

FROM : KINLAW LAW OFFICE

FAX NO. : 1 336 272 8602

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NORTH CAROLINA
RANDOLPH COUNTY

NORTH CAROLINA BOARD
OF CHIROPRACTIC EXAMINERS

In the Matter of:)
)
GARY W. BARGER, DC,)
Respondent.)

FINAL AGENCY DECISION

THIS MATTER coming on to be heard before the Board of Chiropractic Examiners at its regular meeting held on December 14, 2006, in Charlotte, North Carolina; and at the call of the case, the respondent was present and represented by his counsel, Jeffrey B. Watson, and the staff of the Board of Examiners was represented by its counsel, Vance C. Kinlaw. All parties affirmed their readiness to proceed; and after hearing the evidence presented and giving due consideration to the arguments of counsel and the record as a whole, the Board, with the consent of the parties, makes the following:

Findings of Fact

1. This case was heard by a majority of the Board, Dr. John A. Webster, presiding. Dr. Dennis Hall Sr., Secretary of the Board, was also present but did not actively participate in the Board's deliberations due to his earlier participation in the respondent's probable cause hearing.
2. The probable cause hearing for this complaint was held in Asheboro on September 15, 2006.
3. The respondent, Dr. Gary W. Barger, is a duly licensed chiropractic physician in North Carolina and maintains an office and clinic in Randleman.
4. This matter comes before the Board upon a formal complaint filed on May 10, 2006 by Mr. Barry Vachula. The complaint alleges that Dr. Barger failed to render acceptable care by performing an inadequate examination upon Mr. Vachula on January 11, 2006.
5. Mr. Vachula, formerly a resident of the State of New York but now residing in Randolph County, sustained an on-the-job injury in 1982 for which he was receiving workers' compensation benefits. From time to time, the New York Workers' Compensation Board required Mr. Vachula to submit to independent medical examinations.
6. The New York Workers' Compensation Board commissioned Dr. Barger to examine Mr. Vachula for the limited purpose of expressing a professional opinion as to whether Mr. Vachula was fit to return to work.

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7. Mr. Vachula was not a patient of Dr. Barger, and Mr. Vachula's only encounter with Dr. Barger was the office visit of January 11, 2006.

8. In the course of examining Mr. Vachula, Dr. Barger utilized the following tests and examination procedures:

A. He obtained a verbal history from Mr. Vachula, which was later augmented by prior medical reports and documentation provided by the New York Workers' Compensation Board;

B. He directed Mr. Vachula to stick out and wag his tongue from side to side while he assessed relative arm strength in order to evaluate the occiput level;

C. Various forms of palpation;

D. One orthopedic test for the cervical area and one orthopedic test for the low back.

9. In the course of examining Mr. Vachula, Dr. Barger did *not* utilize the following tests and examination procedures:

A. Vital signs;

B. Deep tendon reflexes;

C. Range of motion;

D. Cervical compression and cervical distraction;

E. Muscle strength grading based on the standard orthopedic scale (5/5, 3/5, etc.);

F. Sensory (pin wheel);

G. Malingering.

BASED ON THE FOREGOING Findings of Fact, the Board enters the following:

Conclusions of Law

1. The Board of Chiropractic Examiners is duly constituted and has jurisdiction of subject matter and of the person of the respondent. The complaint filed May 10, 2006 is properly before the Board for adjudication on the merits. The burden of proof is borne by the staff of the Board, and the standard of proof is the greater weight of the evidence.

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2. At the probable cause hearing in this matter, the respondent pleaded not guilty to the charge of unacceptable care and now affirms and repeats his plea of not guilty. The respondent makes no admission of liability in connection with the complaint of May 10, 2006 but does not resist the entry of this Final Agency Decision and the disciplinary sanctions imposed pursuant to this Decision.

3. N.C.G.S. 90-154(b)(7) states that not rendering acceptable care as defined in N.C.G.S. 90-154.3 is grounds for disciplinary action by the Board.

4. N.C.G.S. 90-154.3 states that if the Board of Examiners has not defined by rule the standard of care with respect to examination and diagnosis, the standard of care shall be the usual and customary method as taught in the majority of recognized chiropractic colleges. Since the Board of Examiners has not defined by rule the standard of care with respect to examination and diagnosis, the standard of care applicable to this case is the usual and customary method of examination and diagnosis as taught in the majority of recognized chiropractic colleges.

5. As taught in the majority of recognized chiropractic colleges, the usual and customary method for performing an independent medical examination to arrive at an opinion regarding the subject's fitness to return to work is to utilize, at a minimum, the following tests and procedures: vital signs, deep tendon reflexes, range of motion, cervical compression, cervical distraction, muscle strength grading, sensory (pinwheel) and malingering.

6. The Final Agency Decision rendered herein is limited to a review of the methodology used by the respondent in making his examination of January 11, 2006. The respondent's professional opinion regarding the subject's fitness to return to work is not relevant to and played no role in this Decision. The findings of the New York Worker's Compensation Board with respect to the subject's eligibility to continue to receive benefits, whether based in whole or part on the respondent's opinion, is not relevant to and played no role in this Decision.

7. This Decision and the various findings and conclusions made herein are intended solely for the use of the Board of Chiropractic Examiners in the discharge of its regulatory duties. This Decision has not been formulated to satisfy judicial standards of admissibility and is not intended for use as evidence before any other tribunal, whether civil or criminal, save and except any appeal of the Board's action which might be brought by the respondent.

9. The Board does not possess the statutory authority to order a chiropractic physician to make financial restitution to any person who claims that he or she has sustained monetary damages as the result of the physician's failure to render acceptable care.

10. By consenting to the entry of this Final Agency Decision, the respondent waives any objection to venue or defect in the service of notice of hearing and agrees and stipulates that this matter may be taken up by the Board at this time.

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11. Under the Chiropractic Disciplinary Guidelines currently used by the Board, not rendering acceptable care falls within the "Serious" category of disciplinary violations. The presumptive sanctions for this category, when neither aggravating or mitigating factors predominate, range from probation upon specified terms and conditions to one-year license suspension. Probation may also be added to license suspension.

12. Part III of the Chiropractic Disciplinary Guidelines sets forth numerous mitigating and aggravating factors commonly considered by the Board in selecting sanctions. Pursuant to Part III, the Board finds as follows:

A. The mitigating factors present in Dr. Barger's case are:

- (1) The respondent has no prior history of disciplinary violations;
- (2) The respondent was not motivated by dishonesty or selfishness.

B. There are no aggravating factors present in Dr. Barger's case.

13. In the judgment of the Board, the mitigating factors outweigh the aggravating factors. Therefore, in conformity with the Chiropractic Disciplinary Guidelines, sanctions shall fall within the lower end of the presumptive range for a "Serious" violation.

WHEREFORE, BY CONSENT, the North Carolina Board of Chiropractic Examiners hereby finds the respondent, Dr. Gary W. Barger, guilty of not rendering acceptable care, in violation of N.C.G.S. 90-154(b)(7). It is ordered, adjudged and decreed that Dr. Barger be sanctioned as follows:

1. Dr. Barger's license to practice chiropractic in North Carolina shall be suspended for 90 days. This sanction is stayed upon the following terms and conditions:

A. Beginning January 1, 2007, Dr. Barger shall be placed on probation for a term of two years. During this term of probation, Dr. Barger shall:

- (1) Successfully complete 36 hours of approved continuing education in the subjects of examination and diagnosis. These 36 hours shall be in addition to and shall not count towards fulfilling the annual 24-hour continuing education requirement for license renewal;
- (2) Take such action as may be necessary to bring his practice procedures and methodologies into conformity with the standards of care set forth herein; and
- (3) Not be found guilty of the same or a substantially similar disciplinary violation.

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- B. If Dr. Barger completes the prescribed 36 hours of additional continuing education in less than two years, and is otherwise in compliance with this Decision, he may apply to the Board for early termination of probation.
 - C. If Dr. Barger wilfully fails to comply with this Decision, the 90-day suspension now stayed shall be invoked.
2. This Decision shall become effective upon ratification.
 3. This Decision is a public document and shall be reported to national data banks and to the chiropractic licentiate body in North Carolina by summary in the Board's next newsletter.

RATIFIED THIS 14th day of December, 2006.

NORTH CAROLINA BOARD OF CHIROPRACTIC EXAMINERS

By: John A. Webster, DC
John A. Webster, DC, President

CONSENT:

Gary W. Barger, DC
Gary W. Barger, DC
Respondent

Dennis L. Hall Sr., DC
Dennis L. Hall Sr., DC
Secretary of the Board

Jeffrey B. Watson
Jeffrey B. Watson
Attorney for Respondent

Vance C. Kinlaw
Vance C. Kinlaw
Attorney for the Board