

NORTH CAROLINA
BURKE COUNTY

BEFORE THE NORTH CAROLINA
BOARD OF CHIROPRACTIC EXAMINERS

MICHAEL C. GWYN,
Complainant,)
vs.)
DR. BERNARD E. TOSKY,
Respondent.)

DECISION

THIS MATTER coming on before the Board of Chiropractic Examiners upon the complaint of Michael C. Gwyn at a hearing before the agency held on April 12, 1996 in Morganton, Burke County, North Carolina;

AND AT THE CALL OF THE CASE, the complainant and the Board's attorney were present and ready to proceed, and the respondent and his attorney were present and ready to proceed;

AFTER DUE CONSIDERATION of the pleadings, the evidence presented and the arguments of counsel, the Board of Examiners makes the following:

Findings of Fact

1. Michael C. Gwyn is a citizen and resident of Burke County, North Carolina, and is a former patient of Dr. Bernard E. Tosky.
2. Dr. Tosky is a duly-licensed chiropractic physician who maintains an office and clinic in Burke County, North Carolina, known as Alpine Chiropractic Center.
3. This matter comes before the Board of Chiropractic Examiners upon a sworn, written complaint filed by Mr. Gwyn on or about February, 28, 1994.
4. Mr. Gwyn's complaint alleges that Dr. Tosky was negligent in treating him and that the treatment rendered did not conform to the standards of acceptable care, in violation of G.S. 90-154(b)(5) and G.S. 90-154.3.
5. The evidence before the Board consisted of the clinical and billing records of Dr. Tosky, the testimony of the complainant, and the expert testimony of Dr. Mack King. Dr. Tosky chose not to testify.
6. On or about October 24, 1992, Mr. Gwyn was involved in an automobile accident. He first sought medical attention at the Valdese Hospital emergency room, where he was given a cervical collar and told to see his personal physician.

7. On or about October 28, 1992, Mr. Gwyn presented at the office of Dr. Tosky. He had been treated about six months previously by Dr. Tosky for a low back injury. Mr. Gwyn's subjective symptoms were neck stiffness and pain, headaches, back pain, dizziness, ringing in the ears and generalized upper-body pain.
8. Dr. Tosky's records indicate that he made a physical examination upon Mr. Gwyn that consisted of the following orthopaedic and neurological tests: cervical range of motion, ganglion palpation, Valsalva's Test, Adson's Test, Allen's Test, cervical/foramina compression tests, biceps reflex, brachioradialis reflex, median nerve test, ulnar nerve test, palpation/muscle spasm/edema/percussion, Kemp's test, dorsolumbar range of motion, Lasegue's Test, Fajersztajn's Test, Ely Test, Linder's Test, Achilles reflex, and leg measurement.
9. Dr. Tosky's records indicate that of all the tests performed, the following produced positive results: cervical range of motion, ganglion palpation, cervical/foramina compression, brachioradialis, palpation at levels 4C, 5C, and 6C, Kemp's test, dorsolumbar range of motion, Lasegue's test, Fajersztajn's Test, Ely Test, and Linder's Test.
10. Dr. Tosky's billing records indicate that he took the following x-rays: cervical Davis series, AP and lateral thoracic, AP and lateral lumbar. Dr. Tosky did not enter any x-ray findings on Mr. Gwyn's clinical records.
11. Dr. Tosky did not take or record Mr. Gwyn's vital signs.
12. Dr. Tosky did not make or record a diagnosis of the nature and extent of Mr. Gwyn's injuries in the patient's clinical records. The only written diagnosis made by Dr. Tosky appears in the insurance narrative prepared on November 18, 1993, which recites "cervical sprain".
13. Beginning with the first office visit, Dr. Tosky performed spinal adjustments on Mr. Gwyn on thirty-three separate occasions, from October 28, 1992 until March 12, 1993. Dr. Tosky did not note in Gwyn's clinical records the part of the spine that was adjusted or the adjustment technique used on any office visit.
14. In February, 1993, after about three months of treatment, Mr. Gwyn reported to Dr. Tosky that he was experiencing pain, numbness and tingling sensations from his back and shoulders down his arms and into his hands. Dr. Tosky noted that the patient "feels better".
15. At no point in his four and one-half month course of treatment did Dr. Tosky re-examine Mr. Gwyn.

16. At no point in his four and one-half month course of treatment did Dr. Tosky refer Mr. Gwyn to another physician.
17. Mr. Gwyn unilaterally discontinued chiropractic care with Dr. Tosky after the office visit of March 12, 1993.
18. Sometime in February or early March 1993, Mr. Gwyn consulted with Dr. Andrew Deekins, his family medical doctor. Dr. Deekins arranged for Mr. Gwyn to be tested for arthritis, which test proved negative. Thereafter, Dr. Deekins referred Mr. Gwyn to Dr. Donald Glugover, an orthopaedic surgeon.
19. Dr. Glugover examined Mr. Gwyn on March 17, 1993 and referred him to the Bowman Gray School of Medicine. He was followed by several physicians from April 22, 1993 until June 25, 1993. Physical examinations and radiological findings were inconclusive, and the physicians were unable to make a definitive diagnosis.
20. On June 25, 1993, Mr. Gwyn was given a cervical myelogram at N.C. Baptist Hospital which revealed a small disc defect at C5-6.
21. On August 5, 1993, Dr. Charles L. Branch, a neurosurgeon at Baptist Hospital, performed a discectomy at C5-6. In a letter to Dr. Glugover dated August 16, 1993, Dr. Branch stated that surgery had revealed that Mr. Gwyn suffered from "cervical disc disease...with an ossified posterior longitudinal ligament".
22. There is no evidence that Dr. Tosky's spinal manipulation of Mr. Gwyn from October 28, 1992 until March 12, 1993 either caused or exacerbated the conditions for which surgery was ultimately performed.

Conclusions of Law

1. The Board of Chiropractic Examiners is duly-constituted as an occupational licensing agency and has jurisdiction of subject matter and of the person of the respondent.
2. Dr. Tosky has been given notice of these proceedings as required by law, and the complaint described herein is properly before the Board of Examiners for adjudication.
3. It is negligence and a failure to render acceptable care for a doctor of chiropractic not to take and record his patient's vital signs upon initial physical examination.
4. It is negligence and a failure to render acceptable care for a doctor of chiropractic not to make and record in the patient's clinical records a diagnosis, including x-ray findings when x-rays are taken.

5. It is negligence and a failure to render acceptable care for a doctor of chiropractic not to re-examine a patient after four or more weeks of continuous treatment without substantial improvement.
6. It is negligence and a failure to render acceptable care for a doctor of chiropractic not to refer a patient to the appropriate specialist when, after more than three months of treatment, the patient has not responded to chiropractic care and is reporting the onset of new symptoms.
7. It is negligence and a failure to render acceptable care for a doctor of chiropractic to continue performing cervical adjustments upon a patient who has suffered a traumatic neck injury and who, after not responding to chiropractic treatment, reports the onset of radicular pain and numbness in the upper extremities.
8. It is not negligence or a failure to render acceptable care for a doctor of chiropractic to misdiagnose or fail to diagnose cervical disc disease with an ossified posterior longitudinal ligament where such condition could not be detected with ordinary radiography and required a myelogram and surgical inspection to be definitively diagnosed.

BASED ON THE FOREGOING Findings of Fact and Conclusions of Law, the Board of Chiropractic Examiners enters the following:

Final Agency Decision

1. Dr. Bernard Tosky is guilty of negligence and failure to render acceptable care to his patient, Michael C. Gwyn, in that Dr. Tosky:
 - a. Did not make an adequate physical examination;
 - b. Did not make and record a diagnosis prior to the commencement of treatment;
 - c. Did not maintain adequate clinical records as to treatments performed and the patient's progress;
 - d. Did not re-examine the patient after four weeks when the patient did not respond to treatment;
 - e. Did not refer the patient to a specialist when the patient reported the onset of new symptoms;
 - f. Continued to adjust the patient after the patient began reporting radicular pain.
2. Dr. Bernard Tosky is not guilty of negligence or failure to render acceptable care for not making a definitive diagnosis of the patient's condition.

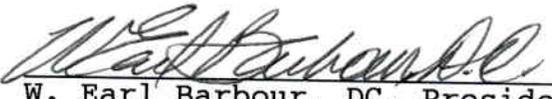
3. Dr. Bernard Tosky is not guilty of negligence or failure to render acceptable care in causing or exacerbating the patient's cervical disc disease.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

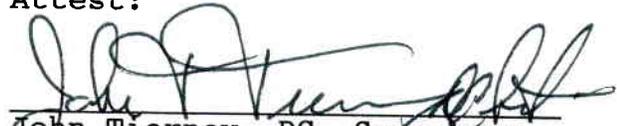
1. The license of Dr. Bernard Tosky to practice chiropractic in North Carolina shall be suspended for a period of fourteen (14) consecutive days, said suspension to commence within 150 days from the issuance of this Decision. During said period of suspension, Dr. Tosky shall not consult with, examine, diagnose or render treatment of any sort to a patient. It shall be permissible for the Alpine Chiropractic Center to continue doing business, but Dr. Tosky shall not personally go about the premises of Alpine Chiropractic Center at any time patients are being seen.
2. At the conclusion of the period of license suspension, Dr. Tosky shall be placed on probation for a period of one year under the following terms and conditions:
 - a. Within his probationary period, he shall complete thirty-six (36) hours of continuing professional education in the following subjects: clinical diagnosis, record-keeping, examination, consultation, and risk management;
 - b. The aforesaid continuing education shall be in addition to the continuing education required by statute for annual license renewal;
 - c. The courses in continuing education required by this Decision shall be approved in advance by the Secretary of the Board.

ENTERED ON THIS THE 30 DAY OF AUGUST, 1996.

NORTH CAROLINA BOARD OF
CHIROPRACTIC EXAMINERS


W. Earl Barbour, DC, President

Attest:


John Tierney, DC, Secretary