FILED
SEP 13 2019
KS State Board of Healing Arts

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

In the Matter of	)	
	)	**Docket No.: 18-HA00038**
Darin M. Upchurch, D.C.,	)	
Kansas License No. 01-04367	)	

JOURNAL ENTRY OF SATISFACTION

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 K.S.A. 77-501, *et seq.*, upon due consideration of the agency record, applicable statutes and regulation, and being duly advised in the premises, makes the following determinations:

1. On September 10, 2018, the Board issued a Final Order against the license of Darin M. Upchurch, D.C. (Licensee) imposing the requirements therein.

2. Licensee has met all requirements of the Final Order and has no further obligation for compliance.

IT IS SO ORDERED this 13 day of September 2019.

KANSAS STATE BOARD OF HEALING ARTS

Kathleen Selzler Lippert

Kathleen Selzler Lippert, Executive Director

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing order was served this 13th day of September 2019 by depositing the same in the United States Mail, first-class postage prepaid, and emailed, addressed to:

Darin Upchurch, D.C.
CONFIDENTIAL

Brian L. Burge
Destiny L. Bounds
Sanders Warren Russel & Scheer LLP
9401 Indian Creek Parkway, Suite 1250
Overland Park, Kansas 66210
b.burge@swrsllp.com
d.bounds@swrsllp.com

And a copy was delivered to:

Nancy Dodik, Associate Disciplinary Counsel
Kansas Board of Healing Arts
800 SW Jackson, Lower Level – Suite A
Topeka, KS 66612

Compliance Coordinator
Kansas Board of Healing Arts
800 SW Jackson, Lower Level – Suite A
Topeka, KS 66612

Licensing Administrator
Kansas Board of Healing Arts
800 SW Jackson, Lower Level – Suite A
Topeka, KS 66612

And the original was filed with the office of the Executive Director.

Linda Shaver for
Susan Gile, Operations Manager

FILED

SEP 10 2018

KS State Board of Healing Arts

BEFORE THE BOARD OF HEALING ARTS
OF THE STATE OF KANSAS

In the Matter of	)	
	)	**Docket No.: 18-HA00038**
Darin M. Upchurch, D.C.,	)	
Kansas License No. 01-04367	)	

FINAL ORDER

On August 10, 2018, the Kansas State Board of Healing Arts ("Board") held the conference hearing on the Petition for discipline filed against the chiropractic license of Darin M. Upchurch, D.C. ("Licensee"). Susan Gering, Deputy Litigation Counsel, appeared on behalf of the Respondent Board. Licensee appeared in person and by counsel Brian Burge of the firm Sanders Warren Russel & Scheer LLP.

Pursuant to the authority granted to the Board by the Kansas Healing Arts Act, K.S.A. 65-2901, *et seq.*, and in accordance with the provisions of the Kansas Administrative Procedure Act, K.S.A. 77-501, *et seq.*, the Board hereby enters this Final Order in the above-captioned matter. After reviewing the agency record, hearing the arguments of the parties, and being duly advised in the premises, the Board makes the following findings, conclusions and orders.

FINDINGS OF FACT

Licensee is or has been entitled to engage in the practice of chiropractic in the State of Kansas, having been issued original and permanent license No. 01-04367 on or about June 22, 1996, and having renewed his license most recently on or about November 28, 2017. Licensee is the sole owner of MaxLife Health & Laser Center located at 11010 Quivira Road, Overland Park, Kansas 66210. Licensee maintains a website for his business at the following address: http://www.maxlifehealthcenter.com/. The telephone number for MaxLife is (913) 327-7246.

In November 2015, Licensee's advertisement on his website stated, "in alignment with his multiple talents, he has elite training in a multitude of chiropractic adjusting techniques," but failed to detail what "elite training" he has had or what makes his training "elite." As of August 10, 2018, the date of the conference hearing on this matter, the MaxLife website still contained this language.

Around the same time, Licensee was also associated with a website, maxslimlipo.com, that advertised the following: "'Lose 2-10 Inches From Your Waist, Hips or Thighs in 25 Minutes... Guaranteed!'" Further, the website advertised "[w]ith this technology we don't destroy your fat cells. What we do is we simply drain the contents of the fat cells so you lose the inches and look good again [...] (Lose 2" on Your First Visit or You Don't Pay!) [...]" "*Guarantee offered to first treatment for new patients on our full BodySculpt procedure only. If you don't lose 2" in combined measurements, your treatment is FREE."

From February 2015 through October 2015, Licensee used Keys Marketing Group, Inc., d/b/a/ Accident Referral Network ("Keys Marketing") to solicit accident victims to refer to Licensee, who was held out to be an accident expert. Among other tactics, Keys Marketing assured potential patients that the treatment with Licensee would be free. During the time Licensee contracted the services of Key Marketing, the following individuals were contacted and became patients of Licensee: M.J., C.H., Q.C., J.K., R.J., and K.B. In addition to these patients, there were additional patients who complained and reported they were improperly solicited by telemarketing services and sent to see Licensee. Licensee was aware of the longstanding problem of his marketing companies soliciting his patient population.

Records received from Licensee show Patient M.J. received care and treatment from Licensee at his clinic from on or about August 28, 2015 to on or about November 30, 2015. For M.J.'s first appointment, on or about August 31, 2015, the record contains a consultation note, a new patient exam note, a work restriction letter, a request for excusal for a chiropractic appointment, and a medical disclaimer form documented by Dr. Krystin Jade Provo, D.C. However, Licensee's records show that all of M.J.'s patient notes are electronically signed and list Licensee as the provider. Further, Licensee's records for M.J.'s appointment on August 31, 2015, includes a patient note which, along with an account charges ledger, indicates x-rays were taken at that appointment. However, M.J. specifically told the Keys Marketing representative caller on September 1, 2015, that she was rescheduled to go back to Licensee's office later that day for x-rays to be performed. Licensee failed to document that M.J.'s x-rays were performed at M.J.'s appointment on September 1, 2015.

On February 27, 2018, the Board, through Deputy Litigation Counsel Susan R. Gering, filed a Petition for discipline against Licensee. The Petition alleged Licensee engaged in false or fraudulent advertising, advertising a guarantee of results from professional services, failed to candidly cooperate with the Board's investigation into the matter, and failed to maintain adequate medical records for patient M.J.

On May 9, 2018, Licensee filed an "Answer to Board's Petition," admitting basic information and generally denying the Licensee committed the alleged violations of the Healing Arts Act. On July 11, 2018, Licensee filed a "Response in Opposition to the Board's Petition," submitted as a supplement to the Answer with the intent to clarify Licensee's position and denial of the allegations. Licensee generally argued the use of the word "elite" on his website was not inherently false or fraudulent, he was never directly associated with the maxslimlipo.com website, and he eventually terminated the agreement with Keys Marketing. On July 27, 2018, Licensee filed objections to the Petition's exhibits on the basis of hearsay, foundation, and relevance.

CONCLUSIONS

The Board has reviewed the entire agency record and considered the briefs, oral arguments, and comments of the parties at the hearing. The Board bases its conclusions on the agency record and the facts, law, and policy described above and below.

The Board overrules Licensee's objections to the Petition's exhibits pursuant to K.S.A. 77-524(a).

The agency record shows Licensee's conduct violated the Kansas Healing Arts Act as follows:

- Licensee, through his own actions, online advertisements bearing his name and company, and his use of Keys Marketing, violated K.S.A. 65-2836(b), in that Licensee committed acts of unprofessional or dishonorable conduct, as further described below.

- As defined by K.S.A. 65-2837(b)(1), Licensee solicited professional patronage through the use of fraudulent or false advertisements, or profiting by the acts of those representing themselves to be agents of licensee, when Licensee used websites to advertise red light therapy and BodySculpt procedures to the public, allowed Keys Marketing to hold him out as an accident expert, contracted with Keys Marketing to monitor information in police reports to solicit patients to refer to Licensee, and continued paying Keys Marketing for their services from on or at least April 8, 2014 to on or at least November 30, 2015.

- As defined by K.S.A. 65-2837(b)(8), Licensee advertised to guarantee a professional service, when the maxslimlipo.com website associated with Licensee advertised to guarantee the following: patients' loss of 2-10 inches from their waist, hips or thighs in 25 minutes; the new treatment technology uses special light therapy to trick patients mitochondria to release their fat content; and the technology simply drains the contents of the fat cells so patients lose the inches and look good again.

- As defined by K.S.A. 65-2837(b)(12), Licensee's conduct as shown in the record and described above was likely to deceive, defraud, or harm the public.

- As defined in K.S.A. 65-2837(b)(25), Licensee failed to keep written medical records which accurately described the services rendered to Patient M.J., including patient histories, pertinent findings, examination results, and test results, when Licensee failed to make an adequate medical record when he provided care and treatment to Patient M.J.

- Licensee violated K.S.A. 65-2836(k), in that Licensee violated K.A.R. 100-24-1 by failing to maintain adequate medicals records for Patient M.J., as described above.

SANCTIONS

Based on the agency record, the findings described above, the policy mandate given to the Board by the Kansas legislature to protect patient safety, and the aggravating factors described below, the Board concludes that the appropriate sanctions are as described below. The Board, after considering the agency record in light of potential mitigating or aggravating factors, finds the following aggravating factors in this case:

- Licensee's lack of genuine remorse, and failure to take responsibility for his actions. This was reflected both in his written pleadings in the Board proceeding and his comments at the August 10, 2018 conference hearing.

- The severity of Licensee's conduct. Licensee used misleading advertisements and an unscrupulous agent to abuse the fundamental trust between patient and chiropractor.

- The vulnerability of patients. Patients targeted by Licensee's websites and by Keys Marketing on Licensee's behalf included victims of recent automobile accidents who had reported experiencing pain. The Board finds this population to be especially vulnerable to false or misleading statements or advertisements by health care providers and those representing themselves to be their agents.

- Licensee has practiced for approximately twenty-two (22) years. He knew, or should have known, the wrongfulness of his conduct in all respects described in this Order. His claims of lack of association with the websites, eventual termination of the agreement with Keys Marketing, or lack of intent to violate the Healing Arts Act did not ameliorate the Board's concerns. The Board finds that a practitioner with more than two decades of experience should have a basic awareness of the laws and rules that apply to his practice in Kansas.

- The length of time over which Licensee's unlawful conduct occurred. Licensee's unlawful conduct spanned at least twenty (20) months between spring 2014 and winter 2015, and the record indicates Licensee's website had not been corrected as of the date of the conference hearing on August 10, 2018. This was not a case of a brief and isolated period of poor judgment. Licensee's violations reflect a sustained period of multiple violations of the Healing Arts Act.

The Board determines the appropriate sanction against Licensee's license to engage in the practice of chiropractic is as follows:

PUBLIC CENSURE

Licensee is **publicly censured** for violating the Kansas Healing Arts Act.

FINE

Licensee is hereby ordered to pay a FINE in the amount of **TWO THOUSAND FIVE HUNDRED DOLLARS AND ZERO CENTS** ($2,500.00) for violations of the Kansas Healing Arts Act.

Such fine shall be paid in full, to the Board on or before December 31, 2018. Licensee shall make all payments payable to the "Kansas State Board of Healing Arts" and send all payments to the attention of:

Compliance Coordinator
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level-Suite A,
Topeka, Kansas 66612.

EDUCATION: RECORD KEEPING AND ETHICAL ADVERTISING

Licensee shall attend and successfully complete a total of eight (8) hours of Board approved continuing education with an emphasis in ethical advertising, and a total of at least twelve (12) hours of Board approved continuing education pertaining to recordkeeping.

On or before September 31, 2018, Licensee must propose courses pertaining to recordkeeping and ethical advertising that will be reviewed and subject to approval by the Board prior to taking the course(s).

On or before November 1, 2018, Licensee shall notify the Compliance Coordinator in writing that Licensee has registered to attend the approved courses.

Licensee shall attend and successfully complete the courses pertaining to recordkeeping and ethical advertising by no later than December 31, 2018.

Licensee shall provide proof of successful completion of the courses to the Compliance Coordinator within thirty (30) days following completion of the courses.

All costs associated with the courses pertaining to advertising shall be at Licensee's own expense, including, but not limited to the cost of the program, any cost of travel to and from the program, and the cost of accommodations while attending the courses.

These hours shall be in addition to and not count towards those hours required for renewal of licensure.

ETHICS EXAMINATION

Licensee shall enter into, complete, and pass all five (5) topic areas of the Essay

Examination that is put on by Ethics and Boundaries Assessment Services, LLC on or before January 31, 2019, unless otherwise approved by the Board. The score report of any and all examination attempts by Licensee, regardless of Licensee receiving a passing or failing score, shall be provided to the Board by Licensee within ten (10) business days of Licensee receiving the test result. The results shall be sent to:

Compliance Coordinator
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level-Suite A,
Topeka, Kansas 66612
KSBHAcompliancecoordinator@ks.gov

On or before December 1, 2018, Licensee shall notify the Compliance Coordinator in writing, that Licensee has registered with the Ethics and Boundaries Assessment Services, LLC ("EBAS") to take the Essay Examination.

CORRECTION OF WEBSITE(S)

On or before October 31, 2018, Licensee shall modify and correct any and all websites associated with his chiropractic practice to be compliant with the Kansas Healing Arts Act and consistent with this Order.

ORDERS

IT IS THEREFORE ORDERED, BY THE KANSAS STATE BOARD OF HEALING ARTS that Darin M. Upchurch, D.C., license No. 01-04367, is hereby disciplined as described above.

IT IS SO ORDERED THIS 10th DAY OF SEMPTEMBER, 2018, IN THE CITY OF TOPEKA, COUNTY OF SHAWNEE, STATE OF KANSAS.

KANSAS STATE BOARD OF HEALING ARTS

Kathleen Selzler Lippert, Executive Director

NOTICE OF APPEAL 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. Pursuant to K.S.A. 77-529, Respondent may petition the Board for Reconsideration of a Final Order within fifteen (15) days following service of the final order. Additionally, 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*. Reconsideration of a Final Order is not a prerequisite to judicial review. 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 and correct copy of the above and foregoing **FINAL ORDER** was served this 10th day of September, 2018, by depositing the same in the United States Mail, first-class, postage prepaid, and addressed to:

Darin Upchurch, D.C.
Licensee
CONFIDENTIAL

Brian L. Burge
Destiny L. Bounds
Sanders Warren Russel & Scheer LLP
Attorneys for Licensee
9401 Indian Creek Parkway, Suite 1250
Overland Park, Kansas 66210

And a copy was hand-delivered to the office of:

Susan Gering, Deputy Litigation Counsel
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level - Suite A
Topeka, KS 66612
Attorney for Petitioner

And the original was filed with the office of the Executive Director.

Elizabeth Visocsky By DA
Elizabeth Visocsky, Operations Manager