

TEXAS BOARD OF CHIROPRACTIC EXAMINERS
William P. Hobby Building
333 Guadalupe, Suite 3-825
Austin, Texas 78701

MINUTES FROM THE FEBRUARY 10, 2011 BOARD MEETING

The Texas Board of Chiropractic Examiners (the Board) met in a regularly scheduled board meeting on February 10, 2011. The meeting was held in the William P. Hobby Building, Tower 2, Room 225, located at 333 Guadalupe Street, Austin, Texas 78701. The meeting was recorded. The following is the official summary of the minutes from that meeting.

1. CALL TO ORDER, ROLL CALL & ESTABLISHMENT OF A QUORUM

Kenneth Perkins, D.C., President (or Presiding Officer)

Call to Order, Roll Call and Establishment of a Quorum

Action Taken: Board President Dr. Perkins called the meeting to order at 1:01 p.m.. The roll was called with the following three board members being absent: Mr. Armando Elizarde absent due to difficulties in making travel arrangements, Mr. Thomas Turner absent due to events surrounding his marriage later in the week, and Ms. Kenya Woodruff, absent due to last-minute pressing business at her place of employment. All six other board members were present and constituted a quorum. Also present were Glenn Parker (Executive Director), Hal ten Brink (General Counsel), Yvette Yarbrough (Board Attorney), Jeb Boyt (Assistant Attorney General), Jennifer Hertsenberg (Director of Licensing), Scott Parker (Director of Enforcement) and Mary Feys (Administrative Assistant for Enforcement).

2. APPROVAL OF MINUTES

Dr. Kenneth Perkins, D.C.

Approval of Minutes from November 4, 2010 Board Meeting

Action Taken: The minutes for the November 4, 2010 board meeting were reviewed and approved.

3. PUBLIC COMMENTS

Dr. Kenneth Perkins, D.C.

Forum for licensees, the general public or other interested stakeholders to address the Board

Action Taken: None. No comments were made during the public comments section.

4. EXECUTIVE COMMITTEE BUSINESS

Dr. Kenneth Perkins, D.C.

4.1 President's Report (*Dr. Perkins*)

Dr. Kenneth Perkins may make a brief oral report to the Board on matters of current interest.

Action Taken: None. This item was for informational purposes only.

4.2 Executive Director's Report (*Glenn Parker*)

Executive Director Glenn Parker will present written and oral reports to the Board concerning recent agency activities, statistical reports, audit outcomes, revenues and expenditures, licensing information, enforcement information and issues in the current legislative session. Mr. Parker will answer questions from the board members concerning agency operations, legislative issues and other matters of concern to the Board.

Action Taken: None. This item was for informational purposes only.

4.3 Discussion of Annual Meetings of FCLB and NBCE and Designation of representatives to FCLB and NBCE

The Board has been asked to name its voting delegates (representatives) for the Federation of Chiropractic Licensing Boards and the National Board of Chiropractic Examiners. The current FCLB representative is Dr. Perkins, with Glenn Parker as the alternate to FCLB. The current NBCE delegate is Dr. Perkins, with Dr. Cynthia Tays as the alternate.

Action Taken: The Board designated Dr. Pat Thomas to serve as the delegate both to FCLB and NBCE. (Dr. Thomas later discovered that he had a conflict with the date. Dr. Cynthia Tays was named as the delegate to FCLB and NBCE in his place with Glenn Parker as the alternate for FCLB.)

4.4 Selection of two board members who are DCs to serve as Examiners for the NBCE Part IV examinations to be held May 13-15, 2011.

Action Taken: Dr. Larry Montgomery and Dr. Kurban were named as prospective examiners for the NBCE Part IV Exam.

4.5 Notification of changes to NBCE Ethics and Boundaries Examination for 2011

Executive Director Glenn Parker will present a brief overview of the NBCE Ethics and Boundaries examination and discuss changes to the exam for 2011.

Action Taken: None. This item was for informational purposes only.

5. LICENSURE AND EDUCATIONAL STANDARDS COMMITTEE BUSINESS

Kathleen Summers, D.C.

- 5.1 The L& E Committee will make its recommendations to the Board concerning the following requests by first-time applicants for approval to sit for the Jurisprudence Examination:

5.1.1 Applicant Kelly Matthews Ryder

5.1.2 Applicant Tracy Don Ellis

Action Taken: The request by Kelly Ryder to take the Jurisprudence Exam was approved. The request by Tracy Ellis was tabled because he did not appear. The Board has informed him that he will need to appear before the Board if he wants to be considered to take the Jurisprudence Examination.

- 5.2 Request to Take the Jurisprudence Exam for Reinstatement of License

5.2.1 Mike Maddox (former DC License #04162)

Action Taken: By a vote of 5-1, the Board voted to deny Mr. Maddox's request to take the Jurisprudence Examination and be reinstated.

- 5.3 Specialty Recognition Applications

5.3.1 Discussion of purpose of specialty recognition by the TBCE

Action Taken: None – for discussion purposes only.

5.3.2 Chiropractic Neurology – American Chiropractic Neurology Board

Action Taken: The Board approved the specialty recognition application from the Chiropractic Neurology Board.

5.3.3 Nutrition – American Clinical Board of Nutrition

Action Taken: The Board tabled the request for special recognition submitted by the American Clinical Board of Nutrition and will consider it at a future meeting.

- 5.4 Comments from Committee Chair Dr. Kathleen Summers concerning Committee business, activities or issues.

Action Taken: None.

NOTE: The presiding officer may choose to go to Item #8 (Executive Session) and Item #9 (Consideration of Motions in Regard to Executive Session) at this point. An update from the Board's attorney regarding the TMA lawsuit may have an effect on consideration of some items under the Rules Committee portion of the agenda.

Action Taken: The Board went into Executive Session after consideration of the L&E Committee items and discussed the items on the Executive Session agenda, primarily concerning the lawsuits filed against the Board by the Texas Medical Association. No votes were taken on any of those items, either in Executive Session or later after the Board returned to Open Session. The Board resumed in Open Session and continued to work through the remaining agenda items.

6. RULES COMMITTEE BUSINESS

Janette Kurban, D.C.

6.1 Consideration of Previously Proposed New Rules or Rule Amendments Eligible for Adoption

6.1.1 Consideration to adopt proposed amendment to Rule 73.3 concerning requiring 8 CE hours of Medicare coding/documentation.

Action Taken: The Board approved the motion to adopt the proposed amendments to Rule 73.3 by a vote of 3-2 with one abstaining.

6.1.2 Consideration to adopt proposed amendments to Rule 75.17 Scope to bring the Rule into compliance with recent judicial decisions. Several comments in opposition to the proposed rule were received by the agency. The staff recommendation is to withdraw the proposed rule amendments.

Action Taken: The Board voted to withdraw the proposed amendment to Rule 75.17 by a vote of 5-0 with one abstaining.

6.1.3 Consideration to adopt proposed new Rule 80.13 or other Rule number as determined by counsel to restrict use of prepaid contracts for multiple visits or treatments and to adopt inclusion of failing to comply with requirements of prepaid plans as a Category One violation in the Maximum Sanctions Table (Penalty Matrix).

Action Taken: The Board voted to adopt the proposed new Rule 80.13 by a vote of 5-0 with one abstaining.

6.1.4 Consideration to adopt previously proposed amendments to rule 71.3 Applications and Applicants to remove sections that have become obsolete due to changes to admissions requirements to chiropractic colleges made by the Council on Chiropractic Education (the accrediting body for chiropractic schools). The proposed amendments were published in the November 26, 2010 edition of the Texas

Register. No comments were received in opposition to the proposed amendments.

Action Taken: The Board voted to adopt the proposed amendments to Rule 71.3 by a vote of 5-0 with one abstaining.

6.2 Consideration of Proposals for New Rules or Amendments to Existing Rules

6.2.1 Consideration of proposed amendments to Rule 75.17 Scope. Staff will present the Rules Committee and the Board with one or two proposals for amendments to Rule 75.17 and ask for direction on which (if either) to publish for consideration and will also ask for direction on developing an entirely new Scope of Practice Rule for consideration at the May 2011 board meeting.

Action Taken: None. This item was withdrawn to allow the Rules Committee to have a public hearing on Rule 75.17 Scope of Practice in March

6.2.2 Consideration to propose amendment to Rule 75.19 Cease and Desist Orders to clarify that the Rule requires the Board to offer a formal (not informal) hearing to a respondent prior to issuing a Cease and Desist Order for practicing chiropractic without a license or for operating an unregistered chiropractic facility. This proposed rule change is being offered on advice of the Board's General Counsel.

Action Taken: None. This agenda item was tabled for further research and discussion by the Board's legal advisors.

6.2.3 Consideration to propose amendment to Rule 78.1 Registration of Chiropractic Radiologic Technologists (Rad-Techs) to remove the requirement that a Rad-Tech must show proof of continuing education upon renewal. TBCE needs only to require a Rad Tech to provide proof that they are currently registered with the Department of State Health Services or that the employing DC has a current hardship exemption form approved by DSHS. The current rule places an unnecessary burden on TBCE to confirm continuing education hours for Rad Techs. This proposed rule change is being requested by the Executive Director to reduce unnecessary processing requirements.

Action Taken: The Board approved publishing this proposed amendment to Rule 78.1 in the Texas Register for public notice and comments.

- 6.2.4 Consideration to propose new Rule 77.5 Misleading Claims to the advertising section of Board Rules to further clarify advertising requirements and prohibitions (e.g., advertising out of scope, unsupported claims, etc.)

Action Taken: The Board approved publishing proposed new Rule 77.5 in the Texas Register for public notice and comment.

- 6.2.5 Consideration to propose amendments to Rule 75.11 Schedule of Sanctions to revise the Maximum Sanctions Table to:

- (1) move "Failure to Respond to Board Inquiries" from Category Four to Category One
- (2) move "Failure to Report Criminal Conviction" from Category Five to Category One
- (3) Add "Practicing Outside Scope" to the Table as a Category One offense
- (4) Add "Violation of Rule 80.13 - Prepaid Treatment Plans" to Category One

Action Taken: The Board approved publishing the proposed amendments to Rule 75.11 in the Texas Register for public notice and comments.

- 6.2.6 Consideration of proposed amendment to Rule 77.2 Publicity to require licensees who use the term "board certified" or similar terminology to identify in any form of public communication to identify in that communication the board certifying said credentials.

Action Taken: The Board approved the motion to publish the proposed amendment to Rule 77.2 in the Texas Register for public notice and comments.

6.3 Scope of Practice Questions and Issues

- 6.3.1 Reconsideration of the following question from staff: May a licensed chiropractor advertise to treat, claim to treat, attempt to treat, or treat a patient for Type II Diabetes?

Action Taken: The Board directed staff to amend Rule 75.17 Scope to specify that the treatment of Type II Diabetes is not within scope of practice. However, doctors of chiropractic may treat patients who have Type II Diabetes for other issues that are within scope.

- 6.3.2 Reconsideration of the following question from staff: May a licensed chiropractor advertise to treat, claim to treat, attempt to

treat, or treat a patient for thyroid problems (hypo or hyper thyroidism)?

Action Taken: The Board directed staff to amend Rule 75.17 Scope to specify that the treatment of thyroid issues is not within scope of practice. However, licensees may treat patients who suffer from thyroid issues for other conditions that are within scope.

- 6.3.3 Can you tell me if chiropractors are allowed to practice homeopathy in your state? Is homeopathy within the scope of practice in your state or are chiropractors specifically excluded from practicing homeopathy? Asked by Sharon Stevenson, Executive Director, National Center for Homeopathy.

Action Taken: The Board directed staff to write a letter to the person who asked this question and explain that chiropractors practice chiropractic, but in Texas are allowed to use homeopathic remedies in the treatment of patients for conditions that within the scope of practice.

- 6.3.4 A practicing DC asked agency staff for direction “about what I can say as far as treatment of ear infections.” A copy of his email is attached. The staff defers his question to the Board. The question is as follows:

“I operate an all cash practice in the Austin/Hill Country Area and have a question about what I can say as far as treatment for ear infections. I understand that you [staff] are not a Chiropractor and may not know about the efficacy of Chiropractic in the treatment of ear infections. I understand that I cannot “guarantee” or “cure” any ailment of any kind. We have many kids in our practice but would like to help many more who don’t know the benefits of Chiropractic. We currently treat kids 10yo and younger for \$500 per year. They are able to come three or four times per month. We encourage them to come weekly to be checked. I would like to hand out a flyer that says something like this:

WITH REGULAR TREATMENT WE BELIEVE THAT WE CAN HELP YOUR CHILDREN WITH EAR INFECTIONS! WE ARE SO CONFIDENT THAT WE CAN HELP THAT WE ARE PUTTING OUR MONEY WHERE OUR MOUTH IS BY REFUNDING YOUR MONEY IF UNDER REGULAR TREATMENT YOUR CHILD GETS AN EAR INFECTION! CALL US FOR DETAILS...

Let me know what you think and what you might change so that I can start to help more kids in my community.”

Action Taken: The Board deferred consideration of this question to a future board meeting.

6.3.5 Is “Dry Needling” within scope of practice?

Action Taken: The Board directed staff to amend Rule 75.17 Scope and/or Rule 75.21 acupuncture to specify that “dry needling” is a type of acupuncture and may only be performed by licensees who are qualified in accordance with Board rules to perform acupuncture.

6.3.6 Is the Use of Laser to Treat Toe Fungus within scope of practice?

Action Taken: The Board determined that the use of a laser to treat toenail fungus is primarily cosmetic and therefore is not within the scope of practice for licensees and directed staff to amend Rule 75.17 scope to reflect that it is not in scope.

6.3.7 Is it within scope of practice for a DC to conduct Screening of arteries to determine the risk of stroke or a heart attack?

Action Taken: The Board directed staff to amend Rule 75.17 Scope to specify that a DC may use arterial screening to assess the risk of a heart attack if the screening is done in the doctor’s office as part of a doctor-patient relationship, but may not review assessments of individuals at “mass screenings” where there is no one-to-one doctor-patient relationship.

6.3.8 Is the Performance of video fluoroscopy within scope and is having a radiology diplomate the only acceptable qualification for a DC who performs the procedure?

Action Taken: The Board directed staff to amend Rule 75.17 Scope to specify that video fluoroscopy may be performed only by licensees who hold a diplomate in radiology from a CCE approved postgraduate program.

6.3.9 Is it within scope of practice for a DC to use an oxygen concentrator (not bottled oxygen) as part of the treatment of a patient?

Action Taken: The Board directed staff to amend Rule 75.17 scope to specify that oxygen therapy is not within scope.

6.3.10 Is it within scope of practice for a DC to perform an “internal coccyx adjustment” or to perform a manual lymphatic drainage near a female’s breast?

Action Taken: The Board determined that it believes both procedures are within scope of practice and directed staff to develop guidelines for both procedures for board consideration. Rule 75.17 Scope will be amended once the guidelines have been approved.

6.4 Other Rules Questions

- 6.4.1 James D. Edwards, D.C. has written to the Board asking for clarification on Rule 77.3 Miscellaneous concerning a DC being required to provide to the patient in writing the full amount of the licensee's charges for that date. A copy of his question is attached.

Dr. Edwards quotes Rule 77.3 in full and then asks, "Based on those provisions, it is very clear that the patient must be shown in writing the licensee's charges for that day. However, there is no requirement for the patient to sign the document, and no requirement for the licensee to retain the document."

Dr. Edwards continues, "If the TBCE desires to implement any of those requirements – including the length of time the licensee must retain the documentation – I believe a review of the rule would be in order. In the interim, I request written confirmation that my interpretations of the current rule are correct."

Staff will draft a rule amendment to address Dr. Edwards' concerns.

Action Taken: The Board chose not to propose any changes to Rule 77.3 in response to Dr. Edward's request.

6.5 Update on other issues under consideration by the Committee

Comments from Committee chair Dr. Janette Kurban concerning Committee business, activities or issues.

Action Taken: None

7. ENFORCEMENT COMMITTEE BUSINESS

Dr. Cynthia Tays, D.C.

7.1 Consideration of SOAH Proposals for Decisions

- 7.1.1 Consideration of SOAH Proposal for Decision in regard to the Case #108-115 concerning licensee Michael McClung, License #2891. (Hal ten Brink to present)

Action Taken: None. This item was deferred until the May 2011 board meeting.

- 7.1.2 Consideration of SOAH Proposal for Decision in regard to Case #105-135 concerning licensee Eric Vanderwerff, License #407199. (Hal ten Brink to present)

Action Taken: None. This item was deferred until the May 2011 board meeting.

- 7.2 Consideration of Accepted Agreed Orders: The Board will consider approval of the following Agreed Orders that have been recommended by the Enforcement Committee and accepted by the Respondents.

- 7.2.1 Case #108-036
- 7.2.2 Case #108-052
- 7.2.3 Case #108-107
- 7.2.4 Case #108-204
- 7.2.5 Case #110-121
- 7.2.6 Case #110-172
- 7.2.7 Case #110-215
- 7.2.8 Case #111-029
- 7.2.9 Case #110-248
- 7.2.10 Case #107-200
- 7.2.11 Case #108-208
- 7.2.12 Case #110-150
- 7.2.13 Case #110-118

Action Taken: The Board approved all the Proposed Agreed Orders for the cases listed above.

- 7.3 Recommendations to Approve or Deny Requests to Expunge Records

There are no requests to expunge records for consideration at this meeting.

Action Taken: None

- 7.4 Statutory Suspensions or Revocations for Felony Convictions and/or Imprisonment

There are no statutory suspensions or revocations for consideration at this meeting.

Action Taken: None

- 7.5 Comments from Enforcement Chair Dr. Cynthia Tays on any Committee business, activities or issues.

Action Taken: None

8. EXECUTIVE SESSION

Dr. Kenneth Perkins, D.C.

The Board may meet in Executive Session for:

Consultation with counsel pursuant to Section 551.071, Government Code wherein the Board and essential staff will receive a briefing from assigned Assistant Attorney

General and General Counsel concerning pending or contemplated litigation and settlement offers including but not limited to:

- 8.1 Texas Medical Association lawsuit against the Board, including Board's appeal, concerning MUA, Needle EMG and Diagnosis.
- 8.2 Newly filed Texas Medical Association lawsuit against the Board regarding Rule 75.17 Scope allowing DCs to perform Vestibular-Ocular-Nystagmus testing.
- 8.3 TBCE vs. Abbott regarding disclosure of some contents of Board investigative files

The Board will reconvene in open session after Executive Session to vote on items considered in Executive Session as necessary.

Action Taken: None

9. CONSIDERATION OF MOTIONS RELATED TO EXECUTIVE SESSION

Board members will have the opportunity to offer motions related to any items discussed in Executive Session.

Action Taken: None. There were no motions made relative to the items discussed in Executive Session.

10. CALL FOR FUTURE ITEMS for discussion and/or consideration by the Board *Dr. Kenneth Perkins, D.C.*

Action Taken: None. Dr. Perkins called for future items. One member suggested considering a rule to limit the use of the term "specializing in..." A second member suggested further exploration of use of continuing education as available through CCE courses and programs.

11. BOARD PLANNING SESSION

This agenda item is intended to provide board and staff with the opportunity to discuss a wide range of issues to help the board and agency staff determine which issues need to be addressed at future board meetings, but not to make final decisions related to any of the issues discussed. Board members and staff will engage in an open discussion to identify issues of concern to the board and staff related to the board's mission, philosophy, operations, committee activities, opportunities for improvement, plans and anything else related to the board's fulfilling its responsibilities. Dr. Perkins may also open the floor for public input. This agenda item may include a discussion of what the Board would like to achieve in the next 24-30 months (through the 2012-2013 biennium).

Action Taken: None. This item was cancelled.

12. MEETING DATES & ADJOURNMENT

Dr. Kenneth Perkins, D.C.

12.1 The planned Board meeting dates for Calendar Years 2011 & 2012 are:

- | | |
|-----------------------|-----------------------|
| (1) February 10, 2011 | (5) February 23, 2012 |
| (2) May 19, 2011 | (6) May 24, 2012 |
| (3) August 11, 2011 | (7) August 16, 2012 |
| (4) November 17, 2011 | (8) November 15, 2012 |

*Note: All planned board meeting dates through 2015 may be found on the agency's website (under "Calendar") at: www.tbce.state.tx.us. All dates are tentative until posted in the Texas Register.

12.2 The next Enforcement Committee dates are scheduled for:

- (1) March 8, 2011
- (2) No other EC meetings have been scheduled as of January 26.

12.3 Adjournment at: 4:37 PM.

Action Taken: The meeting was adjourned at 4:37 p.m.

Statement: I affirm that the above is a true and correct rendering of the minutes for the Texas Board of Chiropractic Examiners Board Meeting held on the above referenced date. These minutes from the board meeting held on February 11, 2011 were approved by the Texas Board of Chiropractic Examiners at its next regularly scheduled board meeting held on May 19, 2011.

Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners

May 19, 2011
Date