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Speech-Language Pathology & Audiology
& Hearing Aid Dispensers Board
Sacramento, California on March 29, 2012
By Yvonne Crawford

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

RANDY JESTER Menifee Hearing Aid 26010 McCall Boulevard, #G Sun City, CA 92586 Hearing Aid Dispenser License No. HA 1572, Respondent.	Case No. 1C-2010-122 **A C C U S A T I O N**

Complainant alleges:

PARTIES

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

2. On or about January 15, 1983, the Board issued Hearing Aid Dispenser License number HA 1572 to Randy Jester (Respondent). That license was in full force and effect at all times relevant to the charges brought herein and will expire on May 31, 2012.

JURISDICTION

3. This Accusation is brought before the Board under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2538.11 of the Code provides, in pertinent part,

"(a) 'Practice of fitting or selling hearing aids,' as used in this chapter, means those practices used for the purpose of selection and adaptation of hearing aids, including direct observation of the ear, testing of hearing in connection with the fitting and selling of hearing aids, taking of ear mold impressions, fitting or sale of hearing aids, and any other necessary postfitting counseling. The practice of selling hearing aids does not include the act of concluding the transaction by a retail clerk."

5. Section 2533 of the Code provides that the board may deny, issue subject to terms and conditions, suspend or revoke a license, or impose conditions of probation upon a licensee, for any of the following causes:

The board may refuse to issue, or issue subject to terms and conditions, a license on the grounds specified in Section 480, or may suspend, revoke, or impose terms and conditions upon the license of any licensee for any of the following:

"(a) Conviction of a crime substantially related to the qualifications, functions, and duties of a speech-language pathologist or audiologist or hearing aid dispenser, as the case may be. The record of the conviction shall be conclusive evidence thereof.

"(b) Securing a license by fraud or deceit.

"(c) (1) The use or administering to himself or herself, of any controlled substance;

"(c) (2) the use of any of the dangerous drugs specified in Section 4022, or of alcoholic beverages, to the extent, or in a manner as to be dangerous or injurious to the licensee, to any other person, or to the public, or to the extent that the use impairs the ability of the licensee to practice speech-language pathology or audiology safely;

"(c) (3) more than one misdemeanor or any felony involving the use, consumption, or self-administration of any of the substances referred to in this section; or

"(c) (4) any combination of paragraph (1), (2), or (3). The record of the conviction shall be conclusive evidence of unprofessional conduct.

"(d) Advertising in violation of Section 17500. Advertising an academic degree that was not validly awarded or earned under the laws of this state or the applicable jurisdiction in which it was issued is deemed to constitute a violation of Section 17500.

"(e) Committing a dishonest or fraudulent act that is substantially related to the qualifications, functions, or duties of a licensee.

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

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

"(h) Use by a hearing aid dispenser of the term "doctor" or "physician" or "clinic" or "audiologist," or any derivation thereof, except as authorized by law.

"(i) The use, or causing the use, of any advertising or promotional literature in a manner that has the capacity or tendency to mislead or deceive purchasers or prospective purchasers.

"(j) Any cause that would be grounds for denial of an application for a license.

"(k) Violation of Section 1689.6 or 1793.02 of the Civil Code."

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

7. Section 490.5 of the Code states: "A board may suspend a license pursuant to Section 17520 of the Family Code if a licensee is not in compliance with a child support order or judgment."

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FIRST CAUSE FOR DISCIPLINE

(Fraud and Misrepresentation in the Fitting or Selling of a Hearing Aid – Client B.H.)

[Bus. & Prof. Code section 2533 (e)]

8. Respondent is subject to disciplinary action under section 2533 (e) of the Code in that he committed fraud[1] and misrepresentation in the fitting and selling of a hearing aid to client B.H. The circumstances are as follows:

9. On or about November 13, 2008, Ms. B H.[2] went to Respondent's office to have her current pair of hearing aids, "Sonic Innovations," tuned and adjusted. The "Sonic Innovations" cost Ms. B H. $4,900 to purchase.

10. Instead of adjusting the "Sonic Innovations" hearing aids as requested, Respondent told Ms. B H. the hearing aids were inadequate and persuaded Ms. B H. to purchase a separate hearing aid from him. Respondent told Ms. B H. that he would sell her a new pair of "Audina CIC" hearing aids which would be more appropriate for her hearing loss.

11. Ms. B H. provided Respondent with her hearing aid, worth $4,900 in trade plus gave Respondent an additional cash payment of $2,600 to purchase the "Audina CIC" hearing aids from him, a total expenditure of $7,500.

12. Ms. B H. used the "Audina CIC" hearing aid for several months, and was never satisfied with the performance of the hearing aid. While using the "Audina CIC" hearing aids she was unable to hear well enough to use the phone. In April of 2009, Ms. B H. went to Respondent's office to tell Respondent she was not happy with the "Audina CIC" hearing aids she purchased from him and found Respondent had closed his business.

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[1] Fraud is defined in California Civil Code section 1572 as follows, "Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (3) The suppression of that which is true, by one having knowledge or belief of the fact; (4) A promise made without any intention of performing it; or, (5) Any other act fitted to deceive."

[2] The names of the patients are abbreviated to protect their privacy rights. The patient names will be provided to Respondent upon a written request for discovery.

13. Ms. B H. repeatedly attempted to reach Respondent at the phone number he had posted at his now defunct office location, but the phone was never in service. After several months of attempting to locate Respondent, Ms. B H. finally found a working phone number for him over the Internet. When Ms. B H. finally spoke to Respondent, he told her he had moved to a new city, but that he would be in her area and would stop by and discuss the matter with her. Respondent also offered to sell Ms. B H. another pair of hearing aids. Respondent never called or visited Ms. B H. as he stated he would during their phone call.

14. After repeatedly attempting unsuccessfully to reach Respondent, Ms. B H. went to another hearing aid dispenser and purchased a new set of hearing aids.

15. The applicable standard of care in this matter is clear. When a patient comes into a hearing aid dispenser's office with a set of hearing aids which are appropriate for the hearing loss the patient has and asks the dispenser for an adjustment, it is the hearing aid dispenser's responsibility to take one of the following actions for the patient:

A. Work with the hearing aids the patient is wearing and attempt to do whatever can be done to adjust the aids to the patient's satisfaction.

B. If the dispenser cannot adjust the hearing aids to the patient's satisfaction, the dispenser should refer the patient back to the office where the aids were originally purchased for further adjustments.

16. It is a violation of the standard of care in this situation for a hearing aid dispenser to sell the patient new hearing aids when the current hearing aids are appropriate for their hearing loss. In his dealings with patient Ms. B H., as alleged above, the Respondent made material misrepresentations of fact, failed to disclose other important facts and made promises without the intention of performing. The sale of new hearing aids in this situation is for the profit of the hearing aid dispenser and therefore an act of fraud on the Respondent's part.

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SECOND CAUSE FOR DISCIPLINE

(Fraud and Misrepresentation in the Fitting or Selling of a Hearing Aid – Client G.H.)

[Bus. & Prof. Code section 2533 (e)]

17. Respondent is subject to disciplinary action under section 2533 (e) of the Code in that he committed fraud and misrepresentation in the fitting and selling of a hearing aid. The circumstances are as follows:

18. On or about December 24, 2007, patient Ms. G H. went with her son, Mr. T H., to Respondent's office and purchased a set of hearing aids. Respondent informed them he did not accept "Visa" for payment. Consequently, Ms. G H. and her son, Mr. T H., each withdrew money from their credit cards to pay Respondent $3,500.00, the full cost for the hearing aids on that day.

Mr. T H. told Respondent when he paid Respondent $3,500.00, the full cost for the hearing aids, that the credit card company charged a high rate of interest (28%) for these two withdrawals so he would appreciate Respondent advising him as quickly as possible when the insurance company paid Respondent. Respondent assured Ms. G H. and Mr. T H. that he would reimburse them as soon as Ms. G H.'s insurance company paid him.

19. Ms. G H.'s insurance company paid Respondent $5,995 immediately. Nonetheless, Respondent did not notify Ms. G H. or her son, Mr. T H., about this reimbursement as he said he would. Moreover, during the many occasions when the patient and her son contacted Respondent about receiving repayment Respondent told them he could not pay them for a variety of reasons.

20. On September 6, 2010, having still not received payment from Respondent, who by then had moved away to a different city, the patient filed a complaint with the Board. On May 12, 2011, the Department of Consumer Affairs Division of Investigation assigned Investigator for this matter, Ms. Tracey Kanno, mailed a letter to Respondent asking that Respondent contact her about this complaint.

21. On May 16, 2011, Respondent contacted Mr. T H. and agreed to pay him $5,995 as follows: an immediate check in the amount of $3,500, with the balance to be sent thereafter in

monthly payments until he reimbursed the patient for the full amount the insurance company had paid Respondent.

22. In his dealings with patient Ms. G H., as alleged above, the Respondent made material misrepresentations of fact, failed to disclose other important facts, and made promises without the intention of performing. By refusing to return his patient's money immediately and only returning the insurance company payment to the patient after being contacted by the Board's investigator, under the circumstances alleged above, Respondent committed fraud.

DISCIPLINE CONSIDERATIONS

23. To determine the degree of discipline, if any, to be imposed on Respondent, Complainant alleges the following disciplinary history: that on or about October 31, 2005, in proceedings entitled *In the Matter of the Accusation Against Randy Jester* before the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board, Case Number D1-2001-29, Respondent admitted all allegations.

As a result of his complete admission in the disciplinary matter alleged above, Respondent was placed on one (1) year's probation which conditions included payment of restitution to the patient, as well as cost recovery for the Board. That decision is now final and is incorporated by reference as if fully set forth.

PRAYER

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

1. Revoking or suspending Hearing Aid Dispenser License number HA 1572, issued to Randy Jester;

2. Ordering him to pay the Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

3. If placed on probation, ordering him to pay to the Board the costs of probation monitoring; and

4. Taking such other and further action as deemed necessary and proper.

DATED: March 29, 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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