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By *Yvonne Crawford*

8 **BEFORE THE**
SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY AND HEARING AID
9 **DISPENSERS BOARD**
10 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

11 In the Matter of the Accusation Against:

Case No. 11-2011-51

12 **MARSHALL LEIGH SHOQUIST**
13 **101 Church Street, Ste. 13**
Los Gatos, CA 95030

AMENDED ACCUSATION

14 **Audiologist License No. AU 461**

15 Respondent.

16
17 Complainant alleges:

18 PARTIES

19 1. Annemarie Del Mugnaio (Complainant) brings this Accusation solely in her official
20 capacity as the Executive Officer of the Speech-Language Pathology and Audiology and Hearing
21 Aid Dispensers Board, Department of Consumer Affairs.

22 2. On or about August 16, 1978, audiologist license no. AU 461 was issued to Marshall
23 Leigh Shoquist (Respondent). Said audiologist license was in full force and effect at all times
24 relevant to the charges brought herein and expires on January 31, 2013 unless renewed.
25 Additionally, hearing aid dispenser license no. HA 1054 was issued to Respondent on February 7,
26 1978; that license expired on January 31, 2010 and was subsequently cancelled and converted to a
27 dispensing audiologist license under Respondent's audiologist license no. AU 461.
28

JURISDICTION

1
2 3. This Accusation is brought before the Speech-Language Pathology and Audiology
3 and Hearing Aid Dispensers Board (Board), Department of Consumer Affairs, under the authority
4 of the following laws. All section references are to the Business and Professions Code unless
5 otherwise indicated.

6 4. Section 2531.5 of the Code provides that the board shall issue, suspend, and revoke
7 licenses and approvals to practice speech-language pathology and audiology as authorized by this
8 chapter.

9 5. Section 2533 of the Code states in pertinent part:

10 “The board may . . . suspend, revoke, or impose terms and conditions upon the license of
11 any licensee for any of the following:

12 “ . . . ”

13 “(e) Committing a dishonest or fraudulent act which is substantially related to the
14 qualifications, functions, or duties of a licensee.

15 “(f) Incompetence, gross negligence, or repeated negligent acts.

16 “(g) Other acts that have endangered or are likely to endanger the health, welfare, and
17 safety of the public.

18 “ . . . ”

19 “(k) Violation of Section 1689.6 or 1793.02 of the Civil Code.”¹

20 6. Civil Code Section 1793.02 provides in pertinent part:

21 “(a) All new and used assistive devices sold at retail in this state shall be accompanied by
22 the retail seller's written warranty which shall contain the following language: ‘This assistive
23 device is warranted to be specifically fit for the particular needs of you, the buyer. If the device is
24 not specifically fit for your particular needs, it may be returned to the seller within 30 days of the
25 date of actual receipt by you or completion of fitting by the seller, whichever occurs later. If you

26 ¹ Section 2533, subdivision (k) (added by Stats. 2011, ch. 449, § 6) became effective
27 January 1, 2012, and is identical in substance to and replaces former Code section 3401,
28 subdivision (n) (repealed by Stats. 2011, ch. 449, § 13).

1 return the device, the seller will either adjust or replace the device or promptly refund the total
2 amount paid. This warranty does not affect the protections and remedies you have under other
3 laws.’ In lieu of the words ‘30 days’ the retail seller may specify any longer period.”

4 “ . . . ”

5 “(c) If the buyer returns the device within the period specified in the written warranty, the
6 seller shall, without charge and within a reasonable time, adjust the device or, if appropriate,
7 replace it with a device that is specifically fit for the particular needs of the buyer. If the seller
8 does not adjust or replace the device so that it is specifically fit for the particular needs of the
9 buyer, the seller shall promptly refund to the buyer the total amount paid, the transaction shall be
10 deemed rescinded, and the seller shall promptly return to the buyer all payments and any assistive
11 device or other consideration exchanged as part of the transaction and shall promptly cancel or
12 cause to be canceled all contracts, instruments, and security agreements executed by the buyer in
13 connection with the sale. When a sale is rescinded under this section, no charge, penalty, or other
14 fee may be imposed in connection with the purchase, fitting, financing, or return of the device.”

15 7. Section 2539.4² of the Code states:

16 “A licensed audiologist shall, upon the consummation of a sale of a hearing aid, deliver to
17 the purchaser a written receipt, signed by or on behalf of the licensed audiologist, containing all
18 of the following:

19 “(a) The date of consummation of the sale.

20 “(b) Specifications as to the make, serial number, and model number of the hearing aid or
21 aids sold.

22 “(c) The address of the principal place of business of the licensed audiologist, and the
23 address and office hours at which the licensed audiologist shall be available for fitting or
24 postfitting adjustments and servicing of the hearing aid or aids sold.

25 “(d) A statement to the effect that the aid or aids delivered to the purchaser are used or
26 reconditioned, as the case may be, if that is the fact.

27 ² Section 2539.4 (added by Stats. 2009, ch. 309, § 12) became effective January 1, 2010,
28 and is identical in substance to former Code section 3366 (repealed by Stats. 2011, ch. 449, §13).

1 “(e) The number of the licensed audiologist's license and the name and license number of
2 any other hearing aid dispenser, temporary licensee, or audiologist who provided any
3 recommendation or consultation regarding the purchase of the hearing aid.

4 “(f) The terms of any guarantee or written warranty, required by Section 1793.02 of the
5 Civil Code, made to the purchaser with respect to the hearing aid or hearing aids.”

6 8. Section 2539.6³ of the Code states:

7 “(a) Whenever any of the following conditions are found to exist either from observations
8 by the licensed audiologist or on the basis of information furnished by the prospective hearing aid
9 user, a licensed audiologist shall, prior to fitting or selling a hearing aid to any individual, suggest
10 to that individual in writing that his or her best interests would be served if he or she would
11 consult a licensed physician specializing in diseases of the ear or if no such licensed physician is
12 available in the community then to a duly licensed physician:

13 “(1) Visible congenital or traumatic deformity of the ear.

14 “(2) History of, or active drainage from the ear within the previous 90 days.

15 “(3) History of sudden or rapidly progressive hearing loss within the previous 90 days.

16 “(4) Acute or chronic dizziness.

17 “(5) Unilateral hearing loss of sudden or recent onset within the previous 90 days.

18 “(6) Significant air-bone gap (when generally acceptable standards have been established).

19 “(7) Visible evidence of significant cerumen accumulation or a foreign body in the ear
20 canal.

21 “(8) Pain or discomfort in the ear.

22 “(b) No referral for medical opinion need be made by any licensee in the instance of
23 replacement only of a hearing aid that has been lost or damaged beyond repair within one year of
24 the date of purchase. A copy of the written recommendation shall be retained by the licensed
25 audiologist for the period provided for in Section 2539.10. A person receiving the written

26 ³ Section 2539.6 (added by Stats. 2009, ch. 309, § 12) became effective January 1, 2010,
27 and is identical in substance to former Code section 3365.5 (repealed by Stats. 2011, ch. 449,
28 §13).

1 recommendation who elects to purchase a hearing aid shall sign a receipt for the same, and the
2 receipt shall be kept with the other papers retained by the licensed audiologist for the period
3 provided for in Section 2539.10. Nothing in this section required to be performed by a licensed
4 audiologist shall mean that the licensed audiologist is engaged in the diagnosis of illness or the
5 practice of medicine or any other activity prohibited by the provisions of this code.”

6 9. Section 2539.10⁴ of the Code states:

7 “A licensed audiologist shall, upon the consummation of a sale of a hearing aid, keep and
8 maintain records in his or her office or place of business at all times and each record shall be kept
9 and maintained for a seven-year period. These records shall include:

10 “(a) Results of test techniques as they pertain to fitting of the hearing aid.

11 “(b) A copy of the written receipt required by Section 2539.4 and the written
12 recommendation and receipt required by Section 2539.6 when applicable.

13 10. California Code of Regulations, title 16, section 1399.126, states:

14 “(a) For purposes of Section 3365.5 of the code, a significant air-bone gap is defined as a
15 difference of 15 decibels or more between the higher air conduction and the lower bone
16 conduction pure tone thresholds at 2 or more succeeding octave frequencies of 500 Hertz through
17 and including 4000 Hertz.

18 “(b) Tests for significant air-bone gap shall be performed in a suitable environment using
19 appropriate equipment to establish threshold values and with appropriate masking procedures
20 employed.”

21 11. Section 118, subdivision (b), of the Code provides that the suspension/expiration/
22 surrender/cancellation of a license shall not deprive the Board of jurisdiction to proceed with a
23 disciplinary action during the period within which the license may be renewed, restored, reissued
24 or reinstated.

25
26
27 ⁴ Section 2539.10 (added by Stats. 2009, ch. 309, § 12) became effective January 1, 2010,
28 and is identical in substance to former Code section 3365 (repealed by Stats. 2011, ch. 449, §13).

1 COST RECOVERY

2 12. Section 125.3 of the Code states, in pertinent part, that the Board may request the
3 administrative law judge to direct a licentiate found to have committed a violation or violations of
4 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and
5 enforcement of the case.

6 FIRST CAUSE FOR DISCIPLINE

7 (Dishonest Act/Failure to Refund re Customer S.W.)⁵

8 13. Respondent is subject to disciplinary action for unprofessional conduct under Code
9 section 2533(e) and/or Code section 2533(k) in that Respondent committed a dishonest act and
10 failed to fully refund customer S.W. for the amount paid for a hearing aid device. The
11 circumstances are as follows:

12 A. On or about February 14, 2011, S.W. ordered a custom set of Starkey ITC
13 hearing aids from Respondent for the purchase price of \$2955. On or about March 14, 2011,
14 Respondent informed S.W. that the Starkey hearing aids had been destroyed during delivery and
15 offered her a set of WOW hearing aids as a temporary replacement. On or about March 21, 2011,
16 S.W. agreed to purchase the WOW hearing aids in lieu of the Starkey hearing aids for the same
17 purchase price of \$2955. On or about April 19, 2011, dissatisfied with the WOW hearing aids,
18 S.W. returned them to Respondent and requested a full refund, which Respondent agreed to
19 provide.

20 B. Respondent subsequently wrote three checks totaling \$2955 payable to S.W.
21 However, when S.W. attempted to deposit the checks, they were returned for insufficient funds.

22 C. S.W. then filed a case against Respondent in Small Claims Court seeking to
23 recover her refund. On or about August 24, 2011, a judgment was entered against Respondent for
24 \$2955 as well as \$60 for costs.

25
26
27 _____
28 ⁵ Customer's names are abbreviated to protect privacy.

1 D. On or about September 28, 2011, in response to an inquiry from the Board
2 regarding the status of S.W.'s refund, Respondent stated that, "It is our position that she is
3 deserving of the full refund of \$2995.00 and we will mail this to her as soon as possible."

4 E. Despite the court judgment and despite assurances to S.W. and the Board that
5 he would refund S.W. for the entire purchase price of the hearing aids, Respondent has failed to
6 fully refund S.W.

7 SECOND CAUSE FOR DISCIPLINE

8 (Dishonest Act/Failure to Refund re Customer A.S.)

9 14. Respondent is subject to disciplinary action for unprofessional conduct under Code
10 section 2533(e) and/or Code section 2533(k) in that Respondent committed a dishonest act and
11 failed to fully refund customer A.S. for the amount paid for a hearing aid device. The
12 circumstances are as follows:

13 A. On or about April 21, 2010, A.S. ordered a Starkey hearing aid from
14 Respondent for the purchase price of \$2750. On or about May 17, 2010, A.S. received the
15 Starkey hearing aid. On or about May 31, 2010, dissatisfied with the Starkey hearing aid, A.S.
16 returned the hearing aid and received store credit for another hearing aid. After trying several
17 different hearing aids, requiring many adjustments, that did not meet his satisfaction, A.S.
18 requested a full refund.

19 B. On or about September 3, 2010, Respondent issued a partial refund of \$1000 to
20 A.S.

21 C. In response to an inquiry from the Board regarding A.S.'s request for a full
22 refund, Respondent stated in a letter dated November 26, 2010 that, "we have decided to
23 complete [A.S.'s] refund of \$1750."

24 D. Respondent subsequently wrote a check for \$300 payable to A.S., but did not
25 refund A.S. the remaining balance of \$1450.

26 E. In response to further inquiries from the Board regarding A.S.'s request for a
27 full refund, Respondent stated in a letter dated July 25, 2011, that he "apologize[d] for the delay
28 in refunding [A.S.]" and that he would "do this as quickly as possible."

1 F. Despite assurances to the Board that he would refund customer A.S. for the
2 entire purchase price of the hearing aid, Respondent has failed to fully refund A.S.

3 THIRD CAUSE FOR DISCIPLINE

4 (Gross Negligence/Repeated Negligent Acts/Incompetence/Failure to Perform Bone Conduction
5 Testing/Failure to Refer for Medical Opinion re Customer J.F.)

6 15. Respondent is subject to disciplinary action for unprofessional conduct under Code
7 section 2533(f) and/or for violations of Code section 2539.6 and/or Code of Regulations section
8 1399.126 in that Respondent was grossly negligent, repeatedly negligent and/or incompetent in
9 his sale and fitting of a hearing aid to customer J.F. by failing to properly conduct bone testing
10 and failing to advise J.F. in writing to consult with a licensed physician. The circumstances are as
11 follows:

12 A. On or about June 8, 2009, J.F. saw Respondent for an audiological evaluation.
13 According to Respondent, testing revealed a bilateral sensorineural hearing impairment with mild
14 to moderate severity in the right ear and moderate to profound severity in the left ear. Speech
15 audiometry revealed a good ability to differentiate among words in the right ear (84%) and very
16 poor ability (2%) in the left ear. Bone conduction testing in the left ear was not performed.
17 Tympanometry was not performed. There is no documentation that Respondent advised J.F. to
18 obtain a medical diagnosis of the vast difference of hearing loss between the two ears.

19 B. Respondent sold J.F. a Rexton Targa Pro Free hearing aid for the right ear on
20 June 8, 2009. The hearing aid was fitted on June 30, 2009. J.F. returned for subsequent fitting
21 adjustments on July 2, 2009 and July 7, 2009. Respondent sent the hearing aid to the
22 manufacturer for repair on February 16, 2010, and the hearing aid was returned from the
23 manufacturer on February 26, 2010. J.F.'s last adjustment was on March 9, 2010.

24 16. Respondent is guilty of unprofessional conduct through gross negligence and/or
25 repeated acts of negligence and/or incompetence under Code section 2533(f) because of the
26 following conduct that constitutes, jointly or separately, an extreme departure from the standard
27 of care:
28

1 C. J.C. returned to Respondent numerous times to adjust the hearing aids and
2 complained that the hearing aids were not working properly; he eventually returned the hearing
3 aids.

4 D. On or about October 31, 2006, Respondent sold J.C. Vivatone Entre 400
5 hearings aids with credit given for his return of the ReSound hearing aids. Respondent did not
6 perform audiometric testing or bone conduction testing prior to selling the Vivatone hearing aids.

7 E. On or about October 5, 2007, Respondent performed a new audiogram on J.C.
8 Respondent did not perform bone conduction testing.

9 F. Between May 18, 2006 and February 23, 2009, there are nine dates in the Noah
10 log indicating programming sessions, but there are no progress notes for these sessions.

11 G. On or about March 9, 2009, Respondent sold and fitted J.C. with a pair of
12 Rexton Revera hearing aids. Respondent did not perform an audiogram or bone conduction
13 testing prior to fitting or selling these hearing aids. There is no Purchase Agreement or other
14 written receipt for the sale of these hearing aids in the records.

15 H. Progress notes from April 7, 2010 state that Respondent “loaned” J.C. a pair of
16 Starkey hearing aids. When J.C. complained that these hearing aids did not work, Respondent
17 charged J.C. for “repair” costs for these used hearing aids. Further, in a letter from Respondent
18 to J.C., dated June 27, 2011, Respondent expressly admitted that the “used hearing aids [] were
19 sold to you” and refunded J.C. in the amount of \$200.00. There is also no Purchase Agreement or
20 other written receipt of the sale of these hearing aids in the records.

21 18. Respondent is guilty of unprofessional conduct through gross negligence and/or
22 repeated acts of negligence and/or incompetence under Code section 2533(f) because Respondent
23 repeatedly failed to conduct bone conduction testing on J.C., which in itself is an extreme
24 departure from the standard of care.

25 FIFTH CAUSE FOR DISCIPLINE

26 (Failure to Maintain Adequate Records re Customer J.C.)

27 19. Paragraph 17 is incorporated herein by reference as if fully set forth.

28

1 1793.02 because Respondent added his own verbiage that gives him more rights than authorized
2 under the statute. Specifically, Respondent added the following language: "Seller has the right to
3 achieve proper fitting by adjusting, *repairing* or replacing the device. . . ." (Emphasis added.)
4 While section 1793.02 permits a seller to adjust or replace a device, it does not permit a seller to
5 repair the device. Thus, Respondent's written warranty is in violation of Civil Code section
6 1793.02 and constitutes unprofessional conduct under Section 2533(k).

7 PRAYER

8 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
9 and that following the hearing, the Speech-Language Pathology and Audiology and Hearing Aid
10 Dispensers Board issue a decision:

- 11 1. Revoking or suspending Audiologist License No. Number 461, issued to Marshall
12 Leigh Shoquist;
- 13 2. Ordering Marshall Leigh Shoquist to pay the Speech-Language Pathology and
14 Audiology and Hearing Aid Dispensers Board the reasonable costs of the investigation and
15 enforcement of this case, pursuant to Business and Professions Code section 125.3; and
- 16 3. Taking such other and further action as deemed necessary and proper.

17
18 DATED: July 12, 2012


ANNEMARIE DEL MUGNAIO
Executive Officer
Speech-Language Pathology and Audiology and Hearing
Aid Dispensers Board
Department of Consumer Affairs
State of California
Complainant

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