

Effective 12-26-90
HDL-90201

STATE OF MINNESOTA
COUNTY OF HENNEPIN

BEFORE THE MINNESOTA
COMMISSIONER OF HEALTH

In the Matter of Andrew Benson,
Hearing Instrument Seller

STIPULATION
AND CONSENT ORDER

IT IS HEREBY STIPULATED AND AGREED by Andrew Benson, (hereinafter "Hearing Instrument Seller", or "HIS"), and the Minnesota Department of Health (hereinafter "Department"), and that without trial or adjudication of any issue of fact or law herein and without any evidence or admission by any party with respect to any issue:

1. During all times herein, HIS has been and is subject to the jurisdiction of the Commissioner;
2. HIS does not have a valid hearing instrument seller permit issued by the Commissioner of Health;
3. HIS sold hearing instruments in Minnesota on February 4, 1989, and on May 18, 1990;
4. HIS is currently selling hearing instruments in Minnesota without a valid permit issued by the Commissioner of Health;
5. HIS' business address is Benson Hearing Aid Center, 1124 34th Avenue North, St. Cloud, Minnesota, 56303;
6. Regarding F.M., MDH File Number 90201;
 - a. On February 4, 1989, F.M. signed a purchase agreement to purchase one instrument from HIS for the price of \$596;
 - b. F.M. paid HIS a total of \$596 on March 16, 1989 on the same day it was delivered;
 - c. F.M. had difficulties with the instrument's volume and power and HIS returned the instrument to the manufacturer for repairs after a few weeks;
 - d. After HIS returned the instrument to F.M., F.M. still had trouble with the instrument and F.M. returned the instrument to HIS for a refund on July 30, 1989;
 - e. F.M. contacted an attorney in this matter and HIS agreed to provide a refund to F.M. in three equal installments over a three month period;

f. HIS made a refund payment on November 8, 1989, to F.M. in the amount of \$198;

g. HIS made a refund payment on January 15, 1990, to F.M. in the amount of \$198;

h. HIS made a final refund payment on July 9, 1990, to F.M. in the amount of \$200;

i. HIS used a purchase contract that did not comply with Minnesota Statutes, sec. 145.43, subd. 1a (b);

j. In a letter dated August 21, 1990, Health Occupations Program staff notified HIS of the complaint and requested that HIS respond in writing by September 2, 1990;

k. In the letter dated August 21, 1990, Health Occupations Program staff notified HIS of the following:

1) the facts in this matter as outlined in paragraphs 'a' through and including 'g' and paragraph 'i';

2) Minnesota Statutes, sec. 145.43, subd. 1a (b) requires hearing instrument sellers to provide the following language on all contracts, "MINNESOTA STATE LAW GIVES THE BUYER THE RIGHT TO CANCEL THIS PURCHASE FOR ANY REASON AT ANY TIME PRIOR TO MIDNIGHT OF THE 30TH CALENDAR DAY AFTER RECEIPT OF THE HEARING AID(S). IF THE BUYER DECIDES TO RETURN THE HEARING AID(S) WITHIN THIS 30-DAY PERIOD, THE BUYER WILL RECEIVE A REFUND OF \$.....";

3) Minnesota Statutes, sec. 153A.15, subd. 1 (6) prohibits hearing instrument sellers from engaging in conduct likely to deceive, defraud, or harm the public; or demonstrating a willful or careless disregard for the health, welfare, or safety of a consumer;

4) Minnesota Statutes, sec. 153A.15, subd. 2 states that when the Commissioner of Health finds that a seller of hearing instruments has violated one or more provisions of sections 153A.13 to 153A.16, the Commissioner may impose an enforcement action against the seller;

l. In a letter dated August 25, 1990, HIS responded in writing to the Department's August 21, 1990 letter;

7. Regarding W.L., MDH File Number 90223;

a. On May 18, 1990, W.L. signed a purchase agreement agreeing to purchase one hearing instrument from HIS for the price of \$630;

- b. W.L. paid HIS the \$630 on the date he signed the purchase agreement;
- c. HIS failed to deliver the instrument to W.L.;
- d. On July 30, 1990, W.L. cancelled the transaction and requested a refund;
- e. In a letter dated August 20, 1990, Health Occupations Program staff notified HIS of the following:
 - 1) the facts as contained in paragraphs 'a' through and including 'd';
 - 2) the purchase agreement used in the sales transaction did not comply with Minnesota Statutes, sec. 145.43, subd. 1a (a);
 - 3) Minnesota Statutes, sec. 153A.15, subd. 1 (6) prohibits hearing instrument sellers from engaging in conduct likely to deceive, defraud, or harm the public; or demonstrating a willful or careless disregard for the health, welfare or safety of a consumer;
 - 4) Minnesota Statutes, sec. 153A.15, subd. 1 (9) prohibits hearing instrument sellers from obtaining money, property, or services from a consumer through the use of undue influence, high pressure sales, harassment, duress, deception, or fraud;
 - 5) Minnesota Statutes, sec. 153A.15, subd. 2 states that when the Commissioner of Health finds that a seller of hearing instruments has violated one or more provisions of sections 153A.13 to 153A.16, the Commissioner may impose an enforcement action against the seller;
 - 6) the Commissioner of Health has authority over anyone who sells hearing instruments in Minnesota even if that person is not properly registered with the Commissioner of Health;
- f. Health Occupations staff requested a written response from HIS by September 1, 1990;
- g. HIS did not respond in writing to the Department by September 1, 1990;
- h. Health Occupations Program staff attached a copy of their August 20, 1990 letter to the one dated September 11, 1990, and requested a written response by September 18, 1990;
- i. Health Occupations Program staff notified HIS of the following:
 - 1) Minnesota Rules, Part 4692.0030, subp. 4.A.(5) and subp. 5.A.(4)

allows the Commissioner of Health to deny an application for a hearing instrument seller permit or suspend or revoke a hearing instrument seller permit if there is evidence that the applicant or permit holder did not make good faith efforts to comply with the Commissioner's internal operating procedures for the hearing instrument seller complaint system;

2) Minnesota Statutes, sec. 153A.15, subd. 2 states that when the Commissioner of Health finds that a seller of hearing instruments has violated one or more provisions of sections 153A.13 to 153A.16, the Commissioner may impose an enforcement action against the seller;

3) the Commissioner of Health has authority over anyone who sells hearing instruments in Minnesota even if that person is not properly registered with the Commissioner;

j. As of November 28, 1990, HIS has not responded to the Health Occupations Staff's request for a written response regarding the matter of W.L.;

8. For the purposes of this stipulation, HIS expressly waives all procedures and proceedings before the Commissioner of Health to which HIS may be entitled under the Minnesota and/or United States constitutions, statutes, or rules and also waives the right to any judicial review or appeal under the Administrative Procedure Act, by writ of certiorari under Minn. Stat. sec. 480A or otherwise from the order issued by the Commissioner of Health pursuant to this stipulation;

9. Except as otherwise specified herein, this Stipulation and Consent Order, investigative reports, and related documents shall constitute the entire record of the proceedings herein upon which this order is based and shall be filing with the Department. Any reports and other material related to this action and received after the date of this Stipulation and Consent Order is executed shall become a part of this proceeding. These items shall maintain the data classification to which they are entitled under the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13. They shall not be considered a part of this Stipulation and Consent Order and shall not, to the extent they are not already public documents, become public merely because they are referenced herein;

10. In the event the Commissioner in her discretion does not approve this settlement, or a lesser remedy than specified herein, this Stipulation and Consent Order shall be null and void and shall not be used for any purpose by either party thereto; provided, however, that if this should occur and thereafter an administrative contested case is initiated pursuant to Minn. Stat. Ch. 14 and sec 153A.15, HIS agrees he will not raise any objection on any administrative level or in any court action to the Department's proceeding and hearing the case on the basis that the Commissioner has become disqualified due to her review and consideration by the stipulation and

record. In exchange for this agreement by HIS, the Commissioner agrees, in the event she does not approve this stipulation, to grant HIS all legal rights and remedies available to him under the Minnesota and United States constitutions, Minnesota statutes, and rules of the Department, except as expressly provided in this paragraph;

11. HIS does not contest the facts referred to below:

a. HIS sold hearing instruments in Minnesota on February 4, 1989 and on May 18, 1990;

b. HIS sold hearing instruments illegally after March 14, 1990 when it became illegal to sell hearing instruments in Minnesota without a valid permit issued by the Commissioner of Health;

c. HIS is currently selling hearing instruments in Minnesota without a valid permit issued by the Commissioner of Health;

d. HIS' business address is Benson Hearing Aid Center, 1124 34th Avenue North, St. Cloud, Minnesota 56303;

e. HIS did not provide F.M. with his refund in three monthly installments as promised;

f. HIS did not deliver W.L.'s hearing instrument as agreed to in the purchase agreement signed by HIS and W.L. on May 18, 1990;

g. HIS did not refund W.L.'s money;

h. With both F.M. and W.L., HIS did not comply with Minnesota Statutes, sec. 145.43, subd. 1a (b) because the following language was not printed on either purchase agreement: MINNESOTA STATE LAW GIVES THE BUYER THE RIGHT TO CANCEL THIS PURCHASE FOR ANY REASON AT ANY TIME PRIOR TO MIDNIGHT OF THE 30TH DAY CALENDAR AFTER RECEIPT OF THE HEARING AID(S). IF THE BUYER DECIDES TO RETURN THE HEARING AID(S) WITHIN THIS 30 DAY PERIOD, THE BUYER WILL RECEIVE A REFUND OF \$....(State the dollar amount of refund.)"

12. HIS acknowledges that the facts and conduct specified in paragraphs 2-4, 6-7 and 11 above constitute a violation of Minnesota Statutes, sec. 153A.14, subd. 1 and subd. 4, sec. 145.43, subd. 1a (b), 153A.15, subd. 1 (6), and 153A.15, subd. 1 (9), and provide a reasonable basis in law and fact to justify the action provided for in this order;

13. HIS acknowledges and admits that proof at hearing of any one or more of the facts and conduct specified in paragraphs 2-4, 6-7 and 11 above, including proof by the Department's introduction of admissions made by HIS to Department's staff, would authorize the Commissioner of Health to take action against HIS pursuant to Minnesota Statutes, sec. 153A.15, subd. 2 (1988);

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

15. Upon this Stipulation and Consent Order and all of the facts, records, and proceedings herein, and without further notice or hearing herein, HIS does hereby consent that the Commissioner may make and enter an order affecting HIS as follows:

a. HIS agrees to remit to the Department the amount of \$10 per each working day the HIS did not have a valid permit issued by the Commissioner since March 14, 1990 to the date of the order. HIS may pay the civil penalty in six monthly installments from the date of the Order. HIS shall remit each installment on the first day of each month to: Hearing Instrument Sales Analyst, Health Occupations Program, Health Systems Development, 717 S.E. Delaware Street, P.O. Box 9441, Minneapolis, Minnesota 55440.

b. HIS agrees to cease selling hearing instruments until such time as he obtains a valid hearing instrument seller permit issued by the Commissioner of Health;

c. HIS agrees to accept a written Letter of Reprimand from the Commissioner of Health;

d. HIS understands that pursuant to Minnesota Statutes, sec. 13.41, subd. 4, final action in this matter is public information;

e. HIS agrees to comply with Minnesota Statutes, sec. 153A.14, subd. 1;

f. HIS agrees to comply with Minnesota Statutes, sec. 153A.14, subd. 4;

g. HIS agrees to comply with Minnesota Statutes, sec. 145.43, subd. 1a (b);

h. HIS agrees to comply with Minnesota Statutes, sec. 153A.15, subd. 1 (6);

i. HIS agrees to comply with Minnesota Statutes, sec. 153A.15, subd. 1 (9);

16. HIS' violation of any of the terms and conditions specified in this Stipulation and Consent Order constitutes a basis for further action by the Commissioner of Health under Minnesota Statutes, sec. 153A.15, subd. 2 (1988);

17. HIS hereby acknowledges that he has read and understood this Stipulation and Consent Order, and agrees to this Stipulation and Consent Order and has freely and voluntarily signed the Stipulation without threat or promise by the Commissioner or any of her employees, or agents. When signing the stipulation, HIS acknowledges that he is fully aware that the Stipulation and Consent Order must be approved by the Commissioner. The Commissioner may either approve the Stipulation and Order as proposed, approve it subject to specified changes or reject it. If the Commissioner approves the stipulation or makes a change acceptable to HIS, the Commissioner will issue the Order and the Stipulation will take effect. If the changes are unacceptable to HIS or the Commissioner rejects the Stipulation and Order, it will be of no effect, except as specified in paragraph 10 above;

18. If the Commissioner or one of her employees or agents receives evidence that HIS has violated the terms of the Stipulation and Consent Order, or has made misrepresentations to the Department, the Commissioner shall so notify the HIS in writing at his last known address. HIS shall have the opportunity to contest the allegations by submitting a written request to so contest within 30 days after service of the Notice of Opportunity to Contest Allegations:

a. If HIS does not submit a written request to contest the allegations within 30 days of service of the notice, the issues set forth in the notice may be taken as true or deemed proven without further evidence. Upon a report to the Commissioner of such allegations and of HIS' failure to contest, the Commissioner may impose additional disciplinary action. Any Commissioner order issued under this paragraph shall be final and binding upon HIS and shall not be subject to judicial or administrative review or to a judicial stay pending any attempts to seek such review;

b. If HIS submits a written request to contest the allegations, the Commissioner may initiate either a proceeding conducted pursuant to Minnesota Statutes, chapter 153A or a contested case hearing pursuant to Minnesota Statutes, chapter 14 to determine whether HIS can show cause as to why additional disciplinary action should not be imposed. In any such proceeding, the Commissioner shall have the burden of going forward to provide a sufficient factual basis supporting the allegations. The Commissioner shall provide sufficient evidence to meet the substantial evidence standard used by appellate courts in reviewing administrative actions, that is, evidence demonstrating that the Commissioner is not acting unreasonably, arbitrarily, or capriciously, and that some reasonable evidence exists to support the allegations. Upon such a showing by the Commissioner, the burden of proof as to why additional disciplinary action should not be imposed shall be upon the HIS;

19. This Stipulation contains the entire agreement between the parties, there being no other agreement of any kind, verbal or otherwise, which varies this stipulation;

20. Upon this Stipulation and Consent Order and all other evidence made available to the Commissioner, the Commissioner may at any time after she has approved this Stipulation and Consent Order issue it to HIS without further notice. Copies of the Stipulation and Consent Order when issued by the Commissioner shall be served by first class mail on HIS and/or HIS' legal counsel, which service will be considered personal service on HIS. This Stipulation and Consent Order is effective upon service.

Dated: 12-20, 1990.

Andrew Benson by Rozella Benson
Andrew Benson, Hearing Instrument Seller

Dated: December 21, 1990.

Tom Hiendlmayr
Tom Hiendlmayr, Director
Health Occupations Program
Minnesota Department of Health

IT IS SO ORDERED:

Dated: 12/26, 1990.

MINNESOTA COMMISSIONER OF HEALTH

Sister Mary Madonna Ashton
Sister Mary Madonna Ashton