which made by respondent to support his charges, revealed false statements regarding the conditions and treatments supposedly involving DOI Detective Thurber. Among other things, respondent's false written reports stated that the undercover detective had told the treating acupuncturist that she felt pain in her neck and upper back, and that the pain was experienced "all the time." DOI Detective never stated to respondent during any office visit that she experienced pain; rather DOI Detective purposely proclaimed to respondent, on all the dates of his supposed treatment, that she was not in any pain and that she had not been injured in an automobile collision. In particular, the undercover detective stated to respondent that she had come to his office only to help her to secure money by way of a claim against an insurance company.

INVESTIGATIVE CONCLUSIONS BY DOI

The DOI government employee's thorough investigation into respondent's fraudulent billing practices, which examined only four specific instances of respondent's unlawful acts that spanned a short period of time, suggested an expansive scheme or practice of dishonesty on respondent's part. Yet, the limited ranged of the DOI investigation led the agency's detectives to conclude that "a grand total of $11,502 in fraudulent bills [had been] submitted [by respondent] to both CSAA and California Casualty Insurance Company."

8. The evidence establishes that with regard to the facts set out above, respondent committed fraudulent or dishonest acts as an acupuncturist for a minimum period of time between March 1, 2011, and August 30, 2012.

9. The evidence establishes that with regard to the facts set out above, respondent committed acts involving dishonesty or corruption with respect to the qualifications, functions, or duties of an acupuncturist.

Matters in Mitigation and Respondent's Background

10. Respondent was born in mainland China. Before emigrating from his birthplace, respondent graduated from a university in China. In 1989 he earned a certificate or degree in acupuncture techniques and science from a university in Guang Zhou (Canton City) China. Also in China he became a practicing medical doctor with a specialty in herbal medicine. He had studied medicine at the Shunyatsun Medical University.

11. Respondent immigrated to the United States of America approximately 12 years ago. He claims that in 2007 he became a citizen of the United States.

12. Over more than 11 years of practice as an Acupuncture Board licensee, respondent has built a substantial practice. For several years he operated from a building near downtown San Leandro, Alameda County. As an acupuncture licensee, respondent generated average gross income of between $80,000 to $90,000 during recent years. (On cross-examination, however, he testified that for both 2010 and 2011, he earned "around $100,000.) But, respondent failed to provide the hearing's record with a declaration from an accountant or copies of tax returns to accurately establish his earnings as an Acupuncture Board licensee.

13. Respondent has been married since 1996. Respondent and his spouse have two children.

Matters in Rehabilitation

14. At a superior court proceeding on November 1, 2013, the superior court noted that respondent had paid the crime victim, CSAA, the full amount of restitution in a sum of $7,231.25, which included interest on that debt. (It may be inferred that before the date of the May 2, 2013, conviction that respondent had made full restitution to the other known crime victim, California Casualty Insurance.)

15. Respondent claimed at the hearing that he completed the 30-day period of confinement to the Sheriff's Alternative Work Program on September 2 or 3, 2013.

16. Respondent asserts that he has essentially completed the terms of probation due to the felony conviction. He represents that the probation officer no longer requires him to come to meetings at the Probation Office. Respondent only knows that his probation officer has asked him to send a letter to the Probation Office to indicate the dates that he plans to travel outside the State of California.

17. Respondent owns a building in downtown San Leandro, Alameda County. The building contains both office space as well as a residential dwelling unit. (Respondent was not forthcoming regarding the amount of rental income that his building generates; but he claimed that his mortgage payment is $2,500 per month. And he offered no documentary evidence regarding the mortgage debt obligation regarding his real estate holding.)

18. Respondent asserts that he remains married and that he resides with his wife and two children, who are now 12 year and 10 years of age. He claims that he is the primary supporter of the household. Respondent asserts that his wife earns only $1,000 per month from work on an assembly line. But he offered no corroboration of his wife's limited income.

Matters that Negatively Impact Upon Respondent's Progress towards Rehabilitation

19. Respondent was convicted of a felony offense only approximately 10 months before the Accusation in this matter was issued on March 3, 2014.

20. The term of probation due to the May 2013 felony conviction[2] will not expire until May 2018.

21. During the hearing of this matter, respondent engaged in impermissible collateral attacks against the respective factual bases that led to his felony conviction. Thus, at the hearing of this matter, respondent failed to accept responsibility for his past criminal conduct.

Respondent's testimony was not believable that extenuating circumstances existed in the instances of his provision of services to the four individuals involved in the criminal action against respondent. As to the consumer J.L and consumer B.H., respondent unpersuasively proclaimed that he could not remember the extent of the treatments, or that he now has a recollection that he previously confused a consumer, who was identified in this matter, with another man with a similar appearance so that respondent miscalculated and misapplied his billing entries between the patients.

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[2] On the date of the conviction, the superior court stated that upon respondent completing the essential terms of probation (paying full restitution to the crime victims, paying costs of the court and the Probation Office, and meeting the requirement of confinement, and other critical matters) that the felony conviction would be converted to a record of a misdemeanor conviction after three years of formal probation. But, the court did not direct that the five-year term of probation would be eliminated. And even if respondent's conviction were reduced from a felony to a misdemeanor conviction record in approximately mid-2016, respondent will continue to be subject to the jurisdiction of the criminal court so that a violation of probation terms (such as "to obey all laws") may subject him to incarceration in state prison.)

More egregious was respondent's insistence that the DOI undercover detectives lied in their reports. Respondent uncompellingly asserted that the detectives each described experiencing pain and accepted they willingly his provision of acupuncture services, even though the reports so otherwise. And respondent falsely proclaimed that DOI Detective Thurber expressed to the acupuncturist that she had sustained no injury and that she only wished to have respondent create treatment records that would give credence to a claim to collect insurance money.

Respondent's accounts to diminish his culpability and involvement in the criminal enterprise to file fraudulent insurance claims so as to personally enrich himself is wholly untrue.

22. By his demeanor while testifying, by the implausible nature and character of portions of his testimony that was contradicted by complainant's documentary evidence, by the existence of his interest and motivation to exaggerate events in his past, and by his attitude towards the agency's proposed license disciplinary action, respondent showed, with regard to many material matters that were advanced at the hearing of this matter, that he was not a credible[3] witness.

23. In addition to the foregoing, respondent made certain claims at the hearing of this matter that suggest that he is not a wholly truthful and candid person. At the hearing of this matter, respondent portrayed the circumstances that underpinned his conviction as being grounded upon first, that he had a busy office so that mistakes were made and second, that he did not directly send bills to insurance companies by rather lawyers paid him fees of $40 to $60.

At the hearing of this matter, respondent was not accurate and truthful regarding the nature of his practice as an Acupuncture Board licensee. First, he asserted that all of his patients received acupuncture treatment at a competent level. Further, respondent unbelievably asserted that he had once had a practice and custom to charge clients and insurers for all four billing codes available on his billing documents.

And another matter that reflects poorly upon respondent's credibility was his tactic of feigning ignorance or loss of memory during cross-examination, even though his memory never failed him during direct examination on similar topics raised on cross-examination.

Matter in Aggravation

24. Respondent's testimony at the hearing in this matter suggest other violations of the law in light of his testimony. During cross-examination, respondent asserted that he confused patients so that incorrect bills were generated and sent to insurance companies. And respondent noted that he lack the ability to recall the nature of the treatment services rendered by him to patients so that his memory greatly conflicted with the accounts given by

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[3] California Government Code section 11425.50, subdivision (b), third sentence.

the consumer-patients and the DOI detectives who acted as patients. Respondent's testimony indicates his poor maintenance of treatment and billing records so that he was prone to send inaccurate bills to insurance companies. His admissions reveal a probable violation of the Acupuncture Licensure Act (Bus. & Prof. Code, § 4925, et seq.) In particular, Business and Professions Code section 4955.1, subdivision (e), provides that suspension or revocation of licensure may results for fraudulent acts consisting of "failing to maintain adequate and accurate records relating to the provision of services to their patients."

Other Matters

25. Respondent called no witness to the hearing of this matter. No one appeared on respondent's behalf to offer evidence pertaining to respondent's reputation in his community for honesty and integrity. No person came to the hearing to describe respondent's attitude towards his past criminal action that led to the conviction mentioned above.

26. Respondent did not show documentary proof that he has maintained significant and conscientious involvement in community, religious or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

Costs of Prosecution

27. The Declaration of Deputy Attorney General Templet establishes that before the commencement of the hearing in this matter complainant incurred costs of prosecution of the Accusation against respondent in an amount of $3,302.50.

The costs of prosecution in an amount of $3,302.50 are reasonable.

28. Respondent did not prove that the appropriate measure of the costs to be assessed against him was an amount other than the reasonable costs as presented by Complainant.

Respondent did not advance a meritorious defense in the exercise of his right to a hearing in this matter. Respondent did not show that any component or any allegation in the investigative reports by various government agency investigators was not prosecuted in good faith. Respondent did not establish that any matter raised in the litigation by the deputy attorney general was not prosecuted and established by clear and convincing evidence. Also, respondent cannot be seen, under the facts set out above, to have committed slight or inconsequential misconduct in the context of the content of the Accusation; rather respondent's unlawful conduct was egregious and grounded upon fraudulent acts to take money to which he was not entitled. And, respondent did not raise a "colorable challenge" to Complainant's Accusation's paramount cause for discipline, namely fraudulent acts, dishonesty, grossly unprofessional conduct, felonious criminal behavior in carrying out the business of a licensed acupuncturist.

Respondent's assertions during his direct testimony that the business operation has sustained a financial downturn and now has limited financial resources were not compelling. Respondent's unpersuasive testimonial evidence was contradictory and not supported by evidence from a bookkeeper, audited financial records or an analysis by an accountant. And during cross-examination, when questioned by complainant's attorney regarding an order by the superior court that respondent produce financial statement for review by the Alameda County Probation Office, respondent lied by asserting his ignorance of such a court order that he prepare a financial statement of his business.

Respondent asserts that he is the sole supporter of various members of his household. But he did not call any witness to corroborate his claim. Furthermore, respondent produced no evidence to establish that his family members, who he claims that he must act as the primary supporter, are unable to secure or maintain gainful employment so as to aid in the upkeep of respondent's household.

Respondent failed to credibly provide documentary evidence that as of the date of the Accusation or at the time of the Certification of Costs of Prosecution that he had sparse income or financial resources. To the contrary, it may be inferred that respondent's unlawful business practice of using fraudulent means to collect insurance money over a period of years resulted in sizable profits for respondent's practice as an acupuncture provider. Moreover, respondent asserted that he owns a building in downtown San Leandro, California, from which he can collect rental income. And respondent did not indicate that in light of his experience, skills and education as an acupuncturist along with his training in China as a medical doctor that he cannot secure employment in another well-paying position. Hence, there is no basis to conclude that respondent cannot pay the board's modest claim for recovery of the costs of prosecution by the Department of Justice.

A substantial basis does not exist to warrant a reduction of the assessment against respondent for the costs of prosecution incurred by Complainant.

The immediate foregoing factors do not indicate that the imposition upon respondent of the full costs of prosecution will unfairly penalize respondent.

29. The appropriate cost of prosecution in this matter is a total amount of $3,302.50. And respondent is obligated to pay the agency that amount of money.

LEGAL CONCLUSIONS

Standard of proof:

1. The standard of proof that must be met to establish the charging allegations in this matter is evidence that "clear and convincing" to a reasonable certainty. (*Hettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App.3d 853.) This standard means that the burden rests with Complainant to offer proof that is clear, explicit and unequivocal that is

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.)

Causes for Discipline

CRIMINAL CONVICTION

2. Business and Professions Code section 4955 provides:

> The board may . . . suspend, or revoke, or impose probationary conditions upon, the license of any acupuncturist if he . . . is guilty of unprofessional conduct.
>
> Unprofessional conduct shall include, but not be limited to, the following:
>
> [¶] . . . .[¶]
>
> (b) Conviction of a crime substantially related to the qualifications, functions, or duties of an acupuncturist, the record of conviction being conclusive evidence thereof . . . .

Business and Professions Code section 4956 establishes:

> A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge which is substantially related to the qualifications, functions, or duties of an acupuncturist is deemed to be a conviction within the meaning of this chapter.
>
> The board may order a license suspended or revoked, or may deny a license, or may impose probationary conditions upon a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made
> suspending the imposition of sentence irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing the person to withdraw his or her pleas of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, complaint, information, or indictment.

3. Cause for disciplinary action against the license issued to respondent exists under Business and Professions Code section 4955, subdivision (b), in conjunction with Business and Professions Code section 4956, by reason of the matters set forth in Factual Findings 3 and 4 along with Legal Conclusion 2.

FRAUDULENT AND DISHONEST ACTS

4. Business and Professions Code section 4955.1 states:

> The board may deny, suspend, revoke, or impose probationary conditions upon the license of any acupuncturist if he or she is guilty of committing a fraudulent act including, but not be limited to, any of the following:
>
> [¶] . . . .[¶]
>
> (b) Committing a fraudulent or dishonest act as an acupuncturist.
>
> (c) Committing any act involving dishonesty or corruption with respect to the qualifications, functions, or duties of an acupuncturist.

5. Cause for disciplinary action against the license issued to respondent exists under Business and Professions Code section 4955.1, subdivisions (b) and (c), by reason of the matters set forth in Factual Findings 7 through 9, along with Legal Conclusion 4.

6. Because respondent remains on probation, the department has not had sufficient time to consider respondent's rehabilitation. And to that end, respondent remains on probation from the conviction in May 2013 for the felony offense of making a fraudulent insurance claim. *In re Gossage* (2000) 23 Cal.4th 1080, 1104-1105, establishes, among other things, that from the stand point of a licensing agency's regulatory oversight of licensees, rehabilitation of a licensee cannot begin to be accurately assessed until the licensee, who has been convicted of a crime, is beyond the restrictions of criminal probation and the prospect of incarceration no longer looms over the head of the licensee. In this matter, respondent will not be released from probation for the criminal conviction until May 2018. Hence, a correct assessment of respondent's progress towards rehabilitation cannot take place until a point in the future.

7. Respondent's progress towards rehabilitation is impaired by his refusal to accept full responsibility for his past criminal conduct. Respondent was not credible at the hearing of this matter when he asserted that he was not culpable for any of the criminal acts relating to the prosecution against him and the felony conviction in May 2013.

At the hearing of this matter, respondent's representations exist as a collateral attack against the bases of the facts upon which the superior court determined respondent to be guilty of a felony. The matters set out in Factual Finding 21 outline the aspects of respondent's collateral attack of the conviction in his record. In an administrative proceeding, a respondent cannot challenge the validity of a prior conviction. (*Garcia v. Superior Court* (1997) 14 Cal.4th 953; *People v. Coffey* (1967) 67 Cal. 2d 204). "A final

judgment of conviction is a fact; and, its effect cannot be nullified . . . either by [an] order of probation or by [a] later order dismissing the action after judgment." (*In re Phillips* (1941) 17 Cal.2d 55.) It has long been established that it is improper for a licensee, or an applicant for licensure, to come before a licensing agency after a criminal conviction to attempt to impeach a plea of guilty or a no contest plea and a resulting conviction. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 449-452.)

8. Matters in rehabilitation and matters in mitigation as set out in Factual Findings 10 through 18 were weighed in making the Order below.

Also, the matters establishing that respondent has not attained rehabilitation, which are set out in Factual Findings 19 to 23, were considered.

Ultimate Determination

9. The weight of the evidence supports the determination that it would not be in the public interest for respondent to hold, with the Acupuncture Board, a license, even on a restricted basis.

Cost Recovery

10. Business and Professions Code section 4959 enables the board to request the administrative law judge to direct a licensee, who is found guilty of unprofessional conduct, to pay the board a sum not to exceed its actual and reasonable costs incurred in the investigation and prosecution of a disciplinary proceeding As set forth in Finding 27, the board reasonably incurred costs of prosecution of this matter in the sum of $3,302.50. Under *Zuckerman v. State Board of Chiropractic Examiners,* (2002) 29 CalApp.4th 32, 45, the board must exercise its discretion to reduce or eliminate cost awards in a manner which will ensure that the statute does not deter licensees with potentially meritorious claims or defenses from exercising their right to a hearing. "Thus the board may not assess the full costs of investigation and prosecution when to do so will unfairly penalize a [licensee] who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed." (Id.) The board must also consider the licensee's ability to make payment. Finally, the board ". . . may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation and prosecution to prove that a [licensee] engaged in relatively innocuous conduct". (Id., footnote omitted.)

All of the *Zuckerman* factors militate in favor of the board's recovery of all of its costs as set out in Factual Finding 28. In light of his no contest plea, there is no reason to believe respondent had a "good faith belief" that he was not guilty of unprofessional conduct, nor was there any reason to believe Complainant conducted "a disproportionately large investigation and prosecution that a [licensee] engaged in relatively innocuous conduct." And there was no competent corroborating documentary evidence to show respondent cannot pay the modest amount of the costs of prosecution.

11. The appropriate measure of total costs owed by respondent, to the board, are $3,302.50, as stated in Factual Finding 29.

ORDER

1. Acupuncture License Number AC 8907 issued to respondent Steven Chen Jing Xia is revoked.

2. As a condition precedent to reinstatement of respondent's license, the board may, in its discretion, require respondent Steven Chen Jing Xia to pay the sum of $3,302.50, or any part thereof, on such terms and in such manner as the board, in its discretion, may direct.

Date: September 22, 2014

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings