

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF CHIROPRACTIC EXAMINERS

In the Matter of Jay Y. Cherner, D.C.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge (“ALJ”) Richard C. Luis on July 29 and August 1, 2008, at the Office of Administrative Hearings in St. Paul. Jay Y. Cherner, D.C. (“Respondent”) was represented by Mark W. Gehan, Collins, Buckley, Sauntry and Haugh, PLLP, St. Paul, Minnesota. Careen Martin, Assistant Attorney General, and Peter J. Krieser, Assistant Attorney General, appeared on behalf of the Complaint Panel (“Panel”) of the Minnesota Board of Chiropractic Examiners (“Board”). The hearing record closed on November 12, 2008.

STATEMENT OF ISSUES

1. Whether the Respondent was required to register his acupuncture practice with the Board since 1991?
2. What disciplinary action, if any, is appropriate against Respondent’s chiropractic license for failure to register as a practitioner of acupuncture?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Chiropractors in Minnesota are required to register with the Minnesota Board of Chiropractic Examiners (“Board”) before providing acupuncture services. Minn. R. 2500.3000, subp. 2 (2007).
2. The acupuncture registration requirement was implemented by Minnesota Rule 2500.3000, which was promulgated in 1991.¹
3. Jay Cherner immigrated to the United States from Ukraine in 1978. English is his second language.² He still struggles to grasp the meaning of words spoken or written in English.³

¹ T. 34.

4. Before June 1991, the practice of acupuncture by a licensed chiropractor in the state of Minnesota did not require registration with the Minnesota Board of Chiropractic Examiners.⁴

5. Dr. Jay Cherner began training to be a Doctor of Chiropractic (“D.C.”) in 1982. He graduated from Northwestern College of Chiropractic (“NWCC”, now called Northwestern Health Sciences University) in December 1985. He was subsequently licensed in the State of Minnesota as a chiropractor by the Minnesota Board of Chiropractic Examiners (“MBCE”) in January 1986 and then began private practice. At the time of Dr. Cherner’s licensure, there was no registration requirement for chiropractors to engage in acupuncture. In fact, in 1986, acupuncture (as a type of meridian therapy) was part of the chiropractic scope of practice and Dr. Cherner was performing meridian therapy, as an adjunctive therapy in his practice.

6. NWCC offered a 100-hour elective program in meridian therapy for those who were going to use acupuncture as a part of their practice. Dr. Cherner completed the 100-hour elective program as a student at NWCC and began utilizing acupuncture in his chiropractic practice in 1986.

7. When Minnesota Rule 2500.3000 was promulgated in 1991, subp. 2 read:

“Prior to any licensed chiropractor engaging in acupuncture, the chiropractor must complete 100 hours of study exclusive of other continuing education hours, in the utilization of acupuncture. ... The chiropractor must submit certification of completion of the approved course of study in addition to a \$100 registration fee.” (Emphasis added.)

8. Under the 1991 version of Minn. R. 2500.3000, the chiropractor must submit certification of completion of the approved course of study. Minn. R. 2500.3000, subp. 2 (1991).

9. Under the 1991 version of Minn. R. 2500.3000, once a chiropractor has completed the requirements for registration, the Board will issue a registration certificate. Minn. R. 2500.3000, subp. 2 (1991).

10. Under the 1991 version of Minn. R. 2500.3000, upon receiving the certificate from the board, a doctor of chiropractic may utilize acupuncture to prepare for or complement a chiropractic adjustment. Minn. R. 2500.3000, subp. 2 (1991).

11. Under the 1991 version of Minn. R. 2500.3000, an annual renewal fee of \$50 is required to maintain registered status with the board. Minn. R. 2500.3000, subp. 2 (1991).

² Affidavit of Jay Y. Cherner.

³ Exhibit. 1.

⁴ T. 102.

12. Dr. Cherner understood that the rule adopted in 1991 applied to chiropractors who had not yet engaged in the practice of acupuncture, and not to chiropractors already engaged in the practice of acupuncture. At the time the rule was adopted, Cherner had completed his 100 hours of study of acupuncture, while in school at NWCC. He did not submit the certification of completion or pay the \$100 registration fee. Since 1986, the MBCE had documentation of Dr. Cherner's completion of 100 hours of meridian therapy. Completion of that course of study was documented in his transcript from NWCC, filed when he applied for Doctor of Chiropractic (D.C.) licensure.

13. Dr. Cherner did not receive any individual registration or individual renewal notices for acupuncture registration. The October 1995 Board newsletter provides that license renewal materials "will be mailed to all licensees." Furthermore, this newsletter states that the MBCE will send renewal materials to allow all chiropractors the opportunity to renew on time, thereby avoiding late penalties. When the MBCE provided Cherner with proper renewal notices regarding his chiropractic license, firm registration, or preceptor registration, Cherner never failed to renew.

14. The Spring 2004 newsletter discusses revisions to the acupuncture registration rule, which include a statement that "Any registrant who fails to renew for more than 5 years must reapply for registration, pay the initial registration fee, penalty fees, and successfully complete the National Examination in Acupuncture before rendering acupuncture services." This proposal was codified at Minn. R. 2500.3000, (2005), after being adopted in May, 2004.⁵ Dr. Cherner did not believe he failed to renew, but rather believed he was not required to register based on the language of Minn. R. 2500.3000.

15. Dr. Cherner believed he had the equivalent of an active acupuncture registration through his chiropractic license and acted pursuant to this belief by taking additional continuing education hours required for acupuncture.

16. In 2000, Dr. Cherner registered to be a preceptor to students studying chiropractic, and Dr. Cherner was required to fill out an application for the same. Dr. Cherner disclosed on the application that he was currently practicing acupuncture. This form was signed by Dr. Larry Spicer, Executive Director of the Board.

17. Minnesota Rule 2500.3000 currently reads: "Prior to engaging in acupuncture, a licensed chiropractor must be registered with the board." Minn. R. 2500.3000, subp. 2 (2007).

18. Under the current version of Minnesota Rule 2500.3000, a chiropractor must complete one hundred hours of acupuncture education, pay a fee of one hundred dollars, and submit certification of completion of the approved course of study. Minn. R. 2500.3000, subp. 2 (2007).

⁵ 28 S.R. 1482.

19. Once a chiropractor has completed the requirements for registration, the Board will issue a registration certificate, at which time a chiropractor may utilize acupuncture. Minn. R. 2500.3000, subp. 2 (2007).

20. Currently, to register to practice acupuncture, a chiropractor must complete either the National Board of Chiropractic Examiners acupuncture examination or the National Certification Commission for Acupuncture and Oriental Medicine Examination (NCCAOM). Minn. R. 2500.3000, subp. 2 (2007). These provisions were adopted in May 2004, and codified at Minn. R. 2500.3000, Subp. 2 (2005).

21. Respondent has not taken the National Board of Chiropractic Examiners acupuncture examination or the National Certification Commission for Acupuncture and Oriental Medicine Examination (NCCAOM).⁶

22. Respondent has not completed the requirements to register to engage in acupuncture under Minnesota Rule 2500.3000 (2007).

23. Respondent practiced acupuncture from 1986, through September 7, 2007; including practicing acupuncture for the sixteen years that followed adoption of the registration requirement in 1991.⁷

24. On September 4, 2007, Respondent contacted Michelle King at the Board regarding acupuncture registration.⁸

25. Respondent told Ms. King that he had just spoken with Lori at the Board, who handles licenses and registrations.⁹ Respondent had reported to Lori that insurance had stopped paying him for acupuncture services and Lori had told Respondent to contact Ms. King.¹⁰

26. Respondent told Ms. King that he had been providing acupuncture for years, but didn't know that he had to be registered with the Board.¹¹

27. Ms. King advised Respondent that he should self-report the violation to the Board before the Board received a complaint from someone else.¹²

28. Dr. Cherner self-reported his non-registration to the MBCE on September 10, 2007, after learning that the registration requirement was being applied to his license. He immediately completed his application and submitted it to the MBCE along with the \$100 fee and a copy of the transcript from NWCC. The MBCE acknowledged receipt of Cherner's transcript in a letter dated October 11, 2007. The

⁶ T. 166.

⁷ T. 261, 294; *compare*, Minn. R. 2500.3000 (2007).

⁸ T. 22.

⁹ T. 23.

¹⁰ T. 23.

¹¹ T. 23.

¹² T. 23.)

letter notes, “[We] are in receipt of verification of 100 hours of acupuncture education from Northwestern Health Sciences University.”

29. On September 10, 2007, Respondent’s attorney, John Wolfe, Jr., submitted a letter to the Board on behalf of Respondent.¹³ The correspondence states: “Because Dr. Cherner is not registered with the MBCE to provide chiropractic acupuncture, yet has provided this service to patients as recently as last week, he has been doing so in violation of Minn. R. 2500.3000, subp. 2. and Minn. Stat. sec. 148.10. He is herewith self-reporting pursuant to Minn. Stat. sec. 148.102 subd. 5.”¹⁴ The letter also includes an application for initial acupuncture registration, a \$100.00 fee, and a Request for Administrative Variance.¹⁵ The correspondence indicates Respondent has not utilized acupuncture since learning of the registration requirement.¹⁶

30. The Board has received between 11 and 12 complaints pertaining to other chiropractors who have practiced acupuncture without registering.¹⁷

31. Of the 11 or 12 complaints received, the longest period of time any of these other chiropractors went without registering to practice acupuncture was about three years.¹⁸

32. The mission of the Minnesota Board of Chiropractic Examiners is: To protect the public through effective licensure, enforcement of the statutes and rules governing the practice of chiropractic, to ensure a standard of competent and ethical practice in the profession. Cherner has treated numerous patients with acupuncture as adjunctive therapy to his chiropractic adjustment therapy. Cherner has continuously carried malpractice insurance coverage with a rider for acupuncture since 1986. The record does not show that Cherner’s patients have been harmed by his acupuncture treatments. To the contrary, the record indicates that some have received benefit and healing from Dr. Cherner’s treatment.

33. Review Panel’s Exhibit 33, a newsletter from the Board, is the only document in the record which states explicitly that chiropractors “who utilize acupuncture in their office must register with the Minnesota Board of Chiropractic Examiners.” By Affidavit dated August 22, 2008, Respondent denies any previous recollection of seeing Exhibit 33.

34. Respondent denies that before his self-report, he knew or believed that he was required by the new 1991 rule to register as a chiropractor who was performing acupuncture. The consistency of his denial is supported in the record.

¹³ T. 25.

¹⁴ Ex. 1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ T. 91.

¹⁸ *Id.*

If Respondent knew or suspected that he was required to register, he had little reason not to register. It is undisputed that he already had the necessary instructional hours. The \$100 registration fee and subsequent \$50 renewal fees are modest, and would have had no deterrent effect. Likewise, Dr. Cherner made no effort to conceal the fact that he was performing acupuncture after 1991. He continued to maintain malpractice insurance for acupuncture services, and he took the additional continuing education hours necessary to provide such services.

35. In the fall of 2007, Respondent attended a conference with the Board's Complaint Panel to discuss his failure to register to engage in acupuncture.¹⁹ Respondent told the panel that "he saw roughly 40 to 50 acupuncture visits per week" between 1986 and September 2007.²⁰ Respondent also gave the Panel a dollar amount for what he charged for an acupuncture visit.²¹ The Panel took those variables and multiplied them over 16 years.²² Based on those calculations, the Panel estimated that Respondent billed between \$1.2 and 2.2 million dollars for acupuncture services while Respondent was not registered to provide acupuncture.²³

36. The Board has interpreted Minn. R. 2500.3000 to mean that all chiropractors must register under the rule prior to engaging in acupuncture, regardless of whether the chiropractor was practicing acupuncture before the promulgation of the rule.

37. Respondent was required to register to engage in acupuncture when Minnesota Rule 2500.3000 became effective in 1991.

38. According to the July 1991 Board Newsletter, "All chiropractors who utilize acupuncture in their office must register with the Minnesota Board of Chiropractic Examiners (MBCE)."²⁴ The July 1991 Newsletter makes no mention of a grandfather clause, or any other indication the registration requirement would not apply to chiropractors already engaged in acupuncture.

39. Dr. Larry Spicer, Executive Director of the Board, testified regarding the Board's interpretation of Minnesota Rule 2500.3000.²⁵ Dr. Spicer established that it is part of his duties to interpret and administer and put into effect the statutes and rules of the Minnesota Board of Chiropractic Examiners.²⁶

40. In order to be authorized to perform acupuncture in Minnesota, a chiropractor who has practiced acupuncture but not registered to do so for over five years (such as the Respondent) must complete the registration requirements by submitting an application demonstrating their qualifications to the Board, with the fee,

¹⁹ T. 103.

²⁰ T. 105.

²¹ *Id.*

²² *Id.*

²³ T. 105-06.

²⁴ *Id.*

²⁵ T. 45.

²⁶ T. 45.

and must demonstrate completion of the National Board of Chiropractic Examination, or of the NCCAOM.²⁷ Once that material is sent to the Executive Director, (s)he would approve the application, making sure that all the components are in place, return that to the Board's licensing coordinator, and (s)he would issue a certificate for the doctor of chiropractic to provide acupuncture services in conjunction with chiropractic services.²⁸ A chiropractor would have to receive a registration certificate before (s)he is authorized to perform acupuncture.²⁹

41. Respondent believed Minn. R. 2500.3000 did not apply to him because he was engaged in the practice of acupuncture at the time the rule went into effect.³⁰ In making his determination that the rule did not apply to him, Respondent did not seek the advice of a lawyer and did not review the report of the Chief Administrative Law Judge and the ALJ regarding the acupuncture rule.³¹

42. On October 28, 2002, the Board received a Graduate Preceptorship Program Preceptor Application from Respondent.³² The application contains the following question, "Is acupuncture used in your clinic?"³³ In response, Respondent filled in the word "yes."³⁴ The application contains a blank following the word "needle," which Respondent also filled in "yes."³⁵ The next question asks, "If yes, are you currently registered with the Board to perform acupuncture?"³⁶ Respondent answered "yes."³⁷ Page two of the application is a notarized affidavit signed by Respondent.³⁸ Respondent testified that he understands that when an affidavit is made, it is under oath and that he is sworn to tell the truth in the document.³⁹

43. At the time that Respondent answered "yes" to the registration questions on the 2002 preceptorship application, he had not received a registration certificate for acupuncture from the Board, nor had he submitted an application for registration to the Board.⁴⁰

44. On June 19, 2003, the Board received another Graduate Preceptorship Program Preceptor Application from Respondent.⁴¹ The application was filled out by Dr. Renero, but reviewed by Respondent.⁴² The application contains the

²⁷ T. 43.

²⁸ T. 44.

²⁹ T. 46.

³⁰ T. 240.

³¹ T. 241.

³² Ex. 26.

³³ *Id.*

³⁴ T. 267.

³⁵ *Id.*

³⁶ Ex. 26.

³⁷ T. 267.

³⁸ Ex. 26.

³⁹ T. 268.

⁴⁰ T. 268-69.

⁴¹ Ex. 27.

⁴² T. 269.

following question, “Is acupuncture used in your clinic?”⁴³ The question is answered “yes.”⁴⁴ The application contains a blank following the word “needle,” which is checked.⁴⁵ The next question asks, “If yes, are you currently registered with the Board to perform acupuncture?”⁴⁶ The question is answered “yes.”⁴⁷ Page two of the application is a notarized affidavit signed by Respondent.⁴⁸ Respondent understood that when he submitted the document it was submitted under oath.⁴⁹

45. At the time that Respondent signed the June 2003 sworn preceptorship application, he had not received a registration certificate for acupuncture from the Board, nor had he submitted an application for registration to the Board.

46. The Respondent’s failure to register to engage in acupuncture has caused no injury or damage to any party or person. There has been no evidence that Respondent’s acupuncture treatments were deficient in any fashion, and there has been no willful defiance by Respondent of the Board’s rules. The Respondent has offered consistently to pay any delinquent registration and renewal fees.

47. Meridian therapy is a type of therapy that involves the use of energy fields that traverse the body, which are commonly spoken of as “meridians.”⁵⁰

48. Meridian therapy is a general category of therapies that utilize the meridian lines on the body.

49. The terms “acupuncture” and “meridian therapy,” were not intended to have an identical meaning.

50. Acupuncture is a specific form of meridian therapy that focuses its attention on treating the meridians specifically by puncture, using needles, and inserting them into various points on the body.⁵¹

51. Acupuncture was given its own definition and statute because there are certain circumstances with respect to breaking the surface of the skin that need to be addressed, such as adverse reactions and sterilization techniques that might not be taught with just basic meridian therapy.⁵²

⁴³ *Id.*

⁴⁴ T. 270.

⁴⁵ Ex. 27.

⁴⁶ Ex. 26.

⁴⁷ T. 270.

⁴⁸ Ex. 27.

⁴⁹ T. 270.

⁵⁰ T. 121

⁵¹ T. 199.

⁵² T. 199-200.

52. The Board has interpreted its own rules and made a determination that a chiropractor who is practicing acupuncture under the rehabilitative therapy provision is not exempted from registering to practice acupuncture.⁵³

53. Respondent was required to register to practice acupuncture even if he was practicing acupuncture under the rehabilitative therapy definition.

54. Minn. Rule 2500.3000 applies to all licensed chiropractors, regardless of whether the chiropractor was engaged in acupuncture prior to adoption of the registration rule.

55. As a licensed chiropractor, it is Respondent's obligation to be familiar with the requirements of the statutes and rules relating to the Minnesota Chiropractic Act.⁵⁴

56. As part of the licensure procedure, Respondent reviewed the Chiropractic Practice Act.⁵⁵

57. Respondent is aware that he is responsible for the content of the chiropractic-related statutes and rules, and does not disclaim that obligation.⁵⁶

58. Respondent was aware that in 1991, rules were proposed and adopted regarding the practice of acupuncture by Minnesota chiropractors.⁵⁷

59. Respondent reviewed the rules both before and after the proposal and adoption of the acupuncture rules.⁵⁸

60. Respondent understands that he can call the Board to ask questions about licensure and registration concerning his practice.⁵⁹

61. Respondent has on several occasions talked to Dr. Spicer about issues in his practice.⁶⁰

62. Respondent was responsible for knowledge of the rules that govern his profession.

63. Respondent should have had reason to know that all chiropractors wanting to engage in acupuncture must register pursuant to Minnesota Rule 2500.3000.

⁵³ T. 203.

⁵⁴ T. 232.

⁵⁵ T. 232.

⁵⁶ T. 233.

⁵⁷ T. 234.

⁵⁸ T. 234.

⁵⁹ T. 264.

⁶⁰ *Id.*

64. In January 1991, the Board mailed all of its licensees newsletters regarding the proposed rule on acupuncture registration.⁶¹

65. All of the Board's newsletters are sent to all licensees of the Board.⁶²

66. In July 1991, the Board mailed all its licensees a newsletter that contained information on acupuncture registration.⁶³

67. The July 1991 newsletter stated, "All Minnesota chiropractors who utilize acupuncture in their office must register with the Minnesota Board of Chiropractic Examiners (MBCE)."⁶⁴

68. The July 1991 newsletter also detailed the requirements for registration, and informed readers that the registration requirement would be enforced beginning September 15, 1991.⁶⁵

69. In addition to the July 1991 newsletter, various other Board newsletters, mailed to all licensees from 1991 to the present, put chiropractors on notice as to registration requirements and responsibility for the chiropractic rules.⁶⁶

70. The April 1995 Newsletter reminded chiropractors licensed in Minnesota that they are responsible for the content of the chiropractic-related statutes and rules.⁶⁷

71. The October 1997 newsletter provided information regarding a board employee who could answer questions regarding acupuncture registration.⁶⁸

72. Respondent receives the Board newsletter from the Chiropractic Board.⁶⁹

73. Respondent reads the Board's newsletter.⁷⁰

74. The Board has a requirement that the Executive Director maintain a telephone log for all Board members to review at their will.⁷¹ As the Executive Director, Dr. Spicer maintains the required telephone log in a Word Perfect file format.⁷² In the

⁶¹ T. 47.

⁶² T. 47.

⁶³ Ex. 33.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ T. 48-78.

⁶⁷ Ex. 7.

⁶⁸ Ex. 11.

⁶⁹ T. 296.

⁷⁰ T. 297.

⁷¹ T. 79.

⁷² T. 79.

log, Dr. Spicer summarizes as best he can the overall content of telephone conversations with regulated parties.⁷³

75. The notes taken in the telephone log are essentially contemporaneous.⁷⁴

76. On November 12, 1996, Dr. Spicer recorded notes pertaining to a telephone conversation he had with Respondent.⁷⁵ The notes read: "Can he do acupuncture independent of chiropractic adjustment?"⁷⁶ Another note reads: "needed to be registered."⁷⁷

77. Dr. Spicer does not remember the November 12, 1996 conversation with Respondent, and relies on his notes to interpret what was said. Dr. Spicer's interpretation of the "needed to be registered" phrase in the notes was that for someone to be able to perform that function, they have to be registered with the Board.⁷⁸ A following note reads, "Wanted to know if another person could do it in his office."⁷⁹

78. Respondent's recollection of the November 12, 1996 conversation with Dr. Spicer was that the conversation was about Dr. Sheng, a Chinese-trained doctor that he had in his practice.⁸⁰ Respondent's recollection was that the conversation was about whether Dr. Sheng could do acupuncture under Respondent's chiropractic license.⁸¹ Respondent's testimony was based upon his recollection of the conversation twelve years after the fact.

79. There is no evidence that Dr. Sheng was licensed under the Board of Medical Practice, or that she had an acupuncture license.

80. On August 27, 2003, Respondent signed an Application for Acupuncture Renewal form on behalf of one of his employees.⁸² On the application, it states, "I hereby affirm that I am a doctor of chiropractic utilizing acupuncture during my practice of chiropractic."⁸³ The application has the name "Allen Tran" on its top.⁸⁴ Allan Tran is a chiropractor who was working for Respondent "at that time."⁸⁵ There is nothing on the form indicating it should be signed by Dr. Tran's employer.⁸⁶ The Board

⁷³ T. 79.

⁷⁴ T. 79.

⁷⁵ T. 84.

⁷⁶ T. 84-85.

⁷⁷ T. 86-87.

⁷⁸ *Id.*

⁷⁹ T. 87.

⁸⁰ T. 289.

⁸¹ T. 289.

⁸² T. 272

⁸³ Ex. 28.

⁸⁴ *Id.*

⁸⁵ T. 271.

⁸⁶ T. 272.

returned the form to Respondent with a letter explaining that the acupuncture registration and renewal forms must be completed and signed by the registrant.⁸⁷

81. Respondent's submission of the form to the Board with his signature demonstrates actual knowledge of a registration requirement for acupuncture.

82. Administrative Law Judge's 1991 Report regarding proposed Minn. R. 2500.3000 provides, "Consequently the Judge finds the Board has the statutory authority to regulate the use of acupuncture by chiropractors in order to protect the health, safety, and welfare of the public."⁸⁸ The acupuncture registration requirement protects the public by establishing minimal standards for education and qualifications to practice acupuncture. The acupuncture registration rule provides for a registration certificate, which is one way a patient would know that a chiropractor is registered with the Board to perform acupuncture.⁸⁹

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Minnesota Board of Chiropractic Examiners have jurisdiction in this proceeding under Minn. Stat. §§ 14.50, 148.01 through 148.108, 214.10, and 214.103 (2008).

2. The Board's Review Panel gave proper notice of the alleged violations to Respondent and fulfilled all procedural requirements. This matter is properly before the Administrative Law Judge.

3. Contrary to the Respondent's belief, Minnesota Rule 2500.3000 applies to all licensed chiropractors, regardless of whether the chiropractor was engaged in acupuncture prior to the promulgation of the registration rule.

4. Contrary to the Respondent's belief, Respondent was required to register prior to engaging further in acupuncture, pursuant to Minnesota Rule 2500.3000, although Respondent was practicing acupuncture prior to the adoption of the rule.

5. Respondent did not register to practice acupuncture pursuant to Minnesota Rule 2500.3000 (1991), because he believed he was not required to do so, based on his having been engaged in the practice of acupuncture since 1986. That belief was erroneous, and Respondent must now register to practice acupuncture pursuant to the current rule, Minnesota Rule 2500.3000 (2007), prior to resuming the practice of acupuncture.

⁸⁷ Ex. 28.

⁸⁸ Ex. 41.

⁸⁹ T. 245.

6. Since 1991, Respondent was required to register to practice acupuncture prior to engaging in acupuncture, even if he was practicing acupuncture under the rehabilitative therapy definition.

7. Respondent remains required to register to practice acupuncture prior to engaging in acupuncture, even if he is practicing acupuncture under the rehabilitative therapy definition.

8. The terms “acupuncture” and “meridian therapy” are not synonymous.

9. The Panel established by a preponderance of the evidence that Respondent’s conduct described in the above Findings of Fact violates the Minnesota Chiropractic Act, Minn. Stat. §§ 148.01 through 148.108 (2008), Minn. R. 2500.3000 (1991), and Minn. R. 2500.3000 (2007).

10. The State Board of Chiropractic Examiners may refuse to grant, or may revoke, suspend, condition, limit, restrict or qualify a license to practice chiropractic, or may cause the name of a person licensed to be removed from the records in the office of the court administrator of the district court for the violation of, or failure to comply with, the provisions of sections 148.01 to 148.105, the rules of the State Board of Chiropractic Examiners, or a lawful order of the Board.

11. Respondent violated Minn. Stat. § 148.10, subd. 1(a)(10) and Minn. R. 2500.3000 by failing to comply with the rules of the State Board of Chiropractic Examiners by failing to register to practice acupuncture, as required by Minn. R. 2500.3000 (1991) and Minn. R. 2500.3000 (2007).

12. As a result of the violations set forth above, the Board has the authority to impose disciplinary action against Respondent’s license to practice chiropractic.

13. It is appropriate for the Board to consider requiring the Respondent to register as he would have registered when the acupuncture registration rule took effect, and that he be required to pay such fees, together with appropriate interest, as he would have been required to pay beginning in 1991.

14. Any of the Findings of Fact that are more properly termed Conclusions are adopted as such.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Minnesota Board of Chiropractic Examiners take appropriate disciplinary action against the license of Respondent, Jay Y. Cherner, D.C.

Dated: December 12th, 2008.

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

Reported: Digitally Recorded
Transcript Prepared by Jean A. Brennan

NOTICE

This report is a recommendation, not a final decision. The Board of Chiropractic Examiners will make the final decision after a review of the record. The Board may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Board shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Board. Parties should contact Larry A. Spicer, D.C., Executive Director of the Minnesota Board of Chiropractic Examiners, 2829 University Avenue, S.E., Suite 300, Minneapolis, MN 55414-3220 to learn the procedure for filing exceptions or presenting argument.

If the Board fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Board must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Board, or upon the expiration of the deadline for doing so. The Board must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Administrative Law Judge concludes that while Dr. Cherner should have known that he was required to register with the Board in order to continue utilizing acupuncture in his chiropractic practice, he did not actually become aware that the requirement for registration applied to him until September, 2007. The ALJ is persuaded that, prior to that time, Dr. Cherner actually believed that he was “grandfathered in”, and thus exempt from the registration requirement, because he had been engaging in acupuncture in connection with his chiropractic practice for a period of five years before initial passage of the registration requirement in 1991.

The Administrative Law Judge cannot accept the initial argument of the Licensee, to the effect that he is not required to register as a practitioner of acupuncture. Today's version of Minn. R. 2500.3000, Subp. 2, begins with sentence:

“Prior to engaging in acupuncture, a licensed chiropractor must be registered with the board.”

The first sentence is followed by the balance of the paragraph, which details all the different, specific qualifications necessary in order to register to engage in acupuncture.

The Rule adopted originally in 1991 began with a sentence that reads:

“Prior to any licensed chiropractor engaging in acupuncture, the chiropractor must complete 100 hours of study exclusive of other continuing education hours, in the utilization of acupuncture.”

Unlike the current version of the Rule, the 1991 version fails to make clear that a licensed chiropractor has to register with the Board prior to engaging in acupuncture. The 1991 version lays out a number of requirements, all of which were satisfied by Dr. Cherner, so he interpreted the Rule language adopted that year to mean that he was already qualified and did not need to take any further steps, such as registration, to continue engaging in acupuncture. The Administrative Law Judge is unable to conclude that Dr. Cherner's interpretation of the 1991 Rule language was unreasonable.

In 2004, Minn. R. 2500.3000, was amended to include additional sanctions for failure to renew acupuncture registration, including the fourth paragraph of Minn. R. 2500.3000, Subp. 7, which reads:

Any registrant who fails to renew registration for a period of more than five years, and who wishes to renew registration, must apply for registration prior to providing acupuncture services, pay the initial registration fee, pay the penalty fees in Part 2500.1150, and successfully complete either the National Board of Chiropractic Examiner's Acupuncture Examination or the NCCAOM Examination.

Regarding this language, the ALJ accepts Dr. Cherner's argument that he believed the above language did not apply to him because he was not, and thought at the time he never had to be, a “registrant” to whom the rule applied. The Administrative Law Judge is persuaded that Minn. R. 2500.3000, as it reads today and taken as a whole, is clear in mandating acupuncture registration with the Board before any licensed chiropractor can proceed with acupuncture procedures. But, he is persuaded that Dr. Cherner did not become aware of the requirement until September, 2007, when he inquired with the Board's staff after an insurer refused to cover acupuncture procedures performed by him because he did not have the Board's certificate of registration to perform acupuncture.

The Review Panel has presented evidence to the effect that Dr. Cherner signed Affidavits on at least two occasions to the effect that he was registered to engage in acupuncture, when he was not. Although that may be technically true, the Administrative Law Judge is persuaded that Dr. Cherner believed he had the equivalent of an acupuncture registration because he was licensed as a chiropractor, had satisfied the continuing education required for acupuncture, had received the initial education required for acupuncture while at NWCC, and had successfully practiced acupuncture under his chiropractor's license for many years. Such a belief is not inconsistent with Dr. Cherner's belief that he was (and is) not a "registrant" for purposes of the 2004 rule change mandating additional testing.

The Administrative Law Judge finds persuasive the Respondent's argument that if he knew or suspected that he was supposed to register in order to practice acupuncture, Dr. Cherner had no motive not to register. He already had the necessary instructional hours, the \$100 registration fee and subsequent \$50 renewal fees are modest and would not have likely deterred him, and Dr. Cherner made no effort to conceal the fact that he had been performing acupuncture since 1986, through 1991, until 2007. He also continued to maintain malpractice insurance for acupuncture services, and took the additional continuing education hours necessary to provide the services. While Respondent was, in fact, required by the 1991 Rule to register as a chiropractor performing acupuncture, the ALJ is persuaded that the Respondent's failure to do so resulted from a plausible, lay person's reading of an ambiguous rule.

The decision by the Minnesota Court of Appeals in *Padilla v The Minnesota Board of Medical Examiners*, 382 N.W.2d 876, 886-87 (Minn. App. 1986) prevents the Administrative Law Judge from making any specific recommendation as to appropriate discipline in a matter before this Board.

In that connection, it is noted that there is no evidence showing that Dr. Cherner's failure to register has caused injury or damage to any party or person, that his acupuncture treatments were deficient in any fashion, or that there has been any willful defiance by him of the rules of the Board. Of course, the Board did not receive registration and renewal fees when they were due, but Dr. Cherner has offered to make up those payments. If the Respondent is required to register as he would have registered when the Rule took effect in 1991, he is willing to pay back the fees, with interest, that should have been paid during the course of time beginning in 1991.

It is within the discretion of the Board to decide whether, at this point, Dr. Cherner must successfully complete either the National Board of Chiropractic Examiners Acupuncture Examination or the NCCAOM Examination. In that connection, it is noted that Dr. Cherner has engaged successfully in the practice of acupuncture since 1986, and the record contains no evidence of harm to any of his patients. If the listed examinations are designed to demonstrate competence, a lack of complaints after several thousand successful procedures may be relevant evidence of the necessary competence.

R. C. L.

