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May 19, 2017

James Heider
Executive Director
Physical Therapist Licensing Board
Portland State Office Building, Suite 40
800 NE Oregon Street
Portland, OR 97232

Re: Opinion Request OP-2017-2

Dear Mr. Heider:

The Oregon Physical Therapist Licensing Board asks a question about the scope of practice of its licensees. Below we set out that question and our short answer, followed by a discussion.

QUESTION

Is the practice of "dry needling" within the scope of practice of a physical therapist licensed in Oregon?

SHORT ANSWER

No.

DISCUSSION

1. Background

"Dry needling" is a technique in which solid, dry needles are inserted into "trigger points" in the muscle and surrounding tissue to relieve pain and improve mobility.^{1/} The Oregon Physical Therapist Licensing Board (board) informs us that the dry needling technique currently is not taught as part of the standard physical therapy curriculum in Oregon. We understand that physical therapists that wish to learn the technique typically do so by attending seminars put on by companies that teach dry needling.

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In 2008 and early 2009, the board was asked by its licensees whether dry needling is within the scope of practice of physical therapy. The board responded that it was not, because it is an invasive procedure.

On October 17, 2009, the American Academy of Orthopedic Manual Physical Therapists issued a position statement concluding that physical therapists "are well-trained to utilize dry needling in conjunction with manual physical therapy interventions." American Academy of Orthopedic Manual Physical Therapists, Position Statement on Dry Needling, October 17, 2009.^{2/}

The board was then asked to reconsider its earlier opinion. The board issued a statement concluding that dry needling likely is within the physical therapist scope of practice, but cautioning that it is an "advanced intervention requiring post physical therapy graduate training and education." The board, therefore, recommended that:

[T]he acupuncture committee, physical therapist and medical Board work in partnership, with their professional associations, to define a minimum competency by which a physical therapist can safely practice the intervention of dry needling trigger points. In the interest of public safety, until specific training and education parameters can be determined, the Board strongly advises its licensees to not perform dry needling of trigger points.

Oregon Physical Therapist Licensing Board 11.20.09 Statement Relevant to Physical Therapists using the Intervention of Dry Needling.^{3/}

Dry needling, however, remains controversial. The Oregon Medical Board and its Acupuncture Advisory Committee regulate the practice of acupuncture in Oregon. They have concluded that "dry needling" is acupuncture. *See* Letter from Kathleen Haley, Executive Director, Oregon Medical Board to David McTeague, Executive Director Oregon Board of Chiropractic Examiners, October 27, 2010 (concluding that dry needling is acupuncture, because it uses the same needles, the same needling techniques, the same points, and is used for the same purpose); *see also*, ORS 677.757(1) (defining acupuncture to involve "the stimulation of specific points on the surface of the body by the insertion of needles."). The Oregon Medical Board has also advised that dry needling seminars should not be taught in Oregon without its preapproval of content and instructors. Letter from Kathleen Haley, Executive Director Oregon Medical Board to Executive Director, Oregon Health Professionals Regulatory Board, December 7, 2011. *See also*, *International Center for Integrative Medicine v. Kinetacore*, Temporary Restraining Order, Case # 30-216-008-35053, March 17, 2016, Superior Court of California, Orange County (restraining insertion of acupuncture needles into humans by other than acupuncturist or medical doctor and the delivery of acupuncture needles for Kinetacore dry needling seminar).

Physical therapists are not the only health care practitioners interested in performing dry needling. In 2011, the Oregon Board of Chiropractic Examiners adopted a rule authorizing chiropractors to practice dry needling. The Oregon Association of Acupuncture and Oriental Medicine challenged the rule claiming the practice to be acupuncture. The Oregon Court of Appeals did not consider whether the practice was acupuncture, but did hold that dry needling is

not within the chiropractic scope of practice. *Oregon Ass'n of Acupuncture and Oriental Medicine v. Board of Chiropractic Examiners*, 260 Or App 676, 320 P3d 575 (2014). The opinion specifically declined to address whether dry needling is within the physical therapist's scope of practice.

After that opinion was issued, the Oregon Physical Therapist Licensing Board reaffirmed its earlier statement that dry needling likely is within the practice of physical therapy, but should not be performed until training and educational parameters are determined. The board has not adopted rules or taken any other action. The board now asks us to determine whether dry needling is within the scope of practice for physical therapists.

2. Methodology for interpreting statutes

To answer that question, we must interpret the Oregon statutes governing the practice of physical therapy. Our goal in interpreting those statutes is to determine the intent of the legislature that enacted them. We attempt to do so by examining the text, in context, and any pertinent legislative history, if helpful. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (discussing statutory interpretation methodology).

3. ORS 688.010(6) – Practice of physical therapy

a. Text

ORS 688.010 to 688.201 govern the practice of physical therapy in Oregon. ORS 688.010(6) defines the “[p]ractice of physical therapy” as:

(a) Examining, evaluating and testing for mechanical, physiological and developmental impairments, functional limitations and disabilities or other neuromusculoskeletal conditions in order to determine a physical therapy diagnosis or prognosis or a plan of physical therapy intervention and to assess the ongoing effects of physical therapy intervention.

(b) Alleviating impairments and functional limitations by designing, implementing, administering and modifying physical therapy interventions.

(c) Reducing the risk of injury, impairment, functional limitation and disability by physical therapy interventions that may include as a component the promotion and maintenance of health, fitness and quality of life in all age populations.

(d) Consulting or providing educational services to a patient for the purposes of paragraphs (a), (b) and (c) of this subsection.

(Emphasis added).

Dry needling is used to alleviate mechanical and physiological impairments and functional limitations. The question is whether it is a “physical therapy intervention” within the meaning of subsection 6(b). The statutes do not define that phrase. Subsection 6(c) provides the

sole example of a "physical therapy intervention." It states that "physical therapy interventions may include as a component the promotion and maintenance of health, fitness and quality of life in all age populations." That example does not help answer the question.

Although the statutes do not define "physical therapy interventions," they do define "physical therapy * * * unless the context requires otherwise" as "the care and services provided by a licensed physical therapist or physical therapist assistant acting under the physical therapist's direction and control."^{4/} ORS 688.010(5). That definition clarifies that only actions performed by licensed physical therapists or their assistants may be *called* "physical therapy." It sheds no light on *which* care and services are "physical therapy interventions."

b. Dictionary definitions

As there is no applicable statutory definition of "physical therapy interventions," we turn to dictionaries to help determine the meaning of the phrase. That phrase is not defined in dictionaries of common usage or in the medical dictionaries that we consulted.

Parsing the phrase, "intervention" in this context means an "action or ministrations that produces an effect or that is intended to alter the course of a pathological process." STEDMAN'S MEDICAL DICTIONARY at 915 (27th ed 2000). Dry needling is an "intervention" under this definition.

"Physical therapy" in common usage means "the treatment of disease by physical and mechanical means (as massage, regulated exercise, water, light, heat, electricity) – compare PHYSICAL MEDICINE." WEBSTER'S, THIRD NEW INT'L DICTIONARY at 1707 (unabridged 2002). A medical dictionary similarly defines "physical therapy" as the "treatment of pain, disease, or injury by physical means : SYN physiotherapy." STEDMAN'S MEDICAL DICTIONARY at 1822. That dictionary does not define "physiotherapy." Webster's defines "physiotherapy" simply as "PHYSICAL THERAPY." WEBSTER'S at 1707. Hence, in both common and medical usage, "physical therapy" and "physiotherapy" are synonymous. That is significant, as we discuss below, because the Oregon Court of Appeals interprets the term "physiotherapy" to exclude dry needling.

"Physical therapy," as its name suggests and dictionaries confirm, is therapy by "physical" means. "Physical" in this context could mean either "material things" or "physical forces." See WEBSTER'S at 1706 (defining "physical" to mean "of or relating to natural or material things as opposed to things mental, moral, spiritual or imaginary" or "of or relating to physics : characterized or produced by the forces and operations of physics : employed in the processes of physics."). We conclude that physical means of treatment in this context refers to treatment by the use of physical forces for two reasons. First, treatment by "material things" is so broad that it could encompass almost all means of health care treatment other than psychological treatment. Second, the examples of physical means of treatment provided in the definition of "physical therapy" involve treatment by physical forces (water, light, heat, electricity, massage and regulated exercise).

The common (but not the medical) definition of “physical therapy” includes “mechanical means” of treatment. “Mechanical means” of treatment in this context most likely refers to treatment using mechanical forces, rather than treatment with machinery or tools. *See id.* at 1401 (defining “mechanical” as “of, relating to, or concerned with machinery or tools” or “relating to, governed by, or in accordance with mechanics * * * **b** : relating to the quantitative relations of force and matter as distinguished from mental, vital, and chemical.”). That is the sense in which “mechanical” is used elsewhere in the definition of “physical therapy.” *See* ORS 688.010(6)(a) (referring to examining, evaluating and testing for “mechanical * * * impairments,” obviously meaning impairments in the mechanical operations of the body, not machinery or tools). Hence, treatment by “mechanical means” would include therapeutic exercise and the use of traction devices, for example.

The question then is whether “dry needling” is treatment by physical or mechanical means like light, heat, air, water, regulated exercise and massage. Dry needling involves inserting a needle into muscle and surrounding tissue to “stimulate a reaction in trigger points.” It is not entirely clear to us that “dry needling” works by applying a physical or mechanical force. Interpreted in the broadest possible sense, the touch of a needle could be characterized as the use of a mechanical force, however slight. That broad interpretation, however, would also sweep in any treatment that touched the patient externally or internally.

Also, treatment by water, light, heat, electricity, massage and regulated exercise all appear to refer to noninvasive forms of therapy. Dry needling is “invasive,” as it involves puncturing intact skin and inserting a needle into internal body tissue which makes it unlike those treatments. This qualitative difference makes it ambiguous whether dry needling is a physical therapy intervention within the meaning of the statute. As discussed, the board initially concluded that “dry needling” was not within the physical therapy scope of practice, *because* it is an invasive procedure. We also note that whether invasive techniques are or are not within the practice of physical therapy has been addressed with specificity in some state’s physical therapy statutes, but not in Oregon’s.^{5/} In short, whether “physical therapy interventions” include the techniques of dry needling is not self-evident.^{6/}

c. Court of Appeals interpretation of synonym “physiotherapy”

In *Oregon Ass’n of Acupuncture and Oriental Medicine v. Board of Chiropractic Examiners*, the Oregon Court of Appeals interpreted “physiotherapy” as used in the chiropractic statutes to exclude dry needling. The term had been added to the statutes in 1927 so the court applied the definition from a medical dictionary in use at that time. The dictionary defined “physiotherapy” to mean “[t]he use of natural forces such as light, heat, air, water and exercise.” 260 Or App at 681 (citation omitted). The court concluded that dry needling was not the use of a natural force similar to light, heat, air, water and exercise, because it is neither “natural” nor a “force.” *Id.* at 683. It reasoned that, “[i]n contrast to light, heat, air, water, and exercise * * * a needle is a man-made *object*.” *Id.* (emphasis in original). The court continued:

[A]lthough the use of natural forces may involve man-made objects and devices, we find nothing in the definition of physiotherapy suggesting the practice of physiotherapy would include the application of a man-made object directly to the internal tissues of a patient.

Id.

As discussed, “physical therapy” and “physiotherapy” are synonymous. The definition of “physiotherapy” the Court of Appeals applied in the chiropractic statutes does not differ in any meaningful way from the current definition of “physical therapy.” Although the definition of physiotherapy in 1927 specified “natural” forces and the definition of “physical therapy” specifies “physical and mechanical forces” the examples provided of both are substantially the same. In addition, to include dry needling within the meaning of “physical therapy intervention” would require an interpretation of “physical” or “mechanical” means of treatment that is so broad it would include virtually any technique that involved physical touch, including invasive techniques. Based on text alone, therefore, Oregon courts likely would interpret “physical therapy interventions” to exclude dry needling.

d. Context and legislative history

Courts do not construe statutes based on text alone, but in context and also in the light of pertinent legislative history. Pertinent context and legislative history do not suggest a different interpretation than the one based on text alone. At most, one piece of context bolsters interpreting “physical therapy” to exclude invasive treatments. We begin with that context.

(1) Other statutory provision

Another provision in the physical therapy statutes, ORS 688.135(4), provides that a “physical therapist may purchase, store and administer topical and aerosol medications as part of the practice of physical therapy as defined in ORS 688.010.” That provision specifically authorizes physical therapists to use one particular chemical means of treatment in their practice: topical and aerosol medications. Significantly, that provision does *not* authorize physical therapists to administer medications subcutaneously by puncturing intact skin; authorization of that kind might have suggested that physical therapy interventions could include such invasive procedures.

(2) Prior versions of the statute and legislative history

Context also includes prior versions of the statute. *State v. Perry*, 336 Or 49, 55-56, 77 P3d 313 (2003). We examined the statutory changes over time for clues as to legislative intent. We also examined the legislative history surrounding those changes. Nothing in that context or history suggests that the legislature intended physical therapy interventions to include dry needling.

In 1965, the physical therapy statutes defined "physical therapy" as the "treatment of a human being by the use of exercise, massage, heat or cold, air, light, water, electricity or sound * * * [but] shall not include radiology or electrosurgery." Or Laws 1965, ch 314, § 1. Dry needling clearly would not have been "physical therapy" under that definition because it does not use any of the listed means.⁷¹

The definition of "physical therapy" was amended in 1987. Rather than specifying the specific "forces" that qualified as treatment, the new definition provided, as pertinent, that physical therapy includes the "use of physical measures, activities and devices for preventive and therapeutic purposes." Or Laws 1987, ch 726, § 5. That definition did not refer to the use of "mechanical" measures, activities or devices." This definition is consistent with the medical definition of "physical therapy" as "physical" means of treatment.

The legislature amended the statute to its current form in 2005 through House Bill 3260. Or Laws 2005, ch 627, § 3. The Oregon Physical Therapists Association had proposed the bill. Genoa Ingram, testifying on behalf of the association, informed the legislature that the bill was intended:

To update the statutes so that it conforms more with what other states are doing. * * * It updates the language [and] it reorganizes the statutes so it makes things easier to find and just more logical. There are about a half a dozen states that have adopted, substantially adopted the [American Physical Therapy Association] Model Practices Act * * * everyone has had to tweak them slightly. * * * So the majority of the bill does not represent a change in scope but primarily a reorganization of the statute.

Testimony of Genoa Ingram, House Committee on Health and Human Services (HB 3260), April 8, 2005, internet audio at 26:30 to 56:00. She identified only five policy changes that the bill made. None are relevant. Most of the discussion focused on protection of the term "physical therapy." There was no discussion of the types of interventions encompassed in the practice of physical therapy or dry needling in particular. At that time dry needling was not taught, tested, or generally practiced by physical therapists. See *J. Dommerholt, et al.*, 14:4 *Journal of Manual and Manipulative Therapy* E70 (2006) (noting that few physical therapists had been trained in the technique); American Physical Therapy Association, *The Performance of Dry Needling* at 2 (January, 2012) (although much of the anatomical, physiological and biomechanical knowledge needed for dry needling is taught, currently the dry needling technique is not taught). As late as 2009, the board concluded that dry needling was an invasive technique not within the scope of practice. Consequently, there is no basis to believe that the 2005 Legislative Assembly would have thought dry needling in particular was a physical therapy intervention.

e. Conclusion based on text, context, and legislative history

To conclude that dry needling is a "physical therapy intervention" would require an interpretation of "physical" and "mechanical" means of treatment that is so broad it would encompass many treatments clearly not within the physical therapy scope of practice. Such an

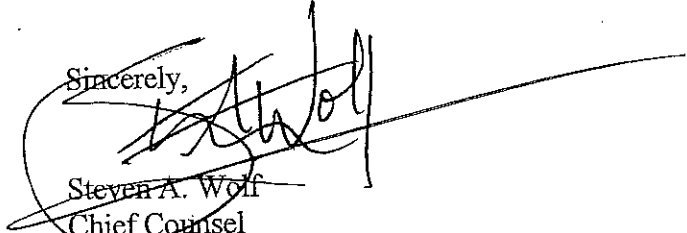
interpretation would also conflict with the Oregon Court of Appeals' recent interpretation of the term "physiotherapy," a term we conclude is indistinguishable from the term "physical therapy." Nor was dry needling part of the generally accepted practice of physical therapy in 2005, which might have suggested that the legislature would have intended it to be included as a "physical therapy intervention." We, therefore, conclude that dry needling is not within the scope of practice for physical therapists licensed in Oregon.

Our conclusion is based solely on our legal analysis of the statute as currently written. Our task is not to weigh the policies for or against permitting physical therapists to perform dry needling. The legislature, of course, may expand the scope of physical therapy practice by amending the statute.

CONCLUSION

Although it is a close question,^{8/} based on the above analysis, we conclude that dry needling is not within the physical therapy scope of practice in Oregon.^{9/} This opinion is limited solely to the question whether dry needling is a "physical therapy intervention" under ORS 688.010(6)(b) and does not address or express any opinion about any other provision or intervention.

Sincerely,



Steven A. Wolf
Chief Counsel

General Counsel Division

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^{1/} The American Physical Therapy Association describes dry needling as:

A skilled intervention that uses a thin filiform needle to penetrate the skin and stimulate underlying myofascial trigger points, muscular, and connective tissues for the management of neuromusculoskeletal pain and movement impairments. Dry needling (DN) is used to treat dysfunctions in skeletal muscle, fascia, and connective tissue, and diminish persistent peripheral nociceptive input, and reduce or restore impairments of body structure and function leading to improved activity and participation.

American Physical Therapy Association, *Description of Dry Needling in Clinical Practice: An Educational Resource Paper* at 2 (February, 2013).

^{2/} A Washington Attorney General opinion concludes that dry needling is not "manual therapy." Wash Att'y Gen Op 2016-3 (2016) (citing FARLEX AND PARTNERS, *MEDICAL DICTIONARY* (2009), which defines manual therapy" as "[a] collection of techniques in which hand movements are skillfully applied to mobilize joints and soft tissues").

^{3/} Safety risks may include "sepsis, excessive trauma, and perforation of the blood vessels and organs." See 61 Fed Reg 64616 (December 6, 1996) (describing risks associated with use of the same needles to pierce the skin in the practice of acupuncture).

^{4/} ORS 688.010(2) defines "physical therapist" to mean a physical therapist licensed under ORS 688.010 to 688.201.

^{5/} See, e.g., Ky Rev Stat § 327.010(1) (specifying that physical therapy includes "invasive" as well as noninvasive procedures); Cal Gov't Code § 2620.5 (authorizing physical therapists to penetrate tissue only for the purpose of one specific test, and only if specially authorized by a physician or surgeon and specially certified by board to perform the test); Haw Rev Stat § 461J-2.5 (prohibiting physical therapists from using "invasive procedures," defined as "the breaking or puncturing of a person's good skin integrity, for example, through surgery or injection").

^{6/} The board has adopted a rule defining "physical therapy intervention," but that definition does not specifically include dry needling or suggest an answer to whether dry needling is a physical therapy intervention:

"Physical therapy intervention" means a treatment or procedure and includes but is not limited to: therapeutic exercise; gait and locomotion training; neuromuscular reeducation; manual therapy techniques (including manual lymphatic drainage, manual traction, connective tissue and therapeutic massage, mobilization/manipulation of soft tissue or spinal or peripheral joints, and passive range of motion); mobility in work (job/school/play), community, and leisure integration or functional training related to physical movement and mobility in self-care and home management (including activities of daily living (ADL) and instrumental activities of daily living (IADL)); functional training related to physical movement and reintegration (including IADL, work hardening, and work conditioning); prescription, application, and, as appropriate, fabrication of devices and equipment (assistive, adaptive, orthotic, protective, or supportive); airway clearance techniques; integumentary repair and protective techniques; electrotherapeutic modalities; physical agents and mechanical modalities; and patient related instruction and education.

OAR 848-040-0100(8).

^{7/} We note that the specific exclusion of "electrosurgery" and "radiology" is consistent with physical therapy not being the practice of medicine. See WEBSTER'S at 1706-1707 (excluding "radiology" from the examples of physical or mechanical means of treatment in the definition of physical therapy but including it as an example of physical means of treatment in the definition of "physical medicine"); *Id.* at 733 (defining "electrosurgery" as "diathermy for surgical process"); *Id.* at 625 (defining "diathermy" as "the generation of heat in tissue for medical or surgical purposes by the application of high-frequency electric currents of various wavelengths by means of electrodes and other instruments"); *Id.* at 1873 (defining "radiology" as "the use of sources of radiant energy * * * in the diagnosis and treatment of disease").

^{8/} We note that several state attorneys general have issued opinions addressing whether dry needling fits within either the physical therapy or chiropractic scope of practice under their state acts. None found it to be an easy question. All of those opinions were based on their own state's statutory language and methods of interpretation. None had the benefit of appellate court guidance on the issue. Detailed discussion of those opinions, therefore, would not add to our analysis. We offer the following brief summaries to illustrate the range of results the opinions have reached.

For attorney general opinions concluding dry needling is – or arguably is – within the scope of practice see, Ky Att'y Gen Op No. 13-010 (2013) (concluding that "assistive devices" and "physical agents" might include treatment with needles and observing that statute specifically authorized invasive procedures); N.C. Att'y Gen Advisory Op, December 1, 2011 (licensing board had authority to determine

whether dry needling within scope of practice but must adopt rules establishing competency standards); Miss Att’y Gen Op. No. 2012-00428 (construing treatment by “mechanical devices” to include dry needling); 95 Md Op Atty Gen 138 (2010) (concluding that statute did not clearly answer question, but licensing board had discretion to determine by rule whether dry needling within scope of practice as “mechanical device” and to establish necessary training and education); Neb Att’y Gen Op 16-009 (2016) (“colorable argument” that dry needling is “mechanical modality” or “physical agent or modality” but best approach to seek a legislative solution); La Att’y Gen Op No. 14-0216 (2015) (treatment by “mechanical means and devices” broad enough to include use of solid filiform needles); Tex Atty Gen Op No. KP-0082 (2016) (“treatment * * * to reduce the incidence or severity of * * * pain to enable * * * a person to perform the independent skills and activities of daily living” broad enough to include dry needling);

For opinions concluding that dry needling is not within scope of practice of physical therapists, *see*, Tenn Att’y Gen Op No. 14-62 (2014) (“physical agents and modalities” “mechanical and electrotherapeutic modalities” and “manual therapy” did not clearly include the invasive use of needles for therapeutic purposes); Wash Att’y Gen Op 2016-3 (2016) (dry needling not a “physical agent” or “mechanical modality” because to construe those terms broadly enough to include dry needling would also encompass a wide range of practices that clearly fall outside the practice of physical therapy); *See also*, *State of Washington ex rel. South Sound Acupuncture Ass’n v. Kinetacore, et al.* No. 13-2-04894-9 King County Superior Court, (October 10, 2014) (district court concluding that “the penetration of human tissue with an acupuncture needle or any similar needle used for dry needling is outside the plain text of the authorized scope of practice for physical therapy” in Washington).

^{9/} We acknowledge that this conclusion is somewhat at odds with a conclusion in a 1974 Attorney General opinion. In that opinion, we concluded that, under narrowly specified conditions, physical therapists could perform “electromyography” tests, which might involve “insertion of a needle electrode into the muscle.” 37 Op Atty Gen 61 (1974). That opinion, however, was issued both before the cases establishing the current method of statutory construction and before the decision in *Oregon Ass’n of Acupuncture and Oriental Medicine*.