

**FILED** CAB  
NOV 21 2012  
KS State Board of Healing Arts

**BEFORE THE BOARD OF HEALING ARTS  
OF THE STATE OF KANSAS**

In the Matter of )  
JOHN W. CARLSTON, D.C. )  
 )  
Kansas License No.: 01-04439 )  
 )  
\_\_\_\_\_ )

**Docket No.: 11-HA00037**

**FINAL ORDER DENYING RECONSIDERATION OF FINAL ORDER REVOKING  
LICENSURE AND ASSESSING COSTS**  
**FINAL ORDER DENYING STAY OF FINAL ORDER REVOKING LICENSURE  
AND ASSESSING COSTS**

NOW on this 20<sup>th</sup> day of November, 2012, the Kansas State Board of Healing Arts ("Board"), by and through its Executive Director, Kathleen Selzler Lippert, a duly authorized Representative of the Board, in accordance with the provisions of the Kansas Administrative Procedure Act, K.S.A. 77-501, *et seq.*, and after consultation with Michael Bezley, M.D., upon due consideration of the agency record and applicable statutes, and being otherwise duly advised in the premises makes the following determination upon Respondent's Motion for Reconsideration and Stay pursuant to K.S.A. 77-528 and 77-529.

**I. Factual Background**

Respondent was previously licensed to practice chiropractic in the State of Kansas, having been issued License No. 01-04439 on approximately April 5, 1997. On or about September 23, 2010, a Petition was filed seeking disciplinary action against Respondent's license for allegations of his failure to adhere to the appropriate standard of care to a degree constituting gross negligence and/or ordinary negligence in the treatment of a patient, and for inadequate medical record documentation. A formal hearing on the Petition was held before Presiding Officer, Stephen E. Good, of the Office of Administrative Hearings on March 12, 2012 through

March 15, 2012, and concluded on March 23, 2012. The Presiding Officer issued an Initial Order on or about June 22, 2012, making findings of facts and conclusions of law.

The Initial order found Respondent in violation of the Kansas Healing Arts Act for committing professional incompetency by deviating from the standard of care to a degree that constitutes gross negligence and incompetence; committing unprofessional conduct by making false or misleading statements to a patient, failing to make and maintain accurate medical records of a patient, using experimental forms of therapy without proper consent, and failing to practice chiropractic with a level of care recognized by similarly situated practitioners. Based upon these findings, the Presiding Officer ordered the revocation of Respondent's license to practice chiropractic in the State of Kansas, and assessed him with the costs of the proceedings.

A conference hearing for the full Board's consideration of the Initial Order was held on October 19, 2012, where the Board found that Respondent did commit each violation of the Kansas Healing Arts Act set forth in the Initial Order in this matter, and, therefore, adopted each Finding, Conclusion and Order contained in the Initial Order. The Board further found that the costs of the proceeding, as set forth in Petitioner's Statement of Costs, in the amount of \$19,352.84, are lawful and should be assessed against the Respondent pursuant to K.S.A. 65-2846. On or about October 24, 2012, the Board issued its Final Order Revoking Licensure and Assessing Costs against Respondent.

On or about November 5, 2012, Respondent filed a Motion for Reconsideration of the Final Order Revoking Licensure and Assessing Costs asserting the Board's findings were contrary to the evidence in the matter, that the punishment and/or revocation of his license greatly exceed the alleged violations, and that the findings and rulings by the Presiding Officer were contrary to the law and to the evidence concerning the matter.

On or about November 5, 2012, Respondent filed a Motion for Stay of the Final Order Revoking Licensure and Assessing Costs asserting that there was no evidence indicating Respondent is a threat to harm the public, that Respondent maintained licensure during the pending disciplinary proceeding, that there was only one patient involved in this case, that there are no other pending complaints concerning Respondent, and that Respondent's livelihood will be adversely impacted pending his appeal if the Stay is not granted.

On or about November 8, 2012, Respondent filed a Motion to File Motion For Reconsideration and Motion to Stay Out of Time Due to Inadvertent Mailing to Wrong Address. Respondent's Motion to File Out of Time asserts that the Motion for Reconsideration and Motion for Stay were mailed to an old address which resulted in their late filing.

## **II. Analysis**

The Final Order Revoking Licensure and Assessing Costs was file stamped on October 24, 2012 and served by facsimile, electronic mail and depositing in the United States Mail, postage prepaid. Pursuant to K.S.A. 77-529, any party, within 15 days after service of a final order, may file a petition for reconsideration with the agency. In the case at bar, a motion for reconsideration is within the statutory time frame if it is filed on or before November 8, 2012. The motions in question were filed stamped by the agency on November 5, 2012, less than 15 days after service of the final order. Therefore, the issue is moot and the Board will consider the substantive issues set forth in Respondent's request for reconsideration and stay of the Final Order.

The Board's statutory duty is to protect the public health, safety and welfare. This duty to regulate the practice of healing arts in the State of Kansas is set forth in K.S.A. 65-2801:

Recognizing that the practice of the healing arts is a privilege granted by legislative authority and is not a natural right of individuals, it is deemed necessary as a matter of policy in the interests of public health, safety and welfare, to provide laws and provisions covering the granting of that privilege and its subsequent use, control and regulation to the end that the public shall be properly protected against unprofessional, improper, unauthorized and unqualified practice of the healing arts and from unprofessional conduct by persons licensed to practice under this act.

Inherent to the Board's duty is the necessity to ensure that all licensees adhere to the applicable standard of care. Further, the Board is allowed to use its own expertise in determining whether a violation of the standard of care has occurred. *Heart v. Kansas Bd. Of Healing Arts*, 27 Kan.App.2d 213, 2 P.3d 797 (2000). In *Heart*, the Court found that deference should be given to the Board given the nature of the Board's expertise in matters involving the various standards of care for the healing arts profession.

In Respondent's Motion for Reconsideration, Respondent asserts the same arguments and information that he provided during the October 19, 2012 conference hearing to review the Initial Order. Respondent reasserts that the findings in the Initial Order, and Final Order, are contrary to the evidence in this matter. The Board did not find merit in Respondent's arguments at the conference hearing, but that does not support a conclusion that the findings are contrary to the evidence.

The evidence in the record reflects that Respondent provided care to Patient #1 between 2003 and 2009; which included approximately 57 appointments. The initial paper work indicated that Patient #1's greatest health concern was "the carcinoma of my left nipple" and her first health goal was to be "healed of carcinoma." The chief complaint listed by Patient #1 at a majority of office visits concerned her left breast. On almost every visit, Respondent examined Patient #1's breasts.

At the conference hearing, Respondent denied treating Patient #1's cancer. Rather, Respondent contends that he was treating Patient #1's underlying conditions, such as bacteria, fungus and yeast that are associated with the disease process. (Trial Tr. Pages 185-189) However, Respondent's contention is not supported by the weight of the evidence.

The record reflects that Respondent's primary approach to the diagnosis and treatment plan for Patient #1 primarily revolved around Applied Kinesiology (AK) and muscle testing. Both the record and witness testimony indicate that Respondent would have Patient #1 lie on the exam table with her elbow propped up. Respondent would place nutrients, herbs and homeopathies on Patient #1's stomach, and then pull on her arm to test her muscle strength. Following these tests, Respondent would advise Patient #1 and her husband that he detected several million, billion or trillion fungi, yeast, bacteria, viruses and parasites.

Muscle testing is a recognized diagnostic tool and modality used in the chiropractic profession. However, there is no scientific evidence to support using muscle testing, as used by Respondent, to determine neither bacteria count nor the presence of fungi, viruses and parasites in some quantifiable amount. Additionally, while Applied Kinesiology is a modality that may be used by some in the chiropractic profession, it is not used as a sole diagnostic tool, and a treatment plan should not be based on this diagnostic evaluation alone. While a practitioner may use Applied Kinesiology for diagnostic assessment, other diagnostic tools, such as lab work, neurology testing, orthopedic evaluation, CT, MRI, or X-rays, should be used in conjunction to verify results.

Further, Respondent's treatment plan for Patient #1 included the use of cold laser treatment, micro current, and diathermy over the breast. These modalities are generally used to

increase blood flow. Increasing blood flow to feed a cancerous tumor or malignancy falls outside of the acceptable standard of care.

Respondent maintains that Patient #1 was educated, knew she had been diagnosed with cancer, researched treatments, and made a conscious decision on the care she wanted to pursue; therefore, Respondent was not obligated to advise Patient #1 on the progression of her disease, nor refer her for other treatment. This claim is unpersuasive.

A doctor's duty and responsibilities are separate and distinct from the personal characteristics of the patient. A patient's educational level does not obviate a doctor's duty. Even if Patient #1 had received medical training, Respondent would still have the duty to advise her on the progression of her disease and refer her for treatment. Respondent failed in this responsibility. Further, it is unreasonable to believe a patient has made a fully informed health care decision if their provider does not provide regular accurate information about their current condition and the efficacy of current treatment modalities. There is no evidence in Respondent's medical record that he provided Patient #1 with regular accurate information about her condition and the efficacy of his treatment.

Patients rely on their doctor to utilize their expert medical observations to accurately assess their medical conditions and report the effectiveness of current treatments. Patient #1 traveled over 6 hours, one direction, to obtain Respondent's medical services. Patient #1 had received chiropractic care from others closer to her home but choose to make the multiple, lengthy trips to see Respondent many times over several years. Patient #1 relied on Respondent's clinical skills and judgment. Respondent's records do not contain anything that would indicate he provided information to Patient #1 on the effectiveness of his treatments. The Board finds it alarming that Respondent would assert that because Patient #1 was well read or did a lot of

research that Respondent was not obligated to explain the progression of Patient #1's disease and whether Respondent's treatments were effective.

The evidence and testimony in the agency record support the Initial Order's determination that Respondent's treatment of Patient #1 deviated from the standard of care to a degree that constitutes gross negligence.

Finally, Respondent suggests that the punishment greatly exceeds the violation. Respondent's inability to accept responsibility for his treatment of Patient #1, and his propensity to place responsibility on the patient to understand the progression of her disease, indicates that remediation is not appropriate. Before remediation can be considered, a licensee must recognize they have a deficit fund of clinical skill or knowledge. Based upon the agency's "Guidelines for the Imposition of Disciplinary Actions" for guidance in determining an appropriate sanction, the Board concluded that the sanctioning goals for such an offense are to protect the public. The Board concluded that deviating from the standard of care to a degree that constitutes gross negligence should result in revocation, and that public protection can only be assured through revocation.

The Board finds that all the information provided in the Respondent's Motion for Reconsideration is duplicative of what was presented and considered at the October 19, 2012 conference hearing. Respondent has failed to demonstrate adequate grounds to support reconsideration of the revocation of Respondent's chiropractic license and the assessment of costs.

In his Motion for Stay, Respondent maintains that he is no threat to harm the public; however, this is not the conclusion of the Board. Based on the gravity of the conduct, the vulnerability of the patient, the abuse of trust and intentional omissions, as well as Respondent's

failure to accept responsibility, the Board determined that revocation is the appropriate remedy to address the multiple violations and to ensure the public is protected.

Respondent further asserts in his request for a Stay that his license continued to be active during the disciplinary process which could have been expedited if Board staff felt there was an emergency, that there was only a single patient involved in the present case, and that there are no other complaints pending against him. Additionally, Respondent's livelihood is dependent on his chiropractic license. While these individual statements may be factually accurate they do not support the conclusion that the Board should grant a stay of revocation of respondent's license.

Respondent was provided with full due process, as set forth in the Kansas Administrative Procedures Act. A fair hearing does not prevent the Board from issuing an order of revocation which protects the public at the conclusion of the disciplinary process.

The Board concluded that Respondent's care constitutes gross negligence and violated numerous other Healing Arts statutes as described and discussed in the Initial order, as explained above, and in the Final Order. The Board recognizes the importance of maintaining licensure for qualified medical professionals, but protection of the public must be the primary consideration.

### **III. Conclusion**

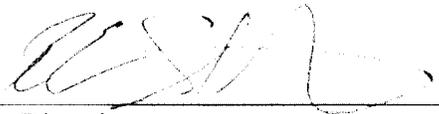
The Board reviewed the agency record and exhibits from both parties, and considered the arguments of the parties. The Board used its medical expertise, training and experience and concluded, unanimously, to adopt the findings of fact, conclusions of law, and remedy set forth in the Initial Order. Further, the Board ordered costs of the hearing to be assessed against Respondent. Upon further review of the Respondent's Motions for Reconsideration, the Board determines that the Final Order in this matter was appropriate, that the grounds for relief asserted

by Respondent are inadequate, and that Respondent's Motions for Reconsideration and Stay should be denied.

**IT IS THEREFORE CONSIDERED, ORDERED AND DECREED BY THE KANSAS STATE BOARD OF HEALING ARTS** that Respondent's Motions for Reconsideration and Stay are hereby **DENIED**.

**IT IS SO ORDERED THIS 20<sup>th</sup> DAY OF NOVEMBER, 2012, IN THE CITY OF TOPEKA, COUNTY OF SHAWNEE, STATE OF KANSAS.**

Kathleen Selzler Lippert  
Executive Director  
Kansas State Board of Healing Arts



By Direction:  
Randy E. Stookey  
Special General Counsel

#### **NOTICE OF RIGHTS**

**PLEASE TAKE NOTICE** that this is a Final Order. A Final Order is effective upon service, and service of a Final Order is complete upon mailing. A party to an agency proceeding may seek judicial review of a Final Order by filing a petition in the District Court, as authorized by K.S.A. 77-601, *et seq.* A petition for judicial review is not timely unless filed within **30 days** following service of the Final Order. A copy of any petition for judicial review must be served upon Kathleen Selzler Lippert, Executive Director, Kansas State Board of Healing Arts, 800 SW Jackson, Lower Level-Suite A, Topeka, KS 66612.

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true copy of the foregoing **FINAL ORDER DENYING RECONSIDERATION OF FINAL ORDER REVOKING LICENSURE AND ASSESSING COSTS** was served this 21<sup>st</sup> day of November, 2012, by depositing the same in the United States Mail, first-class, postage prepaid, and addressed to:

John W. Carlston, D.C.  
1011 E. 13<sup>th</sup> Street N. Basement  
Wichita, KS 67214

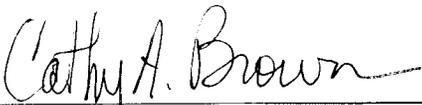
Eldon Boisseau  
Law Offices of Eldon L. Boisseau, LLC  
200 W. Douglas, Suite 101  
Wichita, KS 67202  
*Attorney for Licensee*

And a copy was hand-delivered to:

Stacy R. Bond, Associate Litigation Counsel  
Kansas State Board of Healing Arts  
800 SW Jackson, Lower Level-Suite A  
Topeka, Kansas 66612

And the original was filed with the office of:

Kathleen Selzler Lippert, Executive Director  
Kansas State Board of Healing Arts  
800 SW Jackson, Lower Level-Suite A  
Topeka, Kansas 66612

  
\_\_\_\_\_  
Cathy Brown, Executive Assistant