

NORTH CAROLINA  
MECKLENBURG COUNTY

NORTH CAROLINA BOARD  
OF CHIROPRACTIC EXAMINERS

In the Matter of: )  
)  
MICHAEL & ARDEANA KOWALSKI, )  
Complainants, )  
)  
vs. )  
)  
HOWARD VAN NOSTRAND, DC, )  
Respondent. )

**FINAL AGENCY DECISION**

THIS MATTER coming on to be heard before the Board of Chiropractic Examiners at a special meeting held on November 6, 2003, in Charlotte, North Carolina; and at the call of the case, the respondent was present and represented by his counsel, attorney Joseph B. Chambliss Jr., and the complainants were present and represented by the Board's attorney, 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 makes the following:

Findings of Fact

1. The following members of the Board were present, heard the evidence, and participated in the decision rendered herein: Dr. Steve Willen, presiding, Dr. James Brown, Dr. Tom Brown, Dr. Dennis Hall, Dr. Terry Bradley, and Mr. Steve Bowden. Dr. Rick Davis, Secretary of the Board, was also present but did not actively participate in the hearing and was not privy to the Board's deliberations due to his earlier participation in the Chiropractic Review Committee's investigation and determination of probable cause.
2. The respondent, Dr. Howard Van Nostrand, DC, is a duly licensed chiropractic physician in North Carolina but is a resident of Virginia. At the time of the matters complained of, Dr. Van Nostrand was temporarily employed as a relief doctor at Sunset Road Chiropractic in Charlotte, North Carolina.
3. The complainants, Michael Kowalski and Ardeana Kowalski, are husband and wife and residents of Charlotte, North Carolina.
4. This matter comes before the Board upon a formal complaint filed by Mr. Kowalski in behalf of himself and his wife on October 11, 2002. The complaint principally alleges that Dr. Van Nostrand committed or attempted to commit fraud, in violation of G.S. 90-154(b)(9), by submitting an insurance claim that did not accurately reflect the limited treatment he had provided to Mrs. Kowalski immediately following her injury in an automobile collision.

5. Dr. Van Nostrand denied, and continues to deny, any wrongdoing. The Chiropractic Review Committee, consisting of the Secretary of the Board, the attorney for the Board, and Alternate Board Member Ronald Wahler, DC, held a preliminary hearing in this matter on March 28, 2003. On May 9, 2003, the Review Committee issued a determination that probable cause did exist upon which to refer the complaint to the full Board of Examiners for a hearing on the merits.

6. On the afternoon of Saturday, May 9, 1998, Ardeana Kowalski was riding as a passenger in a motor vehicle owned and being driven by her friend, Brenda Campbell. The Campbell vehicle was struck by another vehicle, and both Ms. Campbell and Mrs. Kowalski were injured. The other driver was clearly at fault and was insured by Chubb Insurance. Ms. Campbell's car was a total loss.

7. Mrs. Kowalski sustained fairly serious injuries resulting from seat belt trauma, as follows: soft tissue damage to the neck and left shoulder, depressed sternum, bruising and inflammation of the left breast, swelling of the right hand, laceration and hematoma of the right knee, and internal bleeding into the abdomen. She lost consciousness for a few minutes at the scene of the collision, and her hemoglobin level later dropped about 5 grams from internal bleeding.

8. Mrs. Kowalski and Ms. Campbell received emergency care at the scene and were transported by ambulance to Carolinas Medical Center in Charlotte. Mrs. Kowalski was examined and X-rayed for possible cervical fracture in the emergency room. Her X-rays were negative for fracture. She was subsequently admitted to the hospital's trauma floor for one night and was released on Sunday, May 10. Ms. Campbell was treated in the emergency room and released a few hours after the collision.

9. Dr. Van Nostrand was a friend of Ms. Campbell, having made her acquaintance several years earlier when he owned a chiropractic clinic in Charlotte. Although he had sold his clinic in 1996 and moved to another state, he had returned to Charlotte in late April 1998 to serve as a temporary or "locum" doctor at Sunset Road Chiropractic. His oral contract of employment called for him to work through May 20. During his month in Charlotte, he rented a room from Ms. Campbell and maintained temporary residence at her home.

10. In the aftermath of the collision, Ms. Campbell contacted her adult daughter by cellular telephone en route to the hospital, and her daughter in turn telephoned Dr. Van Nostrand. Dr. Van Nostrand immediately closed Sunset Road Chiropractic, drove to Carolinas Medical Center and met Ms. Campbell in the emergency room. Ms. Campbell introduced him to emergency room personnel as "my doctor," and he was given access to her treatment notes and X-rays.

11. Dr. Van Nostrand did not know Mrs. Kowalski at that point, but Ms. Campbell told him about her being a passenger in the car and sustaining injury. Since the women's arrival at the hospital, Mrs. Kowalski had been kept in another room. Dr. Van Nostrand did not introduce himself to Mrs. Kowalski, but he looked in on her, talked to her emergency room physicians, and reviewed her cervical X-rays. Later, he stated to another friend who had come to the hospital, Ms. Cookie Carni, that he was not completely satisfied with the angle of Mrs. Kowalski's cervical films.

12. On the evening of Monday, May 11, 1998, the day following her discharge, Mrs. Kowalski and her husband paid a visit to Ms. Campbell's home. The purpose of the visit was social, as Mrs. Kowalski lived close by and had visited Mrs. Campbell's home several times in the past. On this occasion, Mrs. Kowalski was still in considerable pain and wanted relief. She had applied for an appointment with a physical therapist but could not get in for two weeks. Mrs. Kowalski was also concerned about her right hand, which had become swollen and discolored since she left the hospital, and she thought it might be broken.

13. Dr. Van Nostrand was present at Ms. Campbell's house when the Kowalskis stopped by and was formally introduced to them. He offered his advice and opinions about Mrs. Kowalski's injuries. It was discussed that he was going to drive Ms. Campbell to Sunset Road Chiropractic for treatment. Mrs. Kowalski was asked if she wanted to come along. Mr. Kowalski said that their insurance did not cover chiropractic. Dr. Van Nostrand said that health coverage would not matter because this would be a personal injury claim and the other driver's liability carrier would pay. Mrs. Kowalski agreed to go to Sunset Road Chiropractic, primarily because she wanted to have her hand X-rayed. Dr. Van Nostrand took the two women to the clinic. Mr. Kowalski did not accompany them.

14. At Sunset Road Chiropractic on the evening of May 11, while also rendering treatment to Ms. Campbell, Dr. Van Nostrand provided professional services to Mrs. Kowalski as follows: he made a limited physical examination; he took several X-rays of her hand and neck (as many as three films total); he consulted with her regarding the injury to her sternum; he applied moist heat and electrical stimulation therapies to her neck and shoulder; and he dispensed a cervical pillow. He made handwritten examination findings on a form used by Sunset Road Chiropractic. Among his findings, he noted "Possible Fracture Neck" due to the bruising, swelling and trauma he observed. He did not perform a comprehensive examination. He did not perform any chiropractic manipulation.

15. At the conclusion of treatment, Mrs. Kowalski offered to pay for the services rendered. She attempted to give Dr. Van Nostrand her health insurance information, which he declined because he knew, from his own experience and the previous comment of her husband, that the health plan in which she was enrolled did not cover chiropractic. Having already contacted an adjuster from Chubb insurance regarding Ms. Campbell's prospective personal injury claim, he also knew that Chubb had accepted liability. Mrs. Kowalski gave Dr. Van Nostrand a handwritten note that contained her home address, telephone number and social security number. This is the type of information that would ordinarily be given to facilitate the filing of an insurance claim. Beginning with the initial treatment on May 11, Dr. Van Nostrand assumed that he would eventually be paid from the proceeds of Mrs. Kowalski's liability claim for personal injury. At the hearing, Mrs. Kowalski testified that, based on Dr. Van Nostrand's refusal to accept her health insurance information, she assumed her treatment was a courtesy and offered at no charge.

16. Upon returning to Ms. Campbell's home, Dr. Van Nostrand and Ms. Campbell had a discussion about further treatment in the presence of Mrs. Kowalski. Since Sunset Road Chiropractic was some distance away and Ms. Campbell had not yet obtained a rental car, Dr. Van Nostrand

offered to bring home from the clinic an electrical muscle stimulation (EMS) machine and moist heat packs. Ms. Campbell affirmed that she wanted to receive treatment at home.

17. The next day, Tuesday, May 12, Mrs. Kowalski presented at Ms. Campbell's home around the same time that Dr. Van Nostrand arrived from work. He had brought the EMS machine and hot packs. On this occasion, Dr. Van Nostrand provided professional services to Mrs. Kowalski. The evidence is inconclusive as to exactly what services were performed, but considered in the light most favorable to the respondent, they may have included electrical stimulation therapy, application of hot pack, one area, and soft-tissue massage of the neck and shoulder. Dr. Van Nostrand did not perform chiropractic manipulative therapy, 3-4 regions.

18. On May 14, Mrs. Kowalski again presented at Ms. Campbell's home, and Dr. Van Nostrand may have applied a hot pack, one area. Dr. Van Nostrand did not perform chiropractic manipulative therapy, 3-4 regions.

19. On May 15, Mrs. Kowalski again presented at Ms. Campbell's home, and Dr. Van Nostrand may have applied a hot pack, one area. Dr. Van Nostrand did not perform chiropractic manipulative therapy, 3-4 regions, and did not provide "Functional Activities." Dr. Van Nostrand may have given Mrs. Kowalski verbal instructions on how to move her body to help free up her shoulder and increase range of motion. However, Mrs. Kowalski was already familiar with such movements because she formerly taught body mechanics at the hospital where she was employed.

20. On May 16, Mrs. Kowalski again presented at Ms. Campbell's home, and Dr. Van Nostrand may have applied a hot pack, one area. Dr. Van Nostrand did not perform chiropractic manipulative therapy, 3-4 regions, and did not provide "Functional Activities."

21. On May 18, Mrs. Kowalski again presented at Ms. Campbell's home, and Dr. Van Nostrand may have applied a hot pack, one area, and electrical stimulation. Dr. Van Nostrand did not perform chiropractic manipulative therapy, 3-4 regions.

22. On May 19, Mrs. Kowalski again presented at Ms. Campbell's home, and Dr. Van Nostrand may have applied a hot pack, one area. Dr. Van Nostrand did not perform chiropractic manipulative therapy, 3-4 regions, and did not provide "Functional Activities."

23. On May 20, Mrs. Kowalski presented at Ms. Campbell's home for the last time, and Dr. Van Nostrand may have applied a hot pack, one area. Dr. Van Nostrand did not perform chiropractic manipulative therapy, 1-2 regions.

24. At the hearing, Mrs. Kowalski denied receiving any billable professional services whatsoever from Dr. Van Nostrand during the period May 12 through May 20. She acknowledged being in Ms. Campbell's home on several occasions the week after the accident, with Dr. Van Nostrand also present, but testified that all the visits were social in nature. The testimony of Ms. Campbell contradicted Mrs. Kowalski's account. Ms. Campbell testified that it was unusual for Mrs.

Kowalski to visit so often and that the apparent purpose of her visits was to obtain treatment. Ms. Campbell further testified that on each visit, she observed Dr. Van Nostrand perform some type of treatment on Mrs. Kowalski's neck while Mrs. Kowalski sat in a chair. She also saw him apply heat packs and attach wires from an electrical device that appeared to be the same type of device he had used in the clinic on May 11.

25. The testimony of Ms. Carni also contradicted Mrs. Kowalski and was consistent with Ms. Campbell. Ms. Carni said it was unusual for Mrs. Kowalski to be at Ms. Campbell's so frequently, and that a large part of why she was there during the week of May 11 was to obtain treatment from Dr. Van Nostrand. Ms. Carni observed Dr. Van Nostrand "doing stuff" with Mrs. Kowalski's neck and shoulders and also applying heat pack and electrical stimulation equipment.

26. Knowing that his tenure as a locum doctor at Sunset Road Chiropractic was drawing to a close and that he would soon be returning to Virginia, Dr. Van Nostrand contacted a Charlotte chiropractor, Dr. Shauna Christensen, about accepting Ms. Campbell and Mrs. Kowalski as referral patients. On or about May 21, he recommended to both women that they continue chiropractic care with Dr. Christensen. He then left the State. Ms. Campbell began treatment with Dr. Christensen. Mrs. Kowalski acknowledged that Dr. Van Nostrand made the referral, but she elected to begin a course of physical therapy instead and never reported to Dr. Christensen.

27. On May 25, Dr. Van Nostrand prepared a written narrative report summarizing Mrs. Kowalski's history, complaints, the results of his examination, his diagnosis, X-ray findings, and a plan of treatment. He mailed this report to Chubb Insurance and included a copy of the examination form he had completed on May 11 and an itemized billing statement for services rendered to Ardeana Kowalski. This billing statement had been prepared by the office staff of Sunset Road Chiropractic. The purpose of Dr. Van Nostrand's submission to Chubb was to put himself in a position to be paid from Mrs. Kowalski's liability proceeds at such time as her personal injury claim was settled. Dr. Van Nostrand prepared and submitted similar documentation with respect to Ms. Campbell's claim.

28. At the hearing, Dr. Van Nostrand was unable to produce any of Mrs. Kowalski's clinical records other than the examination form generated May 11. He testified that he had made SOAP notes at the time of each treatment and had given the original set of SOAP notes to Dr. Christensen just before leaving Charlotte. Dr. Christensen apparently discarded this set when Mrs. Kowalski failed to pursue treatment with her. Dr. Van Nostrand also testified that he had made one copy set of SOAP notes and left the copy set with the Charlotte attorney whom he had hired to collect all the receivables due him as a result of his month-long tenure at Sunset Road Chiropractic. This attorney apparently relocated to California a year or more later and returned several documents to Dr. Van Nostrand that pertained to Mrs. Kowalski's still-unresolved claim, but the SOAP notes were not among them. Dr. Van Nostrand further testified that he gave the X-rays he took of Mrs. Kowalski on May 11 to Mr. Kowalski on or about May 21. The complainants deny receipt of any clinical records.

29. In the absence of SOAP notes, and because of the passage of time, Dr. Van Nostrand was unable to provide at the hearing any specific information concerning the chiropractic manipulative therapy he supposedly performed on Mrs. Kowalski. He could not identify the region or regions of the spine he adjusted on a given date, nor could he identify the technique he used. In particular, he could not credibly describe how he manipulated the cervical spine at the suspected fracture site. Further, he acknowledged that, due to the severity of her injuries, Mrs. Kowalski could not lie down, yet he asserted that he had adjusted her lumbar spine while she sat in a dining room chair. He stated that if his SOAP notes were available, they would provide accurate information on his treatment and allow him to be in a better position to discuss the adjustments performed.

30. Dr. Van Nostrand's billing statement for Mrs. Kowalski contains the following entries for services rendered that he did not in fact perform or provide. [Note: the term "CMT" is an abbreviation for "Chiropractic Manipulative Therapy." i.e., a chiropractic adjustment.]

<u>DATE</u>	<u>SERVICE DESCRIPTION</u>	<u>CHARGE</u>
05/11/98	99204 Examination, Comprehensive	95.00
05/11/98	98940 CMT; 1-2 Regions	35.00
05/11/98	73120 X-ray Cerv. 8x10 5 views	150.00
05/12/98	98941 CMT, 3-4 Regions	45.00
05/14/98	98941 CMT, 3-4 Regions	45.00
05/15/98	98941 CMT, 3-4 Regions	45.00
05/15/98	97114 Functional Activities	35.00
05/16/98	98951 CMT, 3-4 Regions	45.00
05/16/98	97114 Functional Activities	35.00
05/18/98	98941 CMT, 3-4 Regions	45.00
05/19/98	98941 CMT, 3-4 Regions	45.00
05/19/98	97114 Functional Activities	35.00
05/20/98	98940 CMT, 1-2 Regions	35.00

31. Mrs. Kowalski's personal injury claim took four years to settle and was finally concluded in July 2002. During the pendency of her claim, Dr. Van Nostrand systematically attempted to collect the entire amount of his bill, including compensation for the services he had not rendered. Although he did not have any direct contact with either Mr. or Mrs. Kowalski from May 21, 1998 until a few days after the claim had been paid, Dr. Van Nostrand wrote both of the attorneys who represented Mrs. Kowalski as well as various adjusters assigned to the claim in an effort to preserve his right to obtain compensation.

32. Chubb Insurance refused to pay Dr. Van Nostrand's bill for services rendered to Mrs. Kowalski, but it did promptly pay a similar, slightly larger bill that he had submitted in May 1998 for services rendered to Ms. Campbell. Mr. and Mrs. Kowalski testified at the hearing that neither of the two attorneys who represented them ever indicated receipt of any demand from Dr. Van Nostrand. They also testified that responses to interrogatories signed by them and attesting to all treatment received contained no reference to any bill from Dr. Van Nostrand. However, copies of letters from Dr. Van Nostrand or his attorney to each attorney representing the Kowalskis were introduced at the hearing. These letters conclusively establish that a demand had been made and periodically renewed. In addition, a letter from one of the attorneys to Chubb Insurance included a reference to the chiropractic treatment Mrs. Kowalski had received from Dr. Van Nostrand and the bill for that treatment.

33. In July 2002, Ms. Campbell informed Dr. Van Nostrand that the Kowalskis' claim had been settled, and he immediately began making telephone calls to their home and writing letters to them demanding payment. They denied having knowledge of any services rendered four years earlier for which he was rightfully entitled to compensation and requested that he supply clinical records, which he was unable to do. He threatened litigation to recover his fee. Shortly thereafter, they filed the disciplinary complaint herein.

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 October 11, 2002 is properly before the Board for adjudication on the merits. The burden of proof is borne by the complainants, and the standard of proof is the greater weight of the evidence.

2. A physician-patient relationship may be created by express contract or by implied contract arising from the conduct of the parties. A physician who renders professional services to a patient under either form of contract is entitled to bill the patient, or any third-party payor legally obligated to pay the debts of the patient, for the reasonable value of the services actually rendered.

3. An implied contract for the delivery of chiropractic care existed between Dr. Van Nostrand and Mrs. Kowalski. Dr. Van Nostrand was entitled to demand compensation from Mrs. Kowalski and her husband, and also from Chubb Insurance. However, Dr. Van Nostrand was not entitled to recover for any professional service that he did not actually render.

4. N.C.G.S. 90-154(b)(9) states that "committing or attempting to commit fraud, deception, or misrepresentation" is grounds for disciplinary action by the Board.

5. The intentional billing by a chiropractic physician of an insurance company or a patient for services not actually rendered is an attempt to commit fraud, deception, or misrepresentation, in violation of N.C.G.S. 90-154(b)(9).

6. "Upcoding" is a deliberate attempt to obtain undeserved compensation by submitting a bill for the more complex or time-consuming variant of a professional service when the physician in fact performed only the simpler or less time-consuming variant. Examples of upcoding would include billing for a comprehensive examination when only a limited examination was performed, or billing for seven X-rays when only three were taken. Upcoding constitutes an attempt to commit fraud, deception, or misrepresentation and is a violation of N.C.G.S. 90-154(b)(9).

7. Dr. Van Nostrand violated N.C.G.S. 90-154(b)(9) by billing Chubb Insurance and Mr. and Mrs. Kowalski for the following services that he did not provide during the treatment period May 11-20, 1998: chiropractic manipulative therapy ("CMT") and "functional activities."

8. Dr. Van Nostrand violated N.C.G.S. 90-154(b)(9) by billing Chubb Insurance and Mr. and Mrs. Kowalski for the following services which he deliberately upcoded during the treatment period May 11-20, 1998: "Examination, Comprehensive" and "X-ray Cerv. 8 x 10, 5 views."

9. Under N.C.G.S. 90-154(a), the Board has the authority to impose sanctions, singly or in combination, when it finds that a practitioner is guilty of an offense described in N.C.G.S. 90-154(b). Sanctions may include suspension of a license to practice chiropractic and placing a practitioner on probationary status.

WHEREFORE, upon his plea of not guilty, the North Carolina Board of Chiropractic Examiners, based on the greater weight of the evidence, hereby finds the respondent, Dr. Howard Van Nostrand, guilty of attempted fraud, deception, or misrepresentation, in violation of N.C.G.S. 90-154(b)(9). It is ordered, adjudged and decreed that Dr. Van Nostrand be sanctioned as follows:

1. Dr. Van Nostrand's license to practice chiropractic in North Carolina shall be suspended for five years. This sanction is stayed upon the following terms and conditions:
  - a. Dr. Van Nostrand shall serve a period of active license suspension of two years, during which time he shall not practice chiropractic in this State;
  - b. During each year of the two-year active suspension period, Dr. Van Nostrand shall be required to obtain the standard 24 hours of continuing education, and in addition, he shall be required to obtain a total of 12 extra hours of continuing education per year in any of the following subjects: HIPAA compliance, record-keeping, or risk management;
  - c. After the period of active license suspension has been served and the continuing education requirement imposed herein satisfied, Dr. Van Nostrand's license to



practice shall be restored, but he shall be deemed to be on probation for three years, on the condition that he not attempt or commit any act of fraud, deception or misrepresentation.

2. If Dr. Van Nostrand wilfully fails to comply with the terms of this order, the five-year suspension now stayed shall be invoked.
3. The Final Agency Decision rendered herein shall become effective on the thirty-first day after it is served upon the respondent. Pursuant to N.C.G.S. 150B-43 *et seq.*, this Decision is subject to judicial review by the Superior Court of Wake County, North Carolina, upon timely application by the respondent.
4. The Final Agency Decision rendered herein is a public document and shall be reported to the Virginia Department of Health Professions, to relevant national data banks (specifically including CIN-BAD), and to the chiropractic licentiate body in North Carolina by summary in the Board's next newsletter.

THIS is the 3<sup>rd</sup> day of June, 2004.

NORTH CAROLINA BOARD OF CHIROPRACTIC EXAMINERS

By: Thomas M. Brown D.C.  
Thomas M. Brown, DC, Vice-President