

Commonwealth Of Kentucky

Court Of Appeals

NOS. 1999-CA-000919-MR AND 1999-CA-000974-MR

COMMONWEALTH OF KENTUCKY,
BOARD OF DENTISTRY

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE THOMAS J. KNOFF, JUDGE
ACTION NO. 98-CI-05090

RALEIGH D. ANDREWS, D.D.S.

APPELLEE/CROSS-APPELLANT

OPINION AFFIRMING IN PART, AND REVERSING AND REMANDING IN PART

* * * * *

BEFORE: GUDGEL, Chief Judge; GUIDUGLI and McANULTY, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal and cross appeal from an order entered by the Jefferson Circuit Court affirming in part, and reversing in part, an order of the appellant/cross-appellee, Kentucky Board of Dentistry (board), imposing disciplinary action against appellee/cross-appellant Raleigh D. Andrews, D.D.S. The board contends on direct appeal that the trial court erred by finding that the board's conclusion, that Andrews refused to comply with its subpoena directing him to produce records, is not supported by substantial evidence. Andrews contends on cross appeal that the court erred by concluding that the board's findings, that he used a single set of gloves while treating more

than one patient during the last week of June 1997, and that he improperly delegated the task of taking dental x-rays to one or more unqualified assistants, are supported by substantial evidence. For the reasons stated hereafter, we reverse and remand on cross appeal as to the glove issue; otherwise, we affirm.

Andrews purchased an existing dental practice in Monticello and began practicing dentistry from that office. He continued to employ several of the prior dentist's employees, including another dentist. Disputes developed, and eventually several complaints were filed with the board. After a hearing, the board found that Andrews had committed four violations respecting KRS Chapter 313, which regulates the practice of dentistry and dental specialties. The board suspended Andrews' license to practice dentistry for three years on each of the four disciplinary counts, with the suspensions to run concurrently. The board then probated all but thirty days of three of the suspensions, and sixty days of the fourth suspension. Andrews appealed from the board's decision to the Jefferson Circuit Court, which affirmed two of the suspensions and reversed the remaining two. This appeal and cross appeal followed.

The board contends on direct appeal that the trial court erred by finding that its conclusion, that Andrews refused to comply with the board's subpoena directing him to produce records, is not supported by substantial evidence. We disagree.

The board made the following relevant findings of fact:

16. On October 20, 1997, Board Investigator Robert Thompson went to Monticello with an agent of the Lake

Cumberland Drug Task Force, and served Dr. Andrews with a subpoena from the Board. That subpoena directed Dr. Andrews to supply the Board with the following:

1. Photocopy of appointment book from and including September 15, 1997, to and including October 20, 1997.
2. Original patient records, including X-Rays, of all patients seen by Raleigh D. Andrews, DDS, from September 15, 1997, to and including October 20, 1997.
3. Original patient records of Douglas Appleby (or Applebee).

When presented with the subpoena, Dr. Andrews supplied his appointment book, which Thompson copied. However, Dr. Andrews was concerned about supplying original records to Thompson, and repeatedly called his counsel about the subpoena. After several calls to counsel and a call between Dr. Andrews and the Executive Director of the Board, Dr. Andrews agreed to provide copies of a representative random sampling of patient files for the relevant period. Thompson picked out 20 to 25 files, and went with Dr. Andrews to the local Police Station to use a photocopy machine there to make the agreed upon copies. By this time, it was getting late in the day. Dr. Andrews stayed at the Police Station with Thompson while he copied, and had at least one more telephone conversation with counsel. At approximately 10:15 at night, Dr. Andrews told Thompson that was enough, and left with his files. Dr. Andrews testified that he had to go because he had a charity function he had to attend the next morning. Before Dr. Andrews left with his files, Thompson gave him a copy of KRS 313.220, informing him of the Board's authority in this matter. Thompson left that night with copies of only 11 files. (Citations to record omitted.)

The board concluded that Andrews' actions constituted a failure and refusal to comply with its subpoena and lawful order.

Further, it concluded that his conduct constituted unprofessional conduct and a material violation of the law.

The circuit court subsequently reviewed the record and summarized the evidence as follows:

KRS 313.220(5) provides that any licensee who fails or refuses to comply with an order or direction of the Board shall be reported to the Board for whatever disciplinary action it deems appropriate, "including revocation of any license if such failure or refusal is deemed by the board to be material." The hearing panel and Board concluded that "Dr. Andrews failed and refused to obey a lawful order of the Board" and "this failure and refusal was a material violation of the law and hampered the Board's function under KRS Chapter 313, within the meaning of KRS 313.220(5)." (Emphasis added).

According to the testimony of Robert Thompson, a Board investigator who served the subpoena on Dr. Andrews on October 21, 1997, Dr. Andrews did not have a copy machine so he went to the circuit court clerk's office to copy the appointment book of Dr. Andrews, which was item one on the subpoena. When he returned, he started to collect the original patient charts outlined in the subpoena (item two) with the help of one of Dr. Andrews' dental assistants. Counsel for Dr. Andrews telephoned to say that he could not in good faith recommend that his client release original patient charts and because it would have been impossible to copy the large number of charts requested (approximately 120), Thompson testified that he contacted the Board.

An agreement was reached between the parties to allow Thompson to randomly select a sample of 20 to 25 charts from the list generated from the appointment book to copy. It was approximately 6:00 p.m. or later when Thompson started to randomly select the samples to copy, and he and Dr. Andrews traveled to the police station to make the copies. During the photocopying, Dr. Andrews was contacted by his attorney and after the telephone call, Dr. Andrews said to stop as that was enough. Thompson testified that he could not remember the time this occurred, but it was after dark and he did not believe it was as late as 10:00 p.m. He had copied eleven patient charts at that point.

Dr. Andrews' testimony on this issue corresponds with Thompson's testimony, except he testified that he stayed to help copy the records until 10:15 p.m., and that he had been doing it all day and had something important to do the next day. He also testified that he thought Thompson would come back and finish the copying.

Thompson testified that he did not recall Dr. Andrews saying "don't come back," and he was not given another subpoena or directive by the Board to return to Dr. Andrews' office to copy the rest of the charts. (Citations to record omitted.)

On appeal, the board does not object in any way to the court's summary of the facts. However, the board does object to the court's conclusion that:

The undisputed evidence shows that Dr. Andrews had been cooperating with Thompson for a significant period of time; the parties were able to reach a reasonable compromise over chart selection; the hour was growing late; and Dr. Andrews never told Thompson he could not come back to copy the rest of the selected charts. Given this evidence and the circumstances of this case, the Board's finding that Dr. Andrews not only failed but **refused** to comply with the subpoena is without support of substantial evidence on the whole record.

Having carefully reviewed the entire record, we are compelled to agree with the trial court that there is no substantial evidence to support a finding that Andrews refused to comply with the subpoena. Indeed, Thompson described the parties' conduct as cordial throughout the day the subpoena was served, and it is clear from the evidence that the number of charts to be copied was reduced by agreement of the parties, and that any further limitations or delays in Andrews' compliance were based on the advice of his attorney and the late hour.

Moreover, it is undisputed that the subpoena did not state a date by which compliance was mandated, and there were no efforts to obtain copies of records after the date on which the subpoena was served and the first eleven records were copied. Hence, it follows both that the evidence did not support a conclusion that Andrews refused to comply with the board's subpoena, and that the court did not err by concluding that the board's finding in this vein was not supported by substantial evidence.

Next, Andrews contends on cross appeal that the trial court erred by concluding that the board's finding, that he used a single set of gloves while treating more than one patient during the last week of June 1997, was supported by substantial evidence. We agree.

Two of the charges against Andrews related to the use of gloves. Count I stated:

On at least one occasion on or about the last week of June, 1997, Respondent treated patients and used one set of gloves while treating at least two or more patients that day. Respondent did not dispose of the gloves used while treating the prior patient and did not use a new set of gloves for treatment of the subsequent patient(s).

Count II stated:

On at least one occasion on or about a Saturday or Saturdays in June, 1997, Respondent treated patients and used one set of gloves on all the patients seen by Respondent that day. Respondent did not dispose of the gloves used while treating the prior patient and did not use a new set of gloves for treatment of the subsequent patient(s).

After the hearing, the board made the following findings of fact relating to the use of gloves:

6. From January to February 1997, Dr. Andrews employed Linda Phillips ("Phillips") as a dental assistant in his office. Phillips completed a course in dental radiography approved by the Board and thereafter took x-rays for Andrews. Phillips acted as Dr. Andrews' assistant in the operatory and had the opportunity the [sic] observe him during his work day. One day during her employment, Phillips witnessed Dr. Andrews coming from one patient to another without changing his gloves. She witnessed him with his hands in the first patient's mouth, and then coming directly to the next patient without changing gloves. From that time forward, Phillips would consistently remind Dr. Andrews to change his gloves. When she reminded him, Dr. Andrews did change his gloves. . . .

. . . .

8. From the second week in June, 1997 to approximately July 4, 1997, Dr. Andrews employed Pamela Jones ("Jones") as a dental assistant in his office. Jones acted as Andrews' assistant in the operatory and had the opportunity to observe him during his work day. Jones worked on weekends and during one weekend in June, she was assisting Dr. Andrews in the operatory treating patients. On that day, she observed him work on a patient without changing gloves from working on a prior patient.

However, Phillips' allegation regarding the use of gloves was not mentioned in the charges against Andrews, and the board concluded:

7. . . . that on at least one occasion on or about the last week of June, 1997, Dr. Andrews used one set of gloves while treating at least two or more patients that day, and that he did not dispose of the gloves he was wearing after treating one patient, and did not use a new set of gloves for treatment of a subsequent patient, as described by Ms. Jones in her testimony. . . . The Panel therefore concludes that Dr. Andrews violated KRS 313.130 as charged in Count I of the Amended Accusation.

8. . . . that the Board failed to meet its burden to show that Dr. Andrews violated the law as specifically charged in Count II of the Amended Accusation. The Panel found the testimony of Ms. Jones credible, but there was not a preponderance of evidence in the record upon which the Panel could find that on the specific day referred to in Count II, Dr. Andrews used the same set of gloves on all patients. Therefore, the Panel concludes that Dr. Andrews did not violate KRS 313.130 as charged in Count II of the Amended Accusation.

Thus, based on Jones' testimony, the board found that Andrews failed to change gloves between patients on one or more occasions in late June 1997. However, the board concluded that the evidence was insufficient to show that Andrews used a single set of gloves while treating all patients on a Saturday during that same month.

Relevant to the board's decisions are the following portions of Jones' testimony regarding Andrews' use of gloves:

Q Now, how do you know he didn't change gloves? Tell us what you saw.

A Like there was this one Saturday, when the morning started, he got a pair of gloves out of the clean box and he started working on one patient, and I think we had three that day, and then he would like, when she got done, he would like walk back to the back and then come back up and start working on the other patients without going over and getting a new pair of gloves.

Q Let me stop you right there and ask you, where did Doctor Andrews usually get clean gloves from when you were working with him?

A On the counter behind his chair.

. . . .

Q Where, again, was the box of clean gloves that Doctor Andrews would get clean

gloves from when you saw him put on clean gloves?

A Right behind his chair where he sat.

Q Is that within your sight?

A Yes.

. . . .

Q Did you ever see dirty gloves anywhere else other than in one of those trash cans?

A Yes.

Q Where were they?

A On that Saturday, I think he pulled them off like after the second patient, and there's a drawer right beside his cabinet like thing right beside his chair, right beside the dental chair, and he would stick them in there, and then like with our third patient, he went to sit down and he opened the drawer back up and he got them and put them back on and worked with the third patient.

Q Now, let me ask you, did you ever see what was in that drawer?

A Just one pair of gloves.

Q Was it the same pair of gloves?

A Yes.

Q Do you have any reason to believe that there were [sic] a box of clean gloves in that drawer?

A No.

Q Why do you not think that?

A Because when he opened the drawer, I looked in there and there was nothing but that one pair of gloves that he got out and put on.

Q Now, how do you know that those gloves were dirty gloves that you saw him take out of that drawer and put on?

A Because they were stained.

. . . .

Q Did you ever see Doctor Andrews start to perform a procedure on a patient, leave that patient, and go work on another patient and not change gloves?

A Yes, I did.

Q Was that on the Saturday in question or was that on any other occasion?

A It was on a different day.

. . . .

Q Now, let me see if I understand all this correctly. You testified about the Saturday when you worked with Doctor Andrews alone in his office and you saw a handful of patients that day. You also testified about at least one other occasion where you were concerned Doctor Andrews had reused the same pair of gloves on different patients. Is all that accurate?

A Yes.

Q Is there any doubt in your mind, and is it your opinion that you have seen Doctor Andrews reuse gloves on different patients that had already been used on other patients?

A Yes, it is.

. . . .

Q First of all, ma'am, would you disagree with the fact that you worked less than 15 days for Doctor Andrews?

A I worked about three weeks.

. . . .

Q Now, isn't it true, you believe the clean gloves were only kept in one place in Doctor Andrews' office?

A Yes.

. . . .

Q And you believed the only place anyone could get gloves, whether it be you, other personal [sic], or Doctor Andrews, was in that one place?

A Yes.

Q And you could see that one place where those clean gloves were, right?

A Yes.

Q Where was that place?

A It was right behind Doctor Andrews' chair.

Q All right. So if Doctor Andrews walked out of an operatory with gloves on, and came back with the same gloves on, if there was only one place to get them, they had to be the same gloves he left with, right?

A Yes.

Q Unless there were other places in the office where he could pick up clean gloves, which you didn't realize existed, correct?

A Yes.

Q Now, the drawer you're talking about where you saw Doctor Andrews reach and get the same pair of gloves on this one occasion, the drawer -- that drawer had gloves which were not turned inside out, correct?

A Yes. Which drawer are you talking about?

Q The drawer you were talking about where he allegedly put a pair of dirty gloves in and then went become [sic] and got that same pair?

A By his desk, by his chair, or in the back.

Q No, in the cart by his chair. Not the clean box that you thought existed only in one place. I'm talking about the drawer where you said you looked in and he pulled out the same pair he had put in; is that true?

A Yes.

Q And I believe you testified do [sic] this board in that drawer there was only one pair?

A Yes.

Q Turn to page 29 of your deposition.

A (WITNESS COMPLIES)

Q Now, the drawer in the back you talked about, you said you only saw dirty gloves in that drawer?

A And papers.

Q And papers.

A Uh-huh.

Q And in the drawer next to his dental chair, you only saw one pair of gloves?

A Yes.

Q Look at page 27 in your deposition.

Question: "Okay. And it's your recollection that when he went to get gloves, he didn't reach over to the box of new ones, he went to another drawer somewhere?"

Answer: "I mean he would change every now and then, but I'm saying that -- I mean, like he -- he kept -- there's a little drawer right there and he kept gloves in there."

I thought you said there was only one pair.

A There was only one pair that I seen. I'm sorry.

Q ". . . he kept gloves in there that he would use on different patients and he would just stick them in there and then he'd just get them back out and use them."

"Where was this drawer?"

"It was right beside the dental chair." In the cabinet next to the dental chair.

You just told this panel, you made sure you looked in that drawer and there was one pair, only one pair, the pair he had taken off, and in your deposition, you said there were gloves in there.

. . . .

Q And to your knowledge, the only box of clean gloves in the entire office was right behind his chair?

A To my knowledge.

Q And I believe you testified that when you take gloves off, they're pulled inside out?

A Yes.

Q And when you looked in the drawer and saw a pair of gloves, they were not inside out?

A Yes.

Q Yes, they were not inside out?

A Yes, they weren't inside out.

. . . .

Q On page 32 of your deposition, line 20, my question was: "Okay. And just to make sure I understand this, when you looked in that drawer, you saw gloves that were not inside out, they were laying there just ready to be put on?"

Answer: "Yes."

You're still talking about one pair of gloves or more than one pair of gloves?

A One pair of gloves.

Q Now, Ms. Jones, isn't it true that whenever Doctor Andrews left your sight, left the operatory, you have no idea where he went, what he did, or what he did with his gloves?

A Yes.

Q That's true, correct?

A Uh-huh.

Q So isn't it true, for all you know, he changes gloves when you're not watching and walks into the room with clean gloves on?

. . . .

HEARING OFFICER: I'll overrule the objection. Is that the way it's phrased in the deposition?

. . . .

Q "So, for all you know, he changes gloves when you're not watching and walks into the room with clean gloves on?"

Answer: "Well, he could, but I've seen him use the same pair of gloves on the same person."

A Yes.

Q The same pair of gloves on the same person?

A I meant on different people.

HEARING OFFICER: Well, now I'm a little confused. Do you know whether Doctor Andrews changed his gloves when he was out of the room?

THE WITNESS: I don't know that for sure, no.

BY MR. RECKER:

Q Is it fair to say, Pam, that you weren't watching him every second from the time he got up from the patient?

A No, I wasn't watching him every second.

Q On the one occasion you saw him do this, go from one room to the other using the same gloves, is it your testimony that on one occasion, I'm looking at page 37 of your deposition, ma'am, if you want to read along with my question.

So is it your testimony that on that one occasion, you walked with him from the moment

he left the mouth of the first patient until entering the mouth of the second patient or you don't know -- or don't you know?

Answer: "I mean he never left that room."

Line 21. Question: "Is it fair to say, Pam, that you weren't watching him every second from the time he got up from the patient?"

Answer: "No, I never watched him every second."

Question: "Then how can you be sure on this one occasion he went from one patient to a second patient with the same gloves on?"

Answer: "I could be pretty sure."

Question: "Who was the patient?"

Answer: "I don't -- can't recall."

Question: "Now, if [sic] this the one example where he used the same gloves on two patients and you watched it, is that correct?"

Answer: "Yeah."

So other than the Saturday, this is the one example you were talking about where you saw him use it on two patients, correct?

A Other than the Saturday?

Q Yes.

A Yes.

Q And on this one occasion, did you not in your deposition state you couldn't be sure if he changed gloves or not because you weren't watching him every second?

A True.

Q Isn't it true you never saw Doctor Andrews, physically watch him go from one mouth with gloves on them with something you could identify, like blood on the gloves, and then walk to the next patient with you into

the next month, you never saw anything like that, did you?

A No, I didn't. What are you asking?

Q If you want to know the specific question, I'll be happy to tell you what page it's on. Page 39 -- I'll tell you what, let's start at page 38.

Question 10: Now, in the affidavit, you go on to say, quote, including a Saturday when Doctor Andrews used the same gloves while seeing all the dental patients that day, end quote.

Are you with me?

A Uh-huh.

Q "So, I guess my question is, on that one Saturday you're talking about, how is it you, after what you just described, how is it you saw him every second of the entire day go from patient to patient?"

Answer: "I don't know. I was just with him. I mean like if he worked on this patient and like if he was numbing her, then we'd go back to the little room and sit and wait a few minutes and then go back and then -- then he wouldn't discard his gloves and he'd just get in another patient."

Question: "Pam, I'm not trying to be difficult, I'm just trying to, you know, physically see this. Isn't it fair to say that even on that Saturday, you can't say with certainty that you saw him every second between one patient and the next patient?"

Answer: "No."

Question: "That's not fair to say?"

Answer: "Well, I mean, I didn't watch him every second."

Question: "Well, that's what I'm asking. Isn't it fair to say that when you're cleaning up an operatory or washing your own hands or whatever, Doctor Andrews could have discarded those gloves and the next time you saw him he had new gloves on which you thought were the same gloves?"

Answer: "I guess."

Question: "I'm just asking if that's a fair portrayal of what could have happened."

Answer: "Yeah."

Question: "Did you ever see him go, physically watching him from one mouth with gloves on them with something you could identify like blood on the gloves --"

"Uh-huh."

"-- and then walk to the next patient with you into the next mouth, you never saw anything like that, did you?"

Answer: "No."

Line 11, page 40: "And then on that one Saturday when there could have been two or three patients, he could have done things when you weren't watching -- when you weren't watching as far as the gloves are concerned?"

Answer: "He could have."

. . . .

Q You've testified about Doctor Andrews treating a patient, getting up, going somewhere, and coming back, and you said you don't know for certain what he did when he was out of your sight; do you remember that?

A Uh-huh.

. . . .

Q When he came back within your sight, did you get a look at the gloves that he was then wearing?

A I don't remember.

Q And when he went away on these occasions when you thought he had come back with the same gloves on, did he go away for a long period of time or was it a short period of time?

A It was a short period.

Q How short?

. . . .

A It was probably about --

Q Was it a couple of minutes or was it
tens of minutes?

A No, it was like three or four
minutes.

Given the foregoing testimony, it is clear Jones was of the opinion that boxes of clean gloves were not available anywhere in the dental office other than beside the dental chair, and that she therefore would have noticed if Andrews obtained clean gloves while she was seated nearby. However, this evidence must be viewed in light of the fact that Jones worked in the dental office only on a part time basis for some three weeks. More important, it is otherwise undisputed and the board found that numerous boxes of clean gloves were located throughout the dental office at all relevant times. Moreover, the record clearly shows that by the end of her testimony, Jones admitted that she did not observe Andrews at all times between patients on the dates in question, and that he may well have changed gloves between patients if, as shown by the evidence and found by the board, clean gloves were available in locations other than beside the dental chair. This being so, we are compelled to conclude that the board's finding, that Andrews used a single set of gloves while treating more than one patient "on at least one occasion on or about the last week of June, 1997," is not supported by substantial evidence. Hence, the circuit court's order must be reversed insofar as it affirms the board's findings and disciplinary action respecting Count I.

Finally, Andrews contends on cross appeal that the trial court erred by concluding that the Board's finding, that he improperly delegated the task of taking dental x-rays to one or more unqualified assistants, is supported by substantial evidence. We disagree.

Andrews adduced evidence below to show that he delegated the responsibility for taking x-rays to a particular qualified assistant, and that he did not delegate such responsibility to any unqualified persons. However, other evidence showed not only that unqualified assistants regularly took x-rays, but also that Andrews was aware of that fact and sometimes specifically directed them to do so. We are not persuaded by Andrews' argument that since he designated a specific qualified assistant to take x-rays, there was no "delegation" of duties to unqualified persons. Instead, the evidence that Andrews encouraged or at least observed the taking of x-rays by unqualified assistants, but took no steps to stop them from doing so, was clearly sufficient to show that Andrews permitted or authorized unqualified persons to take x-rays on his behalf. Thus, viewing the record as a whole, we are satisfied that the board's finding, that Andrews improperly delegated the task of taking x-rays to unqualified assistants, is supported by substantial evidence, and we cannot say that the board erred by making that finding.

For the reasons stated, the court's judgment is affirmed in part, and reversed and remanded in part for further proceedings consistent with our views.

ALL CONCUR.

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