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

In the Matter of the Accusation Against: **MARLE A. SCOTT, HAD** **CARLSON'S HEARING AID CENTER** **2329 Hilltop Drive** **Redding, CA 96002** **Hearing Aid Dispenser License No. HA 7065** Respondent.	Case No. 1C-2011-21 **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, Department of Consumer Affairs.

2. On or about July 11, 2006, the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board issued Hearing Aid Dispenser License Number HA 7065 to Marle A. Scott, HAD (Respondent). The Hearing Aid Dispenser License was in full force and effect at all times relevant to the charges brought herein and will expire on July 31, 2012, unless renewed.

JURISDICTION

3. This Accusation is brought before the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board (Board), Department of Consumer Affairs, under the authority

of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2531.5 of the Code states:

"The board shall issue, suspend, and revoke licenses and approvals to practice speech-language pathology and audiology as authorized by this Chapter."

5. Section 2533 of the Code states:

"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; (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; (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 (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 2538.11 of the Code states:

"(a) 'Practice of fitting or selling hearing aids,' as used in this article, 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 necessary postfitting counseling.

"The practice of fitting or selling hearing aids does not include the act of concluding the transaction by a retail clerk.

"When any audiometer or other equipment is used in the practice of fitting or selling hearing aids, it shall be kept properly calibrated and in good working condition, and the calibration of the audiometer or other equipment shall be checked at least annually.

"(b) A hearing aid dispenser shall not conduct diagnostic hearing tests when conducting tests in connection with the practice of fitting or selling hearing aids.

"(c) Hearing tests conducted pursuant to this article shall include those that are in compliance with the Food and Drug Administration Guidelines for Hearing Aid Devices and those that are specifically covered in the licensing examination prepared and administered by the board."

7. Section 2538.35 of the Code states:

"A licensee shall, upon the consummation of a sale of a hearing aid, deliver to the purchaser a written receipt, signed by or on behalf of the licensee, containing all of the following:

"(a) The date of consummation of the sale.

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

"(c) The address of the principal place of business of the licensee, and the address and office hours at which the licensee shall be available for fitting or postfitting adjustments and servicing of the hearing aid or aids sold.

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

"(e) The number of the licensee's license and the name and license number of any other hearing aid dispenser or temporary licensee who provided any recommendation or consultation regarding the purchase of the hearing aid.

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

8. Section 2538.36 of the Code states:

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

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

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

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

"(4) Acute or chronic dizziness.

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

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

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

"(8) Pain or discomfort in the ear.

"(b) No referral for medical opinion need be made by any licensee in the instance of replacement only of a hearing aid that has been lost or damaged beyond repair within one year of the date of purchase. A copy of the written recommendation shall be retained by the licensee for the period provided for in Section 2538.38. A person receiving the written recommendation who elects to purchase a hearing aid shall sign a receipt for the same, and the receipt shall be kept with the other papers retained by the licensee for the period provided for in Section 2538.38. Nothing in this section required to be performed by a licensee shall mean that the licensee is engaged in the diagnosis of illness or the practice of medicine or any other activity prohibited by the provisions of this code."

9. Section 1399.126 of Title 16 of the California Code of Regulations states:

"(a) For purposes of Section [2538.36][1] of the code, a significant air-bone gap is defined as a difference of 15 decibels or more between the higher air conduction and the lower bone conduction pure tone thresholds at 2 or more succeeding octave frequencies of 500 Hertz through and including 4000 Hertz.

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

10. Section 125.3 of the Code states, 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.

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[1] Section 1399.126 of Title 16 of the California Code of Regulations references Code section 3365.5. On January 1, 2012, Code section 3365.5 was repealed and replaced with Code section 2538.36. Stats. 2011, ch. 449, §§ 9, 13.

FIRST CAUSE FOR DISCIPLINE

(Incompetence, Gross Negligence or Repeated Negligent Acts)
[Bus. & Prof. Code § 2533(f)]

11. Respondent is subject to disciplinary action under section 2533(f) in that she failed to appropriately test a patient and select and fit appropriate hearing aids. The circumstances are as follows:

12. On or about June 23, 2009, Respondent tested patient T.Y.[2] for purposes of providing T.Y. with hearing aids. The testing Respondent performed on T.Y. included an audiogram that showed air conduction, bone conduction, most comfortable loudness testing, uncomfortable loudness testing, and speech discrimination were evaluated. The audiogram shows masking was not used for the better ear, bone conduction testing in the left ear only, and presentation level for speech discrimination test was not clear. On January 6, 2010, Respondent performed a second audiogram on patient T.Y. The audiogram shows air conduction, bone conduction, most comfortable loudness level were evaluated but that masking was not used for either air conduction or bone conduction testing.

13. After completing the testing, Respondent recommended and sold a set of Nano 4 Power RICs without molds to T.Y., which were delivered on August 10, 2009. The cost of the instruments was $3,990.00.

14. Patient T.Y. thereafter complained on several occasions that the instruments were not strong enough for his hearing loss and that Respondent should not have recommended them. T.Y. also requested a refund of his purchase. Respondent responded to T.Y.'s complaints by providing T.Y. with custom ear molds to more appropriately fit his hearing loss.

15. After several attempts to adjust T.Y.'s hearing instruments, Respondent decided to upgrade T.Y's instruments to ReSound Live 771. The new hearing instruments were delivered on February 9, 2010. Respondent did not provide T.Y. with a written receipt for the new set of instruments.

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[2] Patient and doctor names are abbreviated herein to protect confidentiality. Full names will be provided upon receipt of a properly executed and served Request for Discovery.

16. Respondent next saw patient T.Y. on June 7, 2010. T.Y. informed Respondent that his hearing loss needs still were not being met by the new instruments. T.Y. also complained of a plugging feeling in his ears. Respondent referred T.Y. to see Dr K., an ear, nose and throat specialist, for the discomfort and possible fungus in T.Y.'s left ear canal.

17. Dr. K. saw patient T.Y. five times and was unable to verify fungus in the left ear or any significant cerumen that would explain the plugged feeling. Dr. K ordered an audiometric evaluation by his staff audiologist and CT scan for further evaluation of T.Y.'s complaints of plugged feeling and poor hearing. The audiometric evaluation revealed very poor hearing above 1000 Hz with fair discrimination in both ears; some asymmetry in the left ear was present, left ear being worse than the right. T.Y. refused the CT scan. Dr. K cleared T.Y. for hearing instruments and requested his staff to re-check T.Y.'s current hearing instruments.

18. Respondent's failure to perform complete bone conduction testing and masking during testing, failure to appropriately select and fit hearing instruments for T.Y., and failure to provide a written receipt for the second set of instruments constitutes incompetence and negligence.

19. Respondent's failure to perform complete bone conduction testing and masking during testing, failure to appropriately select and fit hearing instruments for T.Y., failure to perform post-fitting verification for both sets of instruments, and failure to provide a written receipt for the second set of instruments constitutes repeated acts of negligence.

SECOND CAUSE FOR DISCIPLINE

(Receipt Requirements)
[Bus. & Prof. Code § 2538.35]

20. Complainant realleges paragraphs 12 through 17 above, and incorporates them by reference herein as if fully set forth.

21. Respondent is subject to disciplinary action under Code section 2538.35 in that Respondent failed to provide patient T.Y. with a written receipt for the replacement pair of instruments.

THIRD CAUSE FOR DISCIPLINE

(Inadequate Testing)

[Bus. & Prof. Code §§ 2538.11(c), 2538.36(a)(6); Cal. Code Regs., tit. 16, § 1399.126]

22. Complainant realleges paragraphs 12 through 17 above, and incorporates them by reference herein as if fully set forth.

23. Respondent is subject to disciplinary action under Code sections 2538.11(c), 2538.36(a)(6) and section 1399.126 of Title 16 of the California Code of Regulations in that Respondent failed to perform complete bone conduction testing or use masking during testing on patient T.Y., thereby preventing Respondent from determining whether a medical referral was required and from properly fitting hearing instruments.

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 7065, issued to Marle A. Scott, HAD.

2. Ordering Marle A. Scott, HAD to pay the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

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

DATED: May 30, 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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