

BEFORE THE MINNESOTA
COMMISSIONER OF HEALTH

In the Matter of Jim Nidelkoff,
Hearing Instrument Dispenser

STIPULATION
AND CONSENT ORDER

HDL-97967

IT IS HEREBY STIPULATED AND AGREED by Jim Nidelkoff, (hereinafter "Practitioner"), and the Minnesota Department of Health (hereinafter "Department"), and that without trial or adjudication of any issue of fact or law herein:

1. Except as otherwise specified herein, this Stipulation and Order, investigative reports, and related documents shall constitute the entire record herein upon which this Order is based and shall be filed with the Department. The Stipulation and Order is public data pursuant to the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13 ("MGDPA"). All other data comprising the record shall not be considered a part of this Stipulation and Order and shall maintain the data classifications to which they are entitled under the MGDPA. The following shall constitute the factual basis for the Order:

a. The Department granted Practitioner hearing instrument dispenser trainee authorization on March 26, 1996 with an expiration date of March 31, 1997. Practitioner's certified dispenser supervisor was Ms. Linda Logan;

b. On May 6, 1997, the Department granted hearing instrument dispenser certification to Practitioner with an effective date of May 6, 1997 and an expiration date of October 31, 1997. In a letter dated October 22, 1997, the Department notified Practitioner that it approved Practitioner's certification renewal with an effective date of November 1, 1997 and an expiration date of October 31, 1998;

c. On July 11, 1996, Practitioner sold a right canal hearing instrument to M.S. in the amount of \$250.00;

1. M.S. received the hearing instrument on August 8, 1996. After about one month of use, M.S. contacted Practitioner to inform him that she was experiencing soreness in her ear;

2. In response to M.S.' complaint of discomfort, Practitioner tested M.S.' hearing instrument and informed M.S. that the instrument was properly functioning;

3. M.S. continued to experience soreness in her ear when wearing the hearing instrument and contacted Practitioner a second time. M.S. informed Practitioner that she wanted to return the aid for a full refund. Practitioner informed M.S. that

she was beyond her 35- day refund period and refused to issue a refund. Practitioner also advised M.S. that she merely needed to adjust to the aid;

4. M.S.' ear soreness continued. On Practitioner's last service visit with M.S. in December 1996, M.S. presented Practitioner with a physician's letter which stated that M.S. could not wear the hearing instrument due to the pressure placed in her ear which aggravated her TMJ dysfunction. Practitioner then accepted M.S.' return of the hearing aid, only to mail the aid back to M.S. four days later;

d. In a letter dated February 27, 1997, the Department advised Practitioner that it had received a complaint about his services to M.S.;

e. In a letter dated March 10, 1997 to Department staff, Practitioner responded to the allegations by stating that, in his opinion, M.S. experienced soreness due to improper insertion of the aid. Practitioner stated that he was not aware of M.S.' TMJ problems until December 1996;

f. On October 29, 1997, the Department in conjunction with the Hearing Instrument Dispenser Competency Review Committee reviewed this matter and made the following conclusions and recommendations:

1. Hearing instrument dispensers must competently fit hearing aids. Practitioner did not properly fit M.S.' hearing aid, nor did he ask M.S. how the aid fit and performed. The Department concluded that Practitioner did not fit M.S.' aid properly;

2. Hearing instrument dispensers must complete a case history of the client's hearing when conducting a hearing test for the purpose of selling a hearing instrument. Practitioner failed to ask M.S. whether she had medical conditions that might warrant referral to a physician, despite Practitioner's knowledge at the time the audiogram was performed that M.S. had a history of dizziness and was treated with Antivert. The Department concluded that Practitioner failed to properly assess M.S.' case history;

2. Practitioner admits and acknowledges that, for purposes of this Stipulation and Consent Order and any future disciplinary proceedings, proof at hearing that Practitioner failed to complete a thorough case history and failed to competently fit M.S.' hearing instrument, as referenced in paragraph one, would constitute a violation of Minn. Stat. § 153A.15, subd. 1(12)(performing services of an authorized hearing instrument dispenser in an incompetent or negligent manner) and would justify enforcement action by the Commissioner under Minn. Stat. § 153A.15, subd. 2;

3. Practitioner expressly waives the formal hearing and all other procedures before the Commissioner of Health to which Practitioner may be entitled under the Minnesota or United States constitutions, statutes, or rules;

4. Upon this Stipulation record, as set forth in paragraph one above, and without any further notice of proceedings, the Commissioner hereby **ORDERS**:

a. That within nine months of the effective date of this order, Practitioner shall complete additional continuing education training in hearing instrument fitting modification and provide the Department with proof thereof;

b. That within thirty days of the effective date of this order, Practitioner shall refund to M.S. \$255.00 and provide the Department with proof thereof;

c. That within thirty days of the effective date of this order, Practitioner shall pay a civil penalty of \$141.20 to the Department, pursuant to Minn. Stat. § 153A.15, subd. 2(4), to reimburse the Department for the costs of its investigation. Practitioner shall remit the \$141.20 civil penalty, by check or money order, made payable to "State of Minnesota, Treasurer," to: Legal Analyst, Minnesota Department of Health, Health Occupations Program, 121 East Seventh Place, P.O. Box 64975, St. Paul, MN 55164-0975;

5. This Stipulation and Consent Order shall not in any way or manner limit or affect the authority of the Commissioner to proceed against Practitioner by initiating a contested case hearing or by other appropriate means on the basis of any act, conduct, or admission of the Practitioner, justifying disciplinary action which occurred before or after the date of this stipulation and which is not directly related to specific acts and circumstances set forth herein;

6. In the event the Commissioner in her discretion does not approve this settlement or a lesser remedy than specified herein, this Stipulation and Order shall be of no evidentiary value and shall not be relied upon or used for any purpose by either party. If this should occur and thereafter an administrative contested case is initiated pursuant to Minn. Stat. Chapter 14 and Minn. Stat. § 153A.15, Practitioner agrees he will assert no claim that the Commissioner was precluded by her review and consideration of this Stipulation or any records relating hereto;

7. This Stipulation contains the entire agreement between the parties, there being no other agreement of any kind, verbal or otherwise, which varies this Stipulation. Practitioner understands that this agreement is subject to the Commissioner's approval. If the Commissioner either approves the Stipulation or makes changes acceptable to the Practitioner, an Order will be issued by the Commissioner. Upon this Stipulation and Consent Order and all other evidence made available to the Commissioner, once the Commissioner has approved it, the Commissioner may issue the Stipulation and Consent Order to Practitioner at any time without further notice;

8. A copy of the Stipulation and Consent Order when issued by the Commissioner, shall be served by first class mail on Practitioner, at Practitioner's last known address. Service via first class mail shall be considered personal service upon Practitioner, at which time this Stipulation and Consent Order shall become effective. Any appropriate federal or state court shall, upon application of the Commissioner, enter its decree enforcing the Order of the Commissioner;

CONSENT:


Practitioner hereby acknowledges that he has read, understood, and agreed to this Stipulation and Consent Order and has freely and voluntarily signed it.

Dated: 7/18, 1998



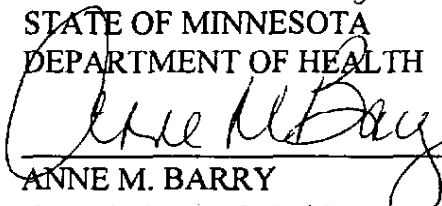
Jim Nidelkoff, Practitioner

Dated: 8/3, 1998



Susan Winkelmann
Investigations and Enforcement Supervisor
Health Occupations Program

Upon consideration of this stipulation and all the files, records and proceedings herein by the Commissioner, **IT IS HEREBY ORDERED** that the terms of this stipulation are adopted and implemented by the Commissioner on this 12th day of August, 1998.

STATE OF MINNESOTA
DEPARTMENT OF HEALTH


ANNE M. BARRY
Commissioner of Health