BEFORE THE
ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: XIN SHENG ZHOU, L.Ac. Acupuncturist License Number AC 13713, Respondent.	Case No.: 1A-2011-159 OAH No.: 2014100798

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 its Decision in the above-entitled matter.

This Decision shall become effective October 29, 2015.

IT IS SO ORDERED September 29, 2015.

ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By _____

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PROPOSED DECISION

Administrative Law Judge (ALJ) David B. Rosenman, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California, on August 3 through 7, 2015. Wendy Widlus, Deputy Attorney General, represented complainant Terri Thorfinnson, Executive Officer of the Acupuncture Board (Board). Respondent Xinsheng Zhou[1] was present and was represented by John Dratz, Jr., Attorney at Law.

The matter was submitted on August 7, 2015.

FACTUAL FINDINGS

1. Complainant brought the Accusation in her official capacity as Executive Officer of the Board.

2. On May 19, 2010, acupuncture license number AC 13713 was issued to respondent by the Board. The license will expire on January 31, 2016, unless renewed. There has been no prior discipline of the license.

3. On October 15, 2011, patient G.H. went to respondent's office for the first time. (Patients' initials are used to provide confidentiality.) He did not receive any treatment. Based on his observations from the waiting area of patients in a treatment area, he filed a complaint with the Board regarding lack of privacy. Based on information provided

[1] The Accusation splits the name, as does the Board's license history (exhibit 2). Respondent uses the form Xinsheng Zhou.

by respondent and someone he believed was a nurse, G.H. also complained that respondent was providing bee sting treatment, a treatment for which respondent was not licensed.

4. In response to the complaint, on April 25, 2012, Department of Consumer Affairs Investigator Jeff Ramos (Ramos) went to the office and spoke to respondent. Respondent spoke to Ramos about his practice of acupuncture, herbal medicine and apitherapy. Apitherapy is described in the Accusation as the medical use of honey bee products including honey, pollen, bee bread, royal jelly, propolis and bee venom. (Accusation, p. 5, fn. 1.) No authority for this definition was provided. Apitherapy is defined in respondent's consent form as the therapeutic use of products of the honey bee hive, including honey, pollen, propolis, royal jelly, bee wax and bee venom. (Exhibit 3, p. AG0103; future references to complainant's exhibit page numbers will not include the "AGO0" prefix.) Based on the descriptions of apitherapy given by other witnesses, the definitions in the Accusation and as given by respondent are accurate. Apitherapy encompasses more than bee sting therapy. Throughout this Proposed Decision, apitherapy and bee sting therapy are distinguished as needed.

5. Ramos informed respondent that his office location, in Alhambra, was not registered with the Board. The next day, April 26, 2012, respondent registered his Alhambra office location with the Board.

Some Statutes and Regulations Relating to Acupuncture

6. Various statutes and regulations set forth the intent of the Legislature in licensing the practice of acupuncture, the practices authorized by holding a license, and some prohibited acts. The focus here is on analyzing the use of bee sting therapy under this framework.

7. Testimony related the history of the licensure of acupuncturists as beginning in 1973. Due in part to the goals of allowing the practice of Asian medicine by acupuncturists and having acupuncturists also function as primary health care providers, in 1980 the Legislature expressed its intent in Business and Professions Code section 4926[2]:

"In its concern with the need to eliminate the fundamental causes of illness, not simply to remove symptoms, and with the need to treat the whole person, the Legislature intends to establish in this article, a framework for the practice of the art and science of Asian medicine through acupuncture.

"The purpose of this article is to encourage the more effective utilization of the skills of acupuncturists by California citizens desiring a holistic approach to health and to remove the existing legal constraints which are an unnecessary hindrance to the more effective provision of health care services. Also, as it effects the public health, safety, and welfare,

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[2] All further statutory references are to the Business and Professions Code, unless noted.

there is a necessity that individuals practicing acupuncture be subject to regulation and control as a primary health care profession."

8. In the statutes, a distinction is created between "acupuncture" as the use of needles and some other techniques, and other treatments also permitted under the license.

As defined in section 4927, subdivision (d): "'Acupuncture' means the stimulation of a certain point or points on or near the surface of the body by the insertion of needles to prevent or modify the perception of pain or to normalize physiological functions, including pain control, for the treatment of certain diseases or dysfunctions of the body and includes the techniques of electroacupuncture, cupping, and moxibustion."

Under section 4937, as relevant here, the holder of an acupuncturist's license is authorized:

"(a) To engage in the practice of acupuncture.

"(b) To perform or prescribe the use of Asian massage, acupressure, breathing techniques, exercise, heat, cold, magnets, nutrition, diet, herbs, plant, animal, and mineral products, and dietary supplements to promote, maintain, and restore health. Nothing in this section prohibits any person who does not possess an acupuncturist's license or another license as a healing arts practitioner from performing, or prescribing the use of any modality listed in this subdivision. [¶]

"(d) For purposes of this section, 'plant, animal, and mineral products" means naturally occurring substances of plant, animal, or mineral origin, except that it does not include synthetic compounds, controlled substances or dangerous drugs as defined in [certain listed sections] of the Health and Safety Code."

9. As relevant here, these statutes permit respondent, as a licensed acupuncturist, to insert needles to stimulate certain points on or near the surface of the body, and to perform or prescribe herbs or naturally occurring substances of animal origin to promote, maintain, and restore health.

10. The types of needles that are permitted must comply with California Code of Regulations,[3] title 16, section 1399.454 (as it incorporates the Code of Federal Regulations, title 21 section 880.5580): the needles must be solid stainless steel, for single use only, and meet requirements for material biocompatibility and sterility. Under CCR section 1399.451, subdivision (f), acupuncture "shall not be performed using hypodermic needles." Testimony established that hypodermic needles are hollow metal needles through which substances can be injected into the body. As defined in Code of Federal Regulations, title 21, section 880.5570, a "hypodermic single lumen needle" is a metal tube sharpened at one end which is

[3] All subsequent references to the California Code of Regulations are to title 16, and are designated as "CCR."

"intended to inject fluids into, or withdraw fluids from, parts of the body below the surface of the skin."

11. Section 4828.1 states: "Protection of the public shall be the highest priority for the Acupuncture Board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."

The Accusation, the Relevant Evidence, and Other Miscellaneous Findings

12. The manner in which some allegations are pleaded in the Accusation is problematic and requires some discussion. (The Accusation is found in exhibit 1.) Paragraph 13 includes information gathered by Ramos in his discussion with respondent on April 25, 2012. Respondent was born in China and speaks English with a heavy accent. It was the ALJ's experience during the hearing that it was often difficult to ascertain the meaning of respondent's words and required concentration, repetition, confirmation and, sometimes, respondent writing the words. It is not known whether Ramos engaged in any similar process before he wrote in his report (exhibit 2) statements attributed to respondent, as alleged in paragraph 13 of the Accusation. Ramos also testified; however, his most detailed version of his conversation with respondent is contained in his report, which was received in evidence for all purposes except for the portion relating to patient J.R., discussed in more detail below. In his testimony, respondent confirmed some, but not all, of the conversation as related by Ramos.

13. One complication of the Accusation is the failure often to distinguish between apitherapy and bee sting therapy. As can be seen from the definitions above, many aspects of apitherapy are permitted under the applicable laws. Therefore, allegations that, generally, apitherapy is outside the scope of acupuncture practice have not been proven. More specifically, complainant alleges that respondent treated patient J.R. with apitherapy, which is an extreme departure from the standard of care, and not acupuncture. (See Accusation, exhibit 2, p. 7, ll. 7 – 8 and 15 – 16.) However, it was not established by the evidence that apitherapy, as defined and in general, is a departure from the standard of care. To the contrary, the evidence established that most aspects of apitherapy are within the standard of care. Rather, it is the use of a bee to sting a patient to deliver bee venom that is the questioned practice.

14. Another complication of the Accusation is that paragraph 13 (Ramos's discussion with respondent about his use of apitherapy and bee sting testing) includes references to respondent treating many patients with apitherapy, but only two references to a bee sting: in a general discussion of respondent performing a test for allergic reaction, and in explaining that no syringes are used as the bee venom is injected by permitting the bee to sting the patient. No specific patient is referenced.

15. Another complication of the Accusation is that paragraph 13 (Ramos's discussion with respondent about his use of bee sting therapy) and paragraph 14 (Ramos's

discussion with patient J.R. about her treatment by respondent) are alleged generally, but are not incorporated by reference into the first cause for discipline, for gross negligence, relating to respondent's treatment of patient J.R. (Accusation, paragraphs 14 – 22). This cause for discipline is discussed in more detail below. The second cause for discipline, repeated negligent acts in the practice of acupuncture, and third cause for discipline, unprofessional conduct, incorporate prior allegations starting at paragraph 13. Therefore, the allegations in paragraphs 13 and 14 are relevant to some, but not all, of the causes for discipline. The fourth cause for discipline relates to respondent's practice at an unregistered office location.

16. Factual Findings 16 – 20 are made with respect to the allegations in paragraph 13 (Accusation, exhibit 1, page 5, lines 13 – 25). Respondent did not agree with Ramos's statement that apitherapy is not within the practice of acupuncture. Respondent stated that apitherapy is not regulated by the FDA (Federal Food and Drug Administration). Respondent disagreed that he told Ramos, as Ramos wrote in his report, that apitherapy was not legal or illegal. Respondent testified credibly that many aspects of apitherapy were included in the acceptable scope of practice of an acupuncturist. Respondent told Ramos he had done research before starting bee sting therapy, not that he was performing research at his clinic. Respondent provided Ramos with a paper he had written while at the University of California (UC) Davis about the use of a fungus to fight a mite that was a serious pest to honey bees.

17. Ramos reported, and it is alleged in the Accusation, that respondent stated he treated approximately 40 to 60 clients a week with apitherapy. At hearing, respondent was not questioned about numbers of patients. He testified credibly that 90 percent of his practice is by acupuncture treatment and 10 percent by bee sting therapy.

18. Ramos reported, it is alleged in the Accusation, and respondent agreed, that respondent has patients sign a consent form before he performs an allergy test on the patient by allowing a bee to sting the patient. Ramos reported, and it is alleged, that if the patient developed a rash or had an adverse reaction respondent "would not provide apitherapy therapy to the patient." (Accusation, p. 5, ll. 17-19.) Respondent was more credible in his testimony to the effect that, if there was a sufficiently adverse reaction to a bee sting, he would not provide bee sting therapy to that patient. Ramos reported, it is alleged in the Accusation, and respondent agreed, that if the patient experienced a severe adverse reaction such as anaphylactic shock he would provide an herbal remedy he had developed and call 911. Respondent added details about numerous ways he might treat a severe adverse reaction; that he has never had the need to call 911 to assist a patient; and that he has an epi-pen that he could administer as needed.

19. Ramos reported, and it is alleged in the Accusation, that respondent does not have an allergic reaction kit, epinephrine, or over the counter medication on site to treat a patient with an adverse reaction to bee venom. This allegation was not established by clear and convincing evidence. Respondent testified credibly that he takes several measures and has supplies on site to treat adverse reactions to bee venom. For example, he takes measures, described in more detail below, to limit the amount of venom used. He tests a patient by

having the first bee sting, as a test for reactions, near the outside of the patient's wrist, in an area he learned is appropriate for this purpose. Prior to administering a bee sting, the patient is given a liquid including water, honey and licorice root (spelled "liquorice root" in respondent's email to Ramos, exhibit 2, p. 122), an herbal remedy for rashes and allergic reactions. Respondent administers this liquid to prevent an allergic reaction. Respondent noted that licorice has properties similar to epinephrine as it is produced in the body's adrenal gland. If there is a reaction to the bee sting, respondent may use more of the water/honey/licorice root, which in his experience usually takes care of the problem. Other available traditional treatments are mungso bean soup and ma huang. Also, aspirin and cilantro, and Benadryl, can treat allergic reactions such as rash or itching. Respondent observes patients for several hours after a bee sting is administered. He has observed about one in 300 patients to have an itchy palm, which he treats. This is the most severe reaction he has observed. He has never had more severe reactions, such as anaphylactic shock or a closed throat.

20. Ramos reported, it is alleged in the Accusation, and respondent agreed, that respondent does not use syringes to administer bee venom; rather the venom is injected by permitting the bee to sting the patient, thereby delivering the bee venom. It is alleged that the bee venom is delivered into the body. Respondent testified at length about the depth of penetration of the bee stinger, establishing that the stinger goes through the epidermis skin layer and into the dermis skin layer, but not into the subcutaneous tissue, all while referring to the diagram of the skin found in exhibit 8.

The First Cause for Discipline: Gross Negligence

21. Paragraph 14 of the Accusation (exhibit 1, p. 6, ll. 1 – 5), alleges that Ramos spoke with patient J.R. and gathered information about her treatment by respondent. Ramos's report and the allegation refer to that treatment as apitherapy and make no specific mention of bees, venom or stings. Respondent objected to the portion of Ramos's report relating to patient J.R. as hearsay. The objection was sustained and that portion was received in evidence as "administrative hearsay."[4] No other admissible evidence was received concerning patient J.R. For example, the patient was not called as a witness; neither Ramos nor respondent were asked any questions about J.R. during the hearing; and no treatment records of J.R. were offered in evidence. In closing argument, respondent's counsel commented on this absence of evidence. In subsequent argument, complainant's counsel did not request to reopen the record to present more evidence, and stated specifically she would

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[1] The term "administrative hearsay" is a shorthand reference to the provisions of Government Code section 11513, subdivision (d), to the effect that hearsay evidence that is objected to, and is not otherwise admissible, may be used to supplement or explain other evidence but may not, by itself, support a factual finding. It may be combined with other evidence to provide substantial evidence sufficient to support a finding. (*Komizu v. Gourley* (2002) 103 Cal.App.4th 1001.)

not seek to amend the Accusation. The administrative hearsay in Ramos's report is not sufficient to support a finding of fact. The allegations in paragraph 14 of the Accusation about respondent's treatment of patient J.R. were not established by clear and convincing evidence or any other applicable evidentiary standard.

22. In the first cause for discipline, it is alleged that respondent was grossly negligent in his care and treatment of patient J.R. Gross negligence as been defined as "the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Cons. Co.* (1956) 46 Cal.2d 588, 594; *Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931.) A negligent act is synonymous with the phrase, "simple departure from the standard of care." (*Zabetian v. Medical Board of California* (2000) 80 Cal.App.4th 462.) Implicit in these concepts is that, for discipline to be imposed for gross negligence or repeated acts of negligence, the licensee must have been engaged in the treatment of a patient (or the failure to treat a patient).

23. Gross negligence was not established here because, as noted in Factual Finding 21, insufficient evidence was received to establish that respondent treated patient J.R. Further, the Accusation alleges that patient J.R. was treated with apitherapy, which is not a prohibited practice. As defined by the parties, apitherapy includes the use of honey bee products, and could fall within an acupuncturist's authorized practice under section 4937, subdivision (b), as the use of herbs and animal products to promote, maintain, and restore health. Therefore, the allegation that respondent treated patient J.R. with apitherapy, without reference to a bee sting, does not state a cause for discipline for gross negligence.

24. The cause for discipline does refer to a bee stinger in paragraph 16 of the Accusation: "the use of a bee stinger as the delivery mechanism of venom is not within the standard of care . . . ." (Exhibit 2; Accusation, p. 6, ll. 14 – 16.) However, there was no evidence that respondent treated patient J.R. with bee stings or a bee stinger.

The Second Cause for Discipline: Repeated Negligent Acts

25. The second cause for discipline, for repeated negligent acts, is found in paragraphs 23 – 26 of the Accusation, and incorporates paragraphs 13 – 21 as well. (Factual findings relating to Accusation paragraphs 13 and 14 are made above. No specific findings are made as to the allegations in Accusation paragraphs 15 – 22 regarding gross negligence, as there was no evidence respondent treated patient J.R.)

26. In Accusation paragraph 25 (generally and in subparagraph 25 D), complainant alleges that respondent did not have an allergic reaction kit on site for any patient who has an adverse reaction to bee venom. This was not proven by clear and convincing evidence. Respondent administered the water/honey/licorice root mixture before the bee sting to address possible adverse reactions. Respondent could administer more of the mixture after the sting, if needed. Respondent had other traditional remedies for adverse reaction (mungso bean soup and ma huang) as well as an epi-pen to administer epinephrine if needed.

27. Accusation paragraph 25B contains the allegation that respondent failed to deliver bee venom within the applicable standard of care while treating patient J.R. This was not proven by clear and convincing evidence because it was not proven that respondent treated J.R.

28. It is alleged in Accusation paragraph 25A that respondent committed repeated acts of negligence by his "failure to practice acupuncture within the applicable standard of care, performing apitherapy instead." (Exhibit 2; Accusation, p. 8, ll. 8 – 9.) This was not proven by clear and convincing evidence, for several reasons. It was not proven that respondent treated J.R., the only patient referenced in the Accusation. Further, apitherapy is not a prohibited practice. Convincing evidence established that bee products would be considered animal products and herbal products as included in the statutory definition of the scope of practice for an acupuncturist. Bee sting therapy is but one aspect of apitherapy. Complainant could have limited the allegation by referencing bee sting therapy. However, the allegation as written implies that practicing apitherapy is outside of the standard of care for an acupuncturist. This allegation is not supported by the facts or the law.

29. It is alleged in Accusation paragraph 25C that respondent failed to perform genuine research regarding "the delivery mechanism of bee venom pursuant to the statutory requirements for permissible research." (Exhibit 1; Accusation, p. 8, ll. 12 – 13.) This allegation is based on a misunderstanding of Ramos's interview with respondent. As noted above, the evidence did not establish that respondent told Ramos he was presently doing research on bee sting therapy. The issue of research as a defense appears to have been generated after Ramos's report (April 30, 2012) was reviewed by complainant's expert, Kevin P. McNamee, D.C., L.Ac., and McNamee issued his first report (exhibit 4, pp. 125 – 129). McNamee's second report was issued May 30, 2014 (exhibit 4, pp. 132 – 133) and begins by stating it was a follow-up to a conversation with complainant's counsel on the same day. McNamee concluded that respondent may not claim a defense under Business and Professions Code section 2075, which states that it is not a violation for an acupuncturist to perform forms of traditional Asian medicine "for the primary purpose of scientific investigation of acupuncture" if it is done "in a program affiliated with and under the jurisdiction of an approved medical school or approved acupuncture school, [and] those procedures shall be carried on only under the supervision of a licensed physician and surgeon." (*Ibid.*) The Accusation followed shortly thereafter (filed July 23, 2014). Therefore, a factual finding can be made in support of the allegation; i.e., that respondent failed to perform genuine research regarding the delivery mechanism of bee venom pursuant to the statutory requirements for permissible research. However, respondent did not claim a defense or exemption under Business and Professions Code section 2075.

The Third Cause for Discipline: Unprofessional Conduct

30. The third cause for discipline, for unprofessional conduct, is found in paragraphs 27 and 28 of the Accusation, and incorporates and relies entirely upon paragraphs 13 – 25. Unprofessional conduct is not defined in the Acupuncture Practice Act. As stated

in *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 574: "Unprofessional conduct is that conduct which breaches the rules or ethical code of a profession, or conduct which is unbecoming a member in good standing of a profession. (Citation.)"

31. Most of the evidence and argument at the hearing related to the specific practice of using a bee to inject bee venom through its stinger into a patient: whether bee sting therapy is safe and effective, whether bee sting therapy is within the scope of practice of an acupuncturist, and whether an acupuncturist utilizing bee sting therapy has departed from the standard of care or committed unprofessional conduct.

32. Due to the nature of the allegations and evidence at the hearing, discussed in more detail above and below, no cause for discipline of respondent's license was established for either gross negligence or repeated acts of negligence. However, unprofessional conduct need not be limited to treatment of a patient. Other aspects of respondent's practice can be analyzed.

33. A bee stinger is not a hypodermic needle.

34. Respondent contends, among other things, that the use of a bee to sting a patient to inject venom is included in the permitted practices of an acupuncturist to perform or prescribe herbs or naturally occurring substances of animal origin to promote, maintain, and restore health. (See Factual Findings 8 and 9.) This contention is not supported by the law or the facts.

35. Complainant relied upon reports and testimony from two experts, McNamee and Anyork Lee, Q.M.E., L.Ac. Their education, training and experience qualified both McNamee and Lee to provide evidence of their expert opinions. Both have active acupuncture practices and are involved in other activities that bring them into contact with licensed acupuncturists. McNamee and Lee opined that the use of a bee sting to inject bee venom into a patient is not included in the scope of practice under Business and Professions Code section 4937 and is an extreme departure from the standard of care.

36. McNamee was not aware of any acupuncturists in California using needles made of material other than stainless steel. In the past, he is aware that gold and silver were used. However, the law now requires the needles to be one-time use; i.e., disposable, so gold or silver needles would not be practical economically. He was not aware of any acupuncturists in California using animal parts as a needle in acupuncture treatment. He described how herbs, animal and mineral products could be properly administered to patients in the form of dehydrated powders, boiled in a tea, pills and salves. Bee venom can be used in these manners. McNamee does not believe that a bee sting is proper because it punctures the skin to deliver the substance, the stinger is a hollow needle that is not stainless steel, and it delivers the venom in full concentration whereas other accepted ways to use animal and herbal products reduce the concentration of the substance as delivered to the body. In his opinion, the injection is akin to the practice of medicine and beyond the acupuncture scope of practice. McNamee also discussed, at length, the risks of allergic reaction to bee venom.

McNamee stated that bee sting therapy was not taught in acupuncture schools and was not practiced in the professional community.

37. McNamee also owns a company that sells acupuncture supplies and is very familiar with the types of needles used in practice. During his testimony her referred to a microscopic view of a bee stinger and a needle (exhibit 11), to demonstrate comparisons in size of an acupuncture needle to a bee stinger, and to illustrate the barbs on the stinger. McNamee's credibility was lessened slightly when it was established that the needle in exhibit 11 is a sewing needle, and the bee stinger is from a bee present in the United Kingdom but not in California. Respondent established that the bees he uses have smoother stingers than the one depicted in exhibit 11.

38. McNamee acknowledged that respondent's research indicated extensive use of apitherapy in Chinese hospitals.

39. Anyork Lee was born in Taiwan and first became familiar with traditional Chinese medicine from his father, who was an herbalist. He was educated in Taiwan through receipt of his Bachelor of Science degree, received his Masters of Business Administration from California State University, Stanislaus in 1979 and his Doctor of Acupuncture Medicine degree from the Asian American Acupuncture College in San Diego in 1983. Lee has served in numerous capacities at the Asian American Acupuncture College and the Alhambra Medical University, as a teacher, administrator and clinic director. Lee was a member of the Acupuncture Board from August 2009 to July 2013, serving as the Board's chairperson from February 2012 to July 2013. He belongs to many professional associations and is familiar with the practices of acupuncturists in California.

40. In support of his opinions about respondent's practices, Lee relied upon his understanding of the Acupuncture Practice Act, what licensed professionals are doing, and what is included in school curricula. In Lee's opinion, using a bee sting to inject venom is not within the legal scope of practice and is not used by acupuncturists, in California or in China. He is not aware of bee sting therapy being included in any textbooks in California or in China, although he is aware of some papers in China that refer to it. It is not included in the curriculum of any school of which he is aware. Lee was aware, through respondent's research, of a government clinic in China that supported bee sting therapy. He added that the clinic was supervised by a medical doctor and that this was not a practice widely used or taught. Lee was concerned about the risk of adverse allergic reactions to a bee sting, particularly that anaphylactic shock, although not common, can be fatal. Creating such a risk to a patient is, in his opinion, an extreme departure from the standard of care.

41. Yaowen Hong is a licensed acupuncturist with an office in the same building as respondent's office. He often visits respondent and has observed respondent provide bee sting therapy. He has observed patients experiencing different levels of pain after a bee sting. He has observed respondent using ice to treat the pain. Sometimes Hong will help to distract the patient by singing (Hong was also a teacher in a college of music), and by having the patient and respondent also sing. He explained some of the mechanisms of the physical

and physiological, as well as the mental and spiritual aspects of pain response. He has not seen any serious allergic reactions to bee stings in respondent's practice.

42. Changshan Xin was respondent's teacher and mentor, and testified as his expert witness. Xin earned a Bachelor of Science degree in 1972 and a Master's of Science degree in 1984, both in traditional Chinese Medicine, from Liaoning Medical University in China. Xin is licensed to practice acupuncture in China and in California. He taught at Liaoning Medical University for six years (1985 – 1991), was then a researcher associate for the Traditional Chinese Medicine Research Institute in Liaoning Province from 1992 – 1998, and has taught at numerous universities in California from 1999 – 2015. This included St. Luke University, where respondent was his student. Xin is the president of the California Acupuncturist United Association. By virtue of his training, education and experience, Xin is qualified to offer his expert opinion in this matter.

43. Xin is familiar with respondent's use of bee sting therapy. In Xin's opinion, that practice does not exceed the scope of practice. Apitherapy is a part of traditional Chinese medicine, in use for more than 2000 years. In China, apitherapy can be practiced by acupuncturists, medical doctors, and farmers who have received training. It is part of animal therapy, another example of which is leach therapy. When Xin and others in the California Acupuncturist United Association learned of the charges brought against respondent, they sponsored a trip for members to research and report on the use of apitherapy and bee sting therapy in China, confirming its acceptance in the professional community there.

44. According to Xin, California law permits use of animal products, with no distinction between live or dead animals, again referring to a live leach. Bee venom is an animal product. The sting is very shallow and provides stimulation to a particular acu-point associated with the main and collateral channels in traditional Chinese medicine, which acu-points are also needle points in acupuncture.

45. Xin described respondent as an outstanding apitherapist, a "rare talent" in the field. Xin is aware that respondent has studied patient's reactions and has worked to reduce or eliminate allergies or adverse reactions. Xin believes respondent's practices have overcome many of the risks of bee stings. In Xin's opinion, California law allows the use of an animal product in the form of a bee sting to inject venom into the body. Other animal products used in China include the silkworm, leach, whiteflower snake and deer products. Silkworm is also used in California, due to a bacteria that has properties similar to penicillin. Bee honey is used in California in forms including pills, salves, or made into tea.

46. When respondent was a student, Xin taught him about apitherapy. In Xin's practice of acupuncture in China, he would refer patients to apitherapists and for bee sting therapy. (Xin was not asked the same question about his practice in California.)

47. Xin's testimony did not establish to what extent, if any, bee sting therapy is used by licensed acupuncturists in California. Nor did he establish that it is taught regularly

in acupuncture schools in California, making only the single reference to apitherapy as taught to respondent.

48. Respondent was born in China. He is 53 years old. He received a Bachelor's of Science degree in agricultural microbiology from Huazhong Agricultural University in China in 1983. He then worked in the forestry department in China for 16 years, specializing in forest diseases, animal pathogens and pests. From 1989 – 1991, he was a visiting scholar at UC Berkeley studying subjects such as the elm tree beetle and ways to control a mite that attacked the honey bee. He worked with many beehives in his studies. The research paper respondent sent to Ramos was a result of those studies. In 1994, respondent visited the United States with a delegation from the forestry department in China. From 1996 – 1998 he worked in the Bay Area as an adviser on edible fungi. From 1998 – 2001, he studied and received a Master's of Science degree in plant protection and pest management from UC Davis. Respondent studied and received a Master's of Science degree in Oriental medicine from St. Luke University in Pomona, California from 2004 – 2009, and studied and received a Ph.D. in Oriental medicine from Yuin University in Compton, California from 2009 – 2015. He opened his office, named the Elegant Bee Clinic, at the end of 2009.

49. Respondent described his training in post-revolutionary China at age 13 to give injections as part of a program to educate children, provide military type training, and expand availability of some types of healthcare on the mainland.

50. Respondent studied bee sting therapy for over five years and provided documents and testimony about his procedures for bee sting therapy. For example, he examined over 80 beehives looking for the type of bee to use. The particular species in the United States is the European honey bee, of which there are over 100 varieties. He uses honey bees of a commercial variety, but looks specifically for bees which are more tolerant to mites, are smaller than average, and can survive the cold weather of winter. He chooses smaller bees so the stinger will be short and smoother, and less venom is injected. He cools/freezes the bees so that less venom is injected. By use of the graphic of skin layers (exhibit 8), respondent established that the bee stinger will go into the epidermis and dermis layers, but not reach the subcutaneous tissue.

51. Respondent uses other methods to reduce or eliminate the likelihood of severe allergic reaction and anaphylactic shock. He does not administer bee sting therapy unless other more conservative treatments are not effective. He screens patients and will not use bee sting therapy if they have conditions, symptoms or take medication that create the likelihood of complications. He uses a consent form, partially of his own design and partially based on a form suggested by the American Apitherapy Society, where he received training in bee sting therapy. Respondent observes the after effects. He limits the number of stings and amount of time/days between stings, based on his research and experience, to obtain an effective benefit for the patient. Treatments for allergic reactions go beyond those discussed above and can relate to treating the specific acu-point associated with the nature of the reaction. More information on this subject is contained in respondent's writings, found at exhibit G, page 3 (same as exhibit H).

52. Respondent has studied the subject of bee stings for many years, has compiled research and practice results, and has written many reports. (See exhibits E – J.) Certain relevant information is gleaned from these reports. Based on his review of reports and statistics, respondent estimated that there have been more than 100,000 bee sting therapies in the United States, and over 10 million in China. (Exhibit E, p. 2.) Based on information from the American Apitherapy Society and internet research, he wrote that more than 10,000 people provide bee sting treatment to the public at the present. (Exhibit E, p. 9; this paper is dated 5-02-2015.) In China, as of a report by Dai written in 2007, there were more than 200,000 people formally trained by apitherapy institutes in the prior 30 years, there are 25 provinces with apitherapy hospitals or medical centers, and apitherapy classes are taught in at least six Chinese state medical universities. (Exhibit E, p. 10.) Discussing the recent history of apitherapy in China, respondent cited documentation referencing an apitherapy textbook used in at least four universities and that an apitherapy class is a required course for graduation. (Exhibit F, p. 8.) Of interest, respondent cited a study and a process in 2006 and 2007 in China to expand low-cost healthcare beyond urban settings. A study was conducted in 20 provinces and large cities. Respondent's summary states: "It was discovered that only 7 provinces incorporated the BST [bee sting therapy] into TCM [traditional Chines medicine] remediation norm. In other words, in the other 13 provinces, BST was illegal. This proposal is a plea to the Ministry of Health to incorporate BST into TCM remediation norm." (Exhibit F, p. 9.) It thus appears that, as of eight years ago, bee sting therapy was not as widespread and accepted in China as respondent would suggest.

53. Respondent's research and writings tend to support the opinion of Xin that bee sting therapy is an available therapy in China with a basis in the history of folk medicine. It also undercuts the testimony of Lee that bee sting therapy is not taught in China and is not in the textbooks used in China. However, respondent's research and writings also contain information to the effect that bee sting therapy, although taught and available in limited settings, is not so widespread as to be considered a regular practice.

54. Much of the evidence presented by both sides addressed the effectiveness and safety of bee sting therapy. However, these are not the subjects of the present hearing. Such evidence is relevant only to the extent it affects the opinions in support of, or against, the alleged causes of discipline for gross negligence, repeated acts of negligence, or unprofessional conduct.

55. Respondent contends that bee sting therapy is within the scope of practice of an acupuncturist or, in the alternative, it should be. This second contention will not be addressed. It was established by clear and convincing evidence that respondent's use of bee sting therapy amounts to unprofessional conduct. The expert testimony of McNamee and Lee was sufficient to support the conclusion that, in California, there is a lack of present use of bee sting therapy in the professional community at large, and there is a lack of training in bee sting therapy in the educational curricula required for licensure.

56. (A) Respondent's contention that bee sting therapy is allowed under the current law, although intriguing, is rejected. The use of bee venom via injection into the

patient from a live bee is not included specifically in the statutes and regulations noted above (see Findings 7 – 11). The statutory definition of acupuncture and regulations requiring stainless steel needles precludes use of a bee stinger. A licensed acupuncturist can also use herbs and animal products to promote, maintain and restore health. The expert testimony of McNamee and Lee and other evidence was sufficient to establish that the use of bee venom via injection into the patient from a live bee is not included in the law permitting use of herbs or animal products.

(B) It would be inconsistent to specifically regulate the insertion of metal needles, not only as noted above but also requiring the acupuncturist to wash hands before, and swab the acu-point area with alcohol, and yet allow a bee stinger to be inserted in the skin with no specification as to other necessary procedures. Respondent contends that a bee stinger is a one-time use, disposable needle that is effectively sterile because it carries no human pathogens. The same can be said for an acupuncture needle; nevertheless, the law imposes several safety steps before an acupuncture needle can be used on a patient.

(C) That other live animals may be a source of treatment does not change the outcome. Respondent also contends that treatment with stinging nettles supports his position. However, the evidence relating to these other plant and animal products was very limited. Xin testified that several animals can be used in treatment. It was not clear which of the references to animal products related to using the live animal. An interesting question is raised about leaches, but insufficient evidence was received to adequately determine whether this is a widespread, accepted practice and to what extent it leads to the conclusion that bee sting therapy must be accepted as falling under the present authority to use animal products. Xin did not establish where or when these animal products are used, and much of his testimony was indistinct as to whether he was referring to practice in China or in California. Respondent's research referred to the use of bee sting therapy by a pioneering physician, Dr. Bodog Beck, in New York in the 1930's and by some acupuncturists in Orange County (exhibit E, p. 9), and use of stinging nettles (exhibit F, pp. 4 – 6). These references establish that these procedures take place, but do not bring bee sting therapy to the level and currency of practice within California such as to conclude that it is within the scope of practice for an acupuncturist.

(D) Considering all of the evidence, the expert opinions of McNamee and Lee were sufficient to support the conclusion that the use of bee sting therapy was a departure from the standard of care. (As noted above, no cause for discipline was found due to a lack of evidence that respondent treated a particular patient.) This departure from the standard of care is such that respondent's use of bee sting therapy amounts to unprofessional conduct.

The Fourth Cause for Discipline: Unregistered Practice Location

57. Respondent's office location in Alhambra was not registered with the Board. The day after Ramos notified respondent of the registration requirement, respondent registered his Alhambra office location with the Board.

Respondent's Motion/Contention re Lack of Harm to Any Patient

58. Respondent made a motion at the conclusion of the complainant's case, and again in his trial brief, to dismiss the Accusation because there was no proof that any patient had been harmed. The motion is denied, for the reasons stated on the record. Further, no harm is necessary to examine whether a licensee is liable for unprofessional conduct. (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1053; *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757.)

Costs

59. Evidence of the costs of prosecution is found in two exhibits. First is a declaration of complainant's counsel supported by a "Matter Time Activity" billing summary in exhibit 15. Complainant's counsel, and her supervisors, billed for 135.75 hours, at the rate of $170 per hour, for various activities from December 17, 2013, to July 30, 2015; subtotal is $27,077.50. Exhibit 16 summarizes costs of investigation (20.75 hours at the rate of $182 per hour), and costs of expert witness services (0.5 hours at the rate of $60 per hour, 8 hours at the rate of $75 per hour, and 8 hours at the rate of $125 per hour); subtotal is $5,406.50. The total amount billed for costs of investigation and prosecution is $32,483.

LEGAL CONCLUSIONS

1. The standard of proof to be used in these proceedings is "clear and convincing proof to a reasonable certainty." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853. See, also, *Borror v. Dept. of Real Estate* (1971) 15 Cal.App.3d 531.) 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. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

2. An acupuncturist's license can be disciplined for gross negligence or repeated negligent acts under the authority of Business and Professions Code section 4955.2, subdivisions (a) and (b).

3. An acupuncturist's license can be disciplined for unprofessional conduct under the authority of Business and Professions Code section 4955.

4. As required by Business and Professions Code section 4961, an acupuncturist shall register all of his places of practice with the Board.

5. Under Government Code section 11503, subdivision (a), an accusation is a written statement of charges "that shall set forth in ordinary and concise language the acts or omissions with which respondent is charged . . . ."

6. Simply put, one job of the ALJ is to determine whether complainant has proven what she has alleged. Here, the allegations of gross negligence are completely tied to respondent's treatment of patient J.R. There was no direct evidence that respondent treated J.R. The only evidence is indirect – in Ramos's investigation report, and such evidence, as administrative hearsay, cannot support a factual finding. No cause exists to impose discipline against respondent's license for the alleged gross negligence.

7. Similarly, the allegations of repeated negligent acts are also tied to respondent's treatment of patient J.R. No cause exists to impose discipline against respondent's license for the alleged repeated negligent acts.

8. Cause exits to impose discipline against respondent's license for unprofessional conduct, pursuant to Factual Findings 2, 4 and 6 – 57 above.

9. Cause exits to impose discipline against respondent's license for having an unregistered practice location, pursuant to Factual Findings 2, 5 and 58 above.

10. Costs of investigation and prosecution can be recovered under the authority of Business and Professions Code section 125.3. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost recovery provision similar to Business and Professions Code section 125.3. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost recovery provision did not deter individuals from exercising their right to a hearing. Thus, the board must not assess the full costs where it would unfairly penalize the respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the board must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the board must consider a respondent's ability to pay; and the board may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. (*Id.* at 45.) Apportionment of costs is further supported by *Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 920-921, wherein it was determined that consideration must be given to, and costs reduced based on, charges on which the respondent prevailed.

11. Assessing full costs against respondent herein would unfairly penalize him, as he committed some misconduct but used the hearing process to obtain the dismissal of some charges; respondent clearly maintained a subjective good faith belief in the merits of his position and raised a colorable challenge to discipline; and the board incurred disproportionately large investigation and prosecution costs when it conducted a disproportionately large investigation and prosecution to prove that respondent engaged in significantly less misconduct than that with which he was charged. Under all of the circumstances, costs will be awarded in an amount of 50 percent of the costs claimed. That is, a reduction from $32,483 to $16,241.50.

12. The Board has issued disciplinary guidelines, under the authority of CCR section 1399.469. The guidelines do not include a reference to unprofessional conduct, and the references to negligence include elements of substantial or minimal harm to a patient. The guidelines also indicate that individual cases may necessitate variations taking into account unique circumstances. This is a case with unique circumstances. Respondent presented himself as seeking to establish that bee sting therapy falls within an acupuncturist's scope of practice, and made cogent and compelling arguments in support. He also contended that bee sting therapy was effective and safe, and provided ample information in support. However, those contentions are not included within the issues to be decided. Under all of the circumstances, the public will be adequately protected by a probationary order of two years under standard terms with the added term that respondent shall not perform bee sting therapy.

ORDER

The license of Xin Sheng Zhou, acupuncturist license number AC 13713, is revoked; however, the revocation is stayed and the license is placed on probation for two years, under the following terms and conditions:

1. Practice Restriction: Respondent shall not perform bee sting therapy during the period of probation.

2. Obey All Laws: Respondent shall obey all federal, state and local laws and all regulations governing the practice of acupuncture in California. A full and detailed account of any and all violations of law shall be reported by the respondent to the Board in writing within seventy-two (72) hours of occurrence.

3. Quarterly Reports: Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

4. Surveillance Program: Respondent shall comply with the Board's probation surveillance program and shall, upon reasonable notice, report to the assigned investigative district office. Respondent shall contact the assigned probation surveillance monitor regarding any questions specific to the probation order. Respondent shall not have any unsolicited or unapproved contact with 1) victims or complainants associated with the case; 2) Board members or members of its staff; or 3) persons serving the Board as expert examiners.

5. Interview with the Board or Its Designee: Respondent shall appear in person for interviews with the Board or its designee upon request at various intervals and with reasonable notice.

6. Changes of Employment: Respondent shall notify the Board in writing, through the assigned probation surveillance compliance officer of any and all changes of employment, location and address within 30 days of such change.

7. Tolling for Out-of-State Practice or Residence: In the event respondent should leave California to reside or to practice outside the State, respondent must notify the Board in writing of the dates of departure and return. Periods of residency or practice outside California will not apply to the reduction of this probationary period.

8. Employment and Supervision of Trainees: Respondent shall not employ or supervise or apply to employ or supervise acupuncture trainees during the course of this probation. Respondent shall terminate any such supervisorial relationship in existence on the effective date of this probation.

9. Cost Recovery: Respondent shall pay to the Board its costs of investigation and enforcement in the amount of $16,241.50. A payment schedule may be arranged.

10. Violation of Probation: If respondent violates probation in any respect, the Board may, after giving respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stated. If an accusation or petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final. No petition for modification or termination of probation shall be considered while there is an accusation or petition to revoke probation pending against respondent.

11. Completion of Probation: Upon successful completion of probation, respondent's license will be fully restored.

DATED: August 25, 2015

DocuSigned by:
David Rosenman
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DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings