



Oregon

John A. Kitzhaber, MD, Governor

Board of Chiropractic Examiners

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OBCE Board Meeting
Morrow Crane Building, 2nd Floor Board Room
3218 Pringle Rd Ste., Salem, Oregon

PUBLIC SESSION MINUTES

March 21, 2013

Members Present

Daniel Côté DC, President
Ann Goldeen DC Vice-President
Doug Dick, Public Member, Secretary
Todd Bilby DC
Christine Robinson DC (teleconference)
Glenn Taylor, Public Member
Jason Young, DC arrived at 10:20 am

Staff Present

Dave McTeague, Executive Director
Kelly Beringer, Admin Asst
Tom Rozinski, Investigator
Lori Lindley, AAG

Others Present: Ryan Jennings (of Gatti et al), Kevin Shuba, Esq., and David Junkin DC

CONVENE: 8:30 AM

ADOPTION OF THE AGENDA

PUBLIC COMMENTS

Ryan Jennings from Gatti & Gatti appeared to request the Board's approval for their draft Documentation course.

DISCUSSION ITEMS

1. Budget & Legislative issues update

- a. Dave McTeague attended the Ways and Means Committee session regarding our supplemental budget request; its moving through the process without question; it was moved out of that committee on Friday.
- b. Governor's Proposed Budget and Budget Policy Packages; Senate Bill 106. SB 106 went out of the Senate Health Committee but did not get a hearing with the Ways and Means. We are proposing an additional \$44,000 AAG budget for the coming 13-15 biennium; and, we're proposing a half-time chiropractor staff position to help us with our file review and case management internally. SB 106 proposes to eliminate the fee maximum, so we can adopt, by rule, the fee increases we've outlined to the legislature. The State Association supports us; their letter is in the board packet.

2. Legislative issues update

Dave briefly described his attendance to the Senate Bill 302 hearing; this is the bill which proposes to merge a number of agencies into a larger "catch-all" agency. The hearing was largely attended, but it does not appear to be going forward this time around. In addition, there was a Secretary of State Audits representative there who discussed the 2012 SOS audit and the issues they have with small boards; one of the main issues was segregation of duties; Kelly will draft a memo for the board on our segregation.



3. Review / Approve Proposed Record Keeping courses

Regarding Gatti & Gatti's draft Documentation course, Dr. Goldeen questioned the E&M section – the outline infers a greater importance to the timed component than she thinks is necessary; remove it or downgrade it, or move it to the bottom. Dr. Bilby also added that the outline is PIP-heavy and he would like to see it less-emphasized for the board's purposes. Bilby moved to provisionally approve the course; Glenn seconded the motion. All in favor. Bilby, aye; Robinson, aye; Goldeen, aye; Côté, aye, Glenn Taylor aye; and Doug Dick, aye. The final will be sent to the Board.

Regarding a second request, CHP submitted their response to the Board's concern about the "legal" section added to their outline; members were satisfied with the response. Dr. Ann Goldeen moved to approve CHP's record keeping course; Dr. Todd Bilby seconded the motion. All in favor. Bilby, aye; Robinson, aye; Goldeen, aye; Côté, aye, Glenn Taylor aye; and Doug Dick, aye.

After some discussion about how sponsor, The Wise DC may verify attendance to their online presentation (quiz, etc.). Staff read the citation on The Wise DCs website; the Board accepted those controls. Dr. Goldeen moved to approve the record keeping/documentation course offered by The Wise DC; Doug Dick seconded the motion. All in favor. Bilby, aye; Robinson, aye; Goldeen, aye; Côté, aye, Taylor aye; and Dick, aye.

4. Policy Issue: BAX 3000 (ETSDP Committee report)

Dave Mcteaue reported that the State Fire Marshall had no issue with the UL rating etc. The ETSDP recommended that this not be used as a diagnostic procedure. It is FDA "cleared" as a skin galvanometer, biofeedback device. The ETSDP was very specific about the informed consent requirements. They approved it as a treatment modality only with an investigation rate of moderate risk which requires the informed consent. Dr. Côté read some of the consent specifics. The draft policy reads,

"The BAX 3000 is marketed as device to diagnose and treat allergies and food sensitivities. The device was reviewed by the OBCE's ETSDP Committee and on January 17, 2013, this policy was adopted by the OBCE in accordance with the ETSDP rule.

The BAX 3000 and similar devices are disapproved (outside the scope) as a diagnostic procedure.

As a treatment modality, the BAX 3000 and similar devices are considered Investigational with Moderate Risk for use with chiropractic patients. This rating requires a written Informed Consent statement signed by the patient. This rating also recommends the chiropractic physician participate in or conduct a formal investigation of the procedure.

The written informed consent must at a minimum address or include:

- The risks of ingesting food or substances which may provoke an anaphylaxis reaction.
- A statement that the use of this treatment could cause an exacerbation.
- An acknowledgement that there is currently a lack of peer reviewed evidence and other evidence such as case studies.
- If the patient is to be part of a research or case study, consents to that participation.
- An understanding that this treatment is considered 'Investigational with Moderate Risk' by the Oregon Board of Chiropractic Examiners.

- This device/procedure is not used to diagnose allergies or other conditions and that other procedures are used for that purpose.

Chiropractic physicians using the BAX 3000 or similar devices must adhere to the OBCE's advertising rules and policies. They must refrain from making advertising claims which cannot be supported."

Dr. Ann Goldeen moved to adopt the policy; Dr. Todd Bilby seconded the motion. Poll: Bilby, aye; Robinson, aye; Goldeen, aye; Côté, aye, and Glenn Taylor aye; Doug Dick, opposed. Motion passed

Regarding advertising of this device (and similar investigational devices), a licensee asked if there is a rule requiring advertisements of investigational devices to *state* that it is investigational. The Board will either adopt a policy, or go into rulemaking; bring the discussion back in May.

5. Policy Issue: May myofascial release be performed by chiropractic assistants?

We have received public comment on this issue. UWS feels the CA should not be performing it unless they are dually licensed as an LMT/CA. Dr. Junkin commented – aren't we undermining the licensed massage therapist? Dr. Robinson agrees – do not allow. Doug and Glenn agree – do not allow. The Board as a whole considers myofascial release to be a specialized therapy or technique, and CAs do not have the training to perform it. It is a manual therapy requiring higher training. Dr. Todd Bilby moved to adopt the policy that CAs may not perform the myofascial release technique; Glenn Taylor seconded the motion. All in favor of denying the procedure. Bilby, aye; Robinson, aye; Goldeen, aye; Côté, aye, Taylor aye; and Doug Dick, aye. Add to the P & P Guide; Send an email message to the profession; and include a mention in the next BackTalk.

6. Rules Advisory Committee Report; Policy & Practice Guide Update

The lists of board policies were presented to the RAC. Dr. Fuchs had a number of issues with many of the existing policies. Staff will draft a memo identifying those in question, and prep the remainder for adoption into the guide in May's meeting. Go into rulemaking on this issue.

The Rules Committee's second discussion related to file reviews. It was a general discussion about whether there should be a rule or policy concerning paper or file reviews (similar to the IME rules). There was some sense that the reviewer should keep at least keep their reports, with caveats. The RAC did not have full agreement regarding keeping the treating physician's record (what the file reviewer used to make his/her decision). Doug and Ann said the reviewer needs to review the whole file, not merely one chart. Dave suggested that the Board schedule this discussion for the July meeting with Dr. Kouzes. Glenn added we do have five pages in the P&P on IMEs and file reviews, does the Board really want to do this, and does the board have time to spend on this issue? Glenn would be open if the discussion was kept to "file reviews." The Board recommended soliciting input in advance. Lori suggested sending those five pages to the stakeholders, etc. Again, Glenn questions whether the board has the time considering our current case load; one half day discussion in July could turn into many days of discussion. Staff will capture the RAC discussion for the July meeting.

7. Committee appointments - PRC Appointment: David Russ interview

The interview begins at mark 6:50 in audio clip "6 3-21-13 Public Russ PRC and In the Matters of WMA"

Dr. Russ has been in practice since 1998; he works a lot with nutrition; he likes to co-treat with MD's and DO's; and he has a mostly, musculoskeletal practice. He's very willing to contribute his time and

he is interested in improving himself. He admits he has no experience reviewing files.

Board discussion post-David Russ interview. Dr. Ann Goldeen moved to appoint Dr. Russ as an alternate member to the Peer Review Committee; Dr. Jason Young seconded the motion. All in favor. Bilby, aye; Taylor, aye; Côté, aye; Goldeen, aye; Young, aye; Robinson, aye; and Dick, aye.

8. 10:00 AM Public Hearing on Proposed Pre-Paid Treatment Rule Amendment OAR 811-015-0002

Pre-rule hearing discussion on “Draft 3” – insurance is already defined in statute (731.102) and the Pre-Paid language is contrary. Board agrees to add the statutory language to section 1...

(ORS 731.102) “Insurance” means a contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies.”

Dave noted that the Association comment was “unless agreed upon in advance with the patient prior to any billings and/or if required to do so contractually” but it was removed in Draft 2.

Dr. Côté wants the rule language to be clear that a licensee cannot bill the patient’s insurance more than what they are charging in the prepay plan. Plus they are billing for everything else, not just the pre-pay services; there cannot be an overlap in payments. There should be a statement that the total amount should not exceed what the normal charges are for their services. There needs to be a statement that there cannot be an overlap where both are applied.

Dr. Bilby referred to a current case where the licensee made a claim that he was exempt because his was not officially a prepayment plan. Dr. Bilby proposed changing the title of the rule to Pre-paid or Other Contracted Treatment Plans. In addition, Dr. Bilby proposed limiting the length of the contracts to three months. It does not limit the amount of time your treat somebody; you can re-contract for another three month contract. Dr. Goldeen added that the same thing is happening for all kinds of services such as “contracts” for decompression, traction, and laser.

Dave added that the pre-paid language should reference the existing fee rule OAR 811-015-0000. Dr. Côté read section 3 of the rule (billing insurance must reflect what the patient was actually billed). In addition, regarding multiple modalities, you cannot bill the insurance company if you say in the contract that the modalities are all inclusive.

Regarding sections 4a and 4b - If circumstances change, and insurance become available whether there is an accident or private insurance... Bilby - you would have to prorate services for what services the patient had received up to that point. ADD TO - early termination or interruption of contract plan based on new injury or condition (add “condition”?) (i.e. PIP or WC) the contract could be suspended, or money refunded... Glenn Taylor added that paragraph 4 seemed to already address this concern.

10:06 am Dr. Côté opened the public rule hearing. Public present includes Kevin Shuba, AAL and David Junkin DC. Dr. Côté asked for any public comment. Kevin Shuba commented that the language might state “injury or condition.” Doug suggested providing some sample scenarios when the rule language is disseminated. Mr. Shuba asked whether the Board had made any comparison with the Workers Compensation rules and the pre-pay plan rule. He suggested that WC may require the prepay

plan be suspended, terminated, or prorated. The Board may want to look into that. Dr. Côté will draft some scenarios. Dave McTeague added that the fee rule does state that licensees must comply with other applicable federal and state laws regarding billing practices.

Discussion: Lori asked where the 90 day limit would be inserted.

10:15 am Dr. Côté closed the hearing.

Staff will make amendments to the draft (sections 1 and 4) and schedule a re-hearing. Board agreed to add a new 1) c) and limit the prepaid contracts to 3 months. Also, add something about existing contracts (Shuba).

Dr. Jason Young commented make sure that we exempt the medical retainer plans; we don't want to exempt the physicians, but the plan. Also make sure to add "condition" in 4).

Draft language for new section 1.c. "Contracts entered into after the effective date of this rule are limited to 90 days, but there is no limitation to the number of contracts." Reverse order of 1.a and (new) 1.c so sections 1) a, b, and c read,

- a) Contracts entered into after the effective date of this rule shall not exceed 90 days, but there is no limitation to the number of contracts.
- b) These prepayment plans must not be in violation of OAR 811-015-0000.
- c) ~~Chiropractic Physicians or clinics who~~ Medical Retainer Plans are certified by the Oregon Department of Insurance as ~~Medical Retainer Plans~~ are exempted from ~~this provision~~ section 1 of this rule.

Also, the change to the section 4 paragraph will read as follows:

- 4) The pre-payment plan must include a written explanation on how the unused portion of funds are calculated or prorated should the patient complete care early or discontinue care due to the patient's choice, doctor's choice, moving, or new injury or condition. The written explanation must be clearly labeled "**Refund Policy**" and **explained in plain language that is understood by the patient. The explanation must include a table of calculations that illustrates the amount of refunds or amount owed in the event of the pre-paid plan's early termination.**

9. Staff Report

The Board's next meeting is schedule for May in Medford. Flights to Medford are available as a quick and cost effective means of travel. The board meeting for July will be held in Hampton Hall at UWS. And September's meeting will be held in Astoria and will be a day and a half with a meet and greet with the local chiropractors on Friday to Saturday noon. We will meet after lunch, break for dinner and reconvene Friday evening. The meet and greet would be Saturday a.m. with Public Session immediately thereafter. .

CORRESPONDENCE

1. "Can a CA perform functional capacity evaluations?" asks Jonathan McClaren DC

Dr. Goldeen opines that these evaluations are for the chiropractor to perform. Dr. Coté agrees, not for the CA; the examiner has to use clinical judgment. Dr. Young asked if there is an additional certification that would allow the CA to perform. Board members say no, CAs may not perform

functional capacity evaluations. Add a policy statement to the P&P.

../.../OBCE Web/2012 PDFs/Jan 2012 Agenda/pub6.pdf

10:30 AM ADJOURN to Executive Session

3:25 pm RE-ADJOURN for In the Matters of

IN THE MATTERS OF

Policy: The Board proposed to adopt a policy giving the Board president interim authority to share confidential case information with law enforcement or sister regulatory agencies, subject to formal approval by the full board at the next scheduled meeting. Doug Dick moved to accept the determination; Glenn Taylor seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.

Susan Gray DC

The Board proposed to issue a Notice to Revoke and/or accept her surrendered license. Dr. Ann Goldeen moved to accept the determination; Doug Dick seconded the motion. Poll: Côté, aye; Robinson, aye; Young, aye; Taylor, aye; Dick, aye; Goldeen, aye and Bilby opposed the motion. Motion carried.

Continuing Education (CE Audit & boundaries)

1. **Deborah Cherachanko DC.** *(In May 2013, the Board proposed to withdraw this Notice of Proposed Civil Penalty as she had in fact complied.)* The Board proposed license suspension and a \$1,250 civil penalty for failure to respond to the CE audit. If licensee provides within 14 days proof of completion of regular CE, and boundaries CE, and the hours are completed by the renewal date, the board will settle the case for \$250; otherwise the CE must be completed within 60 days with assessment of the \$250 civil penalty and \$50 per hour not complete. In addition, licensee will be suspended until the CE is complete. Doug Dick moved to accept the determination; Jason Young seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.
2. **Cary Weddle DC.** Again, same provision as #s 2 and 6 above, but no suspension in consideration of the circumstances in which she is involved. Otherwise, licensee must respond in 14 days providing the proof of completed CE, and the Board will reduce the penalty to \$250. Doug Dick moved to accept the determination; Jason Young seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.

(#s 8 through 11) The Board will verify whether these licensees are still in practice.

3. **Hamed Madani DC.** The Board proposed a \$650 civil penalty (\$250 plus \$50 per [8] incomplete CE credit) for false affidavit. Ann Goldeen moved to accept the determination; Jason Young seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.
4. **Rick Long DC.** The Board proposed a \$1250 civil penalty (\$250 plus \$50 per [20] incomplete CE credit) for false affidavit. Jason Young moved to accept the determination; Doug Dick seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.
5. **Richard Sommers DC.** The Board proposed a \$350 civil penalty (\$250 plus \$50 per [2] incomplete

CE credit) for false affidavit. Ann Goldeen moved to accept the determination; Jason Young seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.

6. **Blake Macnab DC.** The Board proposed a \$250 civil penalty for failure to comply with the CE mandate for boundaries education. Licensee must complete the CE within 30 days, or be suspended. Ann Goldeen moved to accept the determination; Jason Young seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.
7. **David Young DC.** *(In May 2013 the Board proposed to withdraw the Notice of Proposed Civil Penalty as the licensee did provide proof of completion of the hours.)* The Board proposed a \$250 civil penalty for failure to comply with the CE mandate for boundaries education. Licensee must complete the CE within 30 days, or be suspended. Doug Dick moved to accept the determination; Glenn Taylor seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.

Case # 2013-1014 The Board proposed Case Closed with a strong letter of concern. Doug Dick moved to accept the determination; Todd Bilby seconded the motion. Jason Young abstained. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; and Côté, aye. Doug will draft letter for the Board's review.

Case # 2012-2011 The Board proposed a Letter of Concern with case closed. Daniel Côté moved to accept the determination; Jason Young seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.

Case # 2012-1047 Kevin Misenheimer DC

The Board proposed a civil penalty of \$2,000, of which \$1,000 is for violation of the Doctors Title Act and \$1,000 for fee splitting in a LivingSocial agreement. Daniel Côté moved to accept the determination; Ann Goldeen seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.

Case # 2013-5000 Christian McCutcheon

First motion. The Board authorized staff to share information with the District Attorney's office and sister regulatory agencies regarding the violations of practice without a license. Todd Bilby moved to accept the determination; Doug Dick seconded the motion. Jason Young abstained. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; and Côté, aye.

Second motion. The Board authorizes Department of Justice and staff to pursue either criminal prosecution against McCutcheon, and/or file a civil restraining order/injunction against the McCutcheon. Todd Bilby moved to accept the determination; Doug Dick seconded the motion. Jason Young abstained. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; and Côté, aye. Motion carries. The Board also authorized a press release to be issued on this matter.

Case # 2013 -1006 et al The Board authorized sharing of confidential case information with local authorities. Daniel Côté moved to accept the determination; Ann Goldeen seconded the motion. Jason Young abstained. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; and Côté, aye. Motion carries.

Case # 2012-1049 The Board proposed insufficient evidence to find a violation with a letter of concern. Glenn Taylor moved to accept the determination; Doug Dick seconded the motion. Jason Young recused. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; and Côté, aye.

Case #s 2012-1038 & 2012-3027 Dorian Quinn DC

Motion 1. The Board proposed a 90-day suspension, a \$5,000 civil penalty, 12 hrs CE in Clinical Justification and 8 hours in Ethics; and completion of the NBCE's Ethics and Boundaries Exam for violations as identified in the Peer Review report. Licensee must complete these requirements in 90 days. Ann Goldeen moved to accept the determination; Doug Dick seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.

Motion 2. Regarding the same two cases above, the Board proposed sharing confidential information with sister regulatory agencies. Ann Goldeen moved to accept; Doug Dick seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.

Case # 2013-3007 The Board found no statutory violation. Daniel Côté moved to accept the determination; Ann Goldeen seconded the motion. All in favor. Robinson, aye; Goldeen, aye; Dick, aye; Taylor, aye; Bilby, aye; Young, aye; and Côté, aye.

4:00 PM ADJOURN for the day