

RECEIVED

NOV 09 2015



OPINION COMMITTEE

Texas State Board of Acupuncture Examiners

Allen Cline, L.Ac, Presiding Officer

FILE # ML-47860-15

ID # 47860

RQ-0068-KP

November 9, 2015

Via E-Mail: Opinion.committee@texasattorneygeneral.gov

The Honorable Ken Paxton
Attorney General of Texas
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

Dear Attorney General Paxton:

The Texas State Board of Acupuncture Examiners ("Acupuncture Board") is seeking an Attorney General Opinion regarding the following issue:

Is the practice of "trigger point dry needling" the practice of acupuncture as defined by Texas Occupations Code §205.001(2)?

Did the legislature intend that the practice of acupuncture be clearly encompassed under the scope of the licensure for Physical Therapists?

Background and Discussion

The practice of "trigger point dry needling," "dry needling," and/or "intramuscular therapy" (collectively referenced herein as "trigger point dry needling") is the insertion of acupuncture needles through a patient's skin "to treat muscle pain by stimulating and breaking muscular knots and bands."¹ The practice of dry needling by licensed physical therapists has spawned a number of legal opinions in recent years by state boards of acupuncture and physical therapy, state attorneys general, and state courts, as to whether dry needling is the unlicensed practice of acupuncture and/or whether dry needling is within the authorized scope of practice of physical therapists. The results of these opinions have necessarily varied due to state-to-state variations in statutes dealing with the healing arts of acupuncture and physical therapy.

In Texas, neither Texas Occupations Code Chapter 453 ("Texas Physical Therapy Act") nor the rules adopted by the Texas Board of Physical Therapy Examiners explicitly address the practice of trigger point dry needling. In fact, the terms "dry needling," "trigger point therapy" and "intramuscular therapy" cannot be found in either the Physical Therapy Act nor the rules governing physical therapists in 22 TAC Title 9, Chapter 321. To date, the Texas Board of Physical Therapy Examiners has yet to offer a formal opinion as to whether dry needling is within the scope of practice of licensed Texas physical therapists nor issue a ruling authorizing such a process.

During the last few years the Texas Acupuncture Board ("Acupuncture Board") has been made aware that some licensed Texas physical therapists are actively practicing trigger point dry needling and openly advertising this practice, despite the lack of any clear authorization to by the

¹ American Academy of Medical Acupuncture, Policy on Dry Needling, December 9, 2014 (Exhibit A)

Location Address:
333 Guadalupe, Tower 3, Suite 610
Austin, Texas 78701

Mailing Address
P.O. Box 2018
Austin, Texas 78768-2018

Phone 512.305.7011
Fax 512.305-7051
www.tmb.state.tx.us

Texas Board of Physical Therapy Examiners. Although the Acupuncture Board has determined that trigger point dry needling involves the practice of acupuncture, the Acupuncture Board has not yet instituted cease and desist actions against licensed physical therapists employing dry needling therapy.

In an effort to amicably resolve its concerns regarding dry needling with a sister health licensing board, before instituting cease and desists proceedings against its licensees, the Acupuncture Board wrote Roger Matson, Executive director of the Executive Council of Physical Therapy & Occupational Therapy Examiners on July 31, 2014, expressing its concerns that “Physical Therapists carrying out trigger point dry needling therapy without an acupuncture license could be subject to cease and desist actions pursuant to Texas Occupations Code §205.362,” and asking Mr. Matson to “share our concerns with your fellow board members and the licensee whom you license and regulate.” The Acupuncture Board further expressed that it was receptive to entering into dialog into these issues with the Texas Physical Therapy Board.

In November of 2014, Acupuncture Board president Allen Cline, along with Mari Robinson, Executive Director of the Texas Medical Board, the Acupuncture Board’s supervising Board, met with Mr. Matson and representatives of the Texas Physical Therapy Board, including their counsel from the Attorney General’s office. The meeting was not able to resolve the Acupuncture Board’s concerns as there was a disagreement between the two boards as to whether dry needling was authorized under the scope of the Physical Therapy Act. One option discussed at the close of the meeting was seeking an Attorney General Opinion to clarify whether trigger point dry needling was the practice of acupuncture. The Acupuncture Board has chosen this course and is submitting these questions for your consideration.

LEGAL ARGUMENTS:

Trigger Point Dry Needling is the Practice of Acupuncture

§205.001(1) of the acupuncture statute defines “Acupuncture” as:

- (A) the nonsurgical, nonincisive insertion of an acupuncture needle and the application of moxibustion to specific areas of the human body as a primary mode of therapy to treat and mitigate a human condition, including evaluation and assessment of the condition; and
- (B) the administration of thermal or electrical treatments or the recommendation of dietary guidelines, energy flow exercise, or dietary or herbal supplements in conjunction with the treatment described by Paragraph (A).²

As is clear from the statutory definition, a central part of the practice of acupuncture involves the insertion of needles through the skin of the patient into acupuncture or Ashi points, and the manipulation of those needles for therapeutic purposes.

The practice of trigger point dry needling is substantially identical to the practice of acupuncture as both involve the insertion of acupuncture needles through the skin of the patient and the manipulation of those needles as a primary mode of therapy. The American Physical Therapy Association in a resource paper distributed for the purpose of advocating for trigger point dry needling describes the practice of dry needling as “ a skilled intervention...that uses a thin

² Exhibit B.

filiform needle to penetrate the skin and stimulate underlying myofascial triggers points, muscular and connective tissues for management of neuromusculoskeletal pain and movement improvements.”³

The paper goes on to state that physical therapists utilize dry needling with the goal of releasing/inactivating the trigger points and relieving pain. Examining the salient portions of the definition and the statement cited above it is clear that trigger point dry needling, like acupuncture is: (1) the penetration of skin by acupuncture needles (2) as a primary mode of therapy.

That trigger point dry needling therapy is the practice of acupuncture is further shown by the use of acupuncture needles in the practice of trigger point dry needling. The needles used in acupuncture and trigger point dry needling are solid filiform or filament needles regulated by the Food and Drug Administration (“FDA”). The FDA defines acupuncture needles as “a device intended to pierce in the skin in the practice of acupuncture. 21 C.F.R. §880.5580(a). The FDA regulates acupuncture needles as Class II prescription medical devices 21 CFR §880.5580(b). Significantly, these FDA regulations do not address the use of acupuncture needles for trigger point dry needling in any manner, or treat trigger point dry needling as a practice separate and distinct from acupuncture.

The FDA’s regulations restrict the sale or use of acupuncture needles to persons *legally authorized to practice acupuncture*. 21 CFR §880.5580(b)(1) (emphasis added); 21 CFR §801.109. The acupuncture needles that are used in dry needling must carry a specified FDA warning stating: “Caution: Federal law restrict this device to sale by or on the order of a qualified practitioner of acupuncture licensed by the law of the state in which he practices to use or order the use of the device.” 21 CFR §880.109(b)(1). In reclassifying acupuncture needles from Class III to Class II prescription medical devices, the FDA explicitly stated that the sale of acupuncture needles “must be clearly restricted to qualified practitioners of acupuncture as determined by the states.” 61 Fed. Reg. 6416 (Dec. 6, 1996) (pages 6416-6417 are attached as Exhibit D).

The Practice Acupuncture is Limited to Licensees of the Acupuncture Board

The Acupuncture Act governs the licensure and regulation of the practice of acupuncture in the State of Texas. Tex. Occ. Code §§205.101, 205.201. The Texas Legislature established requirements for acupuncture licensing examination and training, including the requirement that acupuncture schools require resident instruction of not less than 1,800 instructional hours, and course instruction at reputable acupuncture schools in anatomy-histology, bacteriology, physiology, symptomatology, pathology, meridian and point locations, hygiene, and public health. Tex. Occ. Code §§205.203, 205.204, 205.205, and 205.206.

“A person may not practice acupuncture in this state unless the person holds a license to practice acupuncture in this state issued by the acupuncture board under this chapter.” Tex. Occ. Code §205.201. The practice of acupuncture without a license constitutes a felony of the third degree. Tex. Occ. Code §205.401. The Legislature has also provided the Acupuncture Board authority

³ *Physical Therapists & the Performance of Dry Needling : An Educational Resource Paper*, American Board of Physical Therapy (“APTA”), APTA Department of Practice and APTA State Government Affairs, January 2012, page 2. (attached as Exhibit C).

to prosecute cease and desist actions against individuals violating the Acupuncture Act through the unlicensed practice of acupuncture. Tex. Occ. Code §205.362(a). Violation of a cease and desist order constitutes grounds for the Acupuncture Board assessing an administrative penalty. Tex. Occ. Code §205.362(b)

Exemptions from the Requirement of an Acupuncture License Apply Only to Physicians and Health Care Professionals Whose Licenses are Clearly Encompassed by the Practice of Acupuncture

The only exemption from the requirement that an individual practicing acupuncture must hold a license to practice acupuncture is that a health care professional licensed under another statute of the State of Texas may practice acupuncture without obtaining a license from the Texas State Board of Acupuncture Examiners only so long as that health care professional is acting within the scope of their license. Tex. Occ. Code §205.003(a).⁴ The Attorney General has opined that the legislature intended to limit this exception to the acupuncture licensing requirements to “only health care professionals whose licenses clearly encompass the practice of acupuncture.” Texas Attorney General Opinion DM-415, page 6 (1996)⁵. To determine whether a health care license clearly encompasses the practice of acupuncture, the relevant scope of practice as set out in the enabling statute for the relevant health care profession must be examined.

The Statutory Scope of Physical Therapy Does Not Clearly Encompass the Practice of Acupuncture

The scope of Physical Therapy is defined by Chapter 453 of the Texas Occupation Code. “Physical therapy is defined as “a form of health care that prevents, identifies, corrects, or alleviates acute or prolonged movement dysfunction or pain of anatomic or physiologic origin.” Tex. Occ. Code §453.001(6). The practice of physical therapy “includes:

- (1) measurement or testing of the function of the musculoskeletal, neurological, pulmonary, or cardiovascular system;
- (2) rehabilitative treatment concerned with restoring function or preventing disability caused by illness, injury, or birth defect;
- (3) treatment, consultative, educational, or advisory services to reduce the incidence or severity of disability or pain to enable, train, or retrain a person to perform the independent skills and activities of daily living; and

⁴ Licensed Texas physicians are exempted from the requirement of a obtaining a separate license to practice acupuncture under §205.003(b)(1) as acupuncture is the practice of medicine. This is discussed in detail below.

⁵ Although Attorney General Opinion DM-415’s (attached as Exhibit E) opinion that the practice of chiropractic does not clearly encompass the practice of acupuncture was reversed by DM-471 (attached as Exhibit F), the portion of the opinion requiring that the relevant scope of a health profession must clearly encompass the practice of acupuncture is still valid. DM-471 simply applied a new set of facts based on the legislature’s actions following the issuance of DM-415, to determine that the Chiropractic Act clearly encompassed the practice of acupuncture.

- (4) delegation of selective forms of treatment to support personnel while a physical therapist retains the responsibility for caring for the patient and directing and supervising the support personnel. Tex. Occ. Code §453.004(b)(1)-(4).

When interpreting a statute, courts must determine the intent of the legislature as expressed by the specific language of the statute. *City of Rockwall v Hughes*, 246 S.W. 3d, 621, 625 (Tex. 2008). The words of statute must be construed according to their plain and common meaning unless the words have acquired a more technical meaning or the construction leads to absurd results. *N.W. Austin Mun. Util. Dist. No. 1 v. City of Austin*, 274 S.W.820, 828 (Tex. App.-Austin 2008, pet. denied). The intent of a statute is ascertained “first and foremost” from the statute’s language as written. *Texas State Board of Chiropractic Examiners v. Abbott*, 391, S.W. 3d 377, 384 (Tex. App.—Austin 2011, no pet.).

A review of the plain language of Chapter 453 of the Texas Occupations Code yields no evidence that the legislature intended that the license for a physical therapist clearly encompass the practice of acupuncture. One first notes that the definitions of physical therapy and practice of physical therapy in Chapter 453 do not use the terms “acupuncture,” “acupuncture needle,” “needle,” “incisive,” “non-incisive,” or “insertion of an acupuncture needle,” or any equivalent terms. For that matter Chapter 453 also does not use or reference the terms for acupuncture, used by physical therapists in their attempt to distinguish trigger point dry needle therapy from acupuncture: specifically: “trigger point dry needling,” “dry needling,” “trigger point therapy,” “intramuscular therapy,” or “trigger points.”

Similarly, the definition of “physical therapist” refers to “a person who is licensed by the board as a physical therapist and practices physical therapy.” The term includes a hydrotherapist, physiotherapist, mechano-therapist, functional therapist, physical therapy practitioner, physical therapist specialist, physical therapy specialist, physiotherapy practitioner, kinesiotherapist, physical rehabilitation specialist, and myofunctional therapist.” Tex. Occ. Code §453.001(4). Notably none of the listed types of physical therapist refer to an acupuncturist or practitioner of trigger point dry needling.”

The Texas Board of Physical Therapy has also neglected to address the practice of trigger point dry needling through rule making. The expanded definition of physical therapy adopted by the Board of Physical Therapy Examiners in 22 TAC 321.1(15) is also utterly silent as to the insertion of acupuncture needles through the skin for pain into ashi or trigger points as a primary means of therapy.

(15) Physical therapy--The evaluation, examination, and utilization of exercises, rehabilitative procedures, massage, manipulations, and physical agents including, but not limited to, mechanical devices, heat, cold, air, light, water, electricity, and sound in the aid of diagnosis or treatment. Physical therapists may perform evaluations without referrals. Physical therapy practice includes the use of modalities, procedures, and tests to make evaluations. Physical therapy practice includes, but is not limited to the use of: Electromyographic (EMG) Tests, Nerve Conduction Velocity (NCV) Tests, Thermography, Transcutaneous Electrical Nerve Stimulation (TENS), bed traction, application of topical medication to

open wounds, sharp debridement, provision of soft goods, inhibitive casting and splinting, Phonophoresis, Iontophoresis, and biofeedback services.

Reviewing the plain and unambiguous language of Chapter 453, it is clear the legislature did not intend that the practice of physical therapy encompass acupuncture. Utter silence as to a form of therapy such as acupuncture cannot be interpreted as the legislature's intent that the license of a physical therapy encompass the practice of acupuncture. This is not surprising as trigger point dry needling is not a part of the standard curriculum for physical therapy education.⁶ Authorizing physical therapists, who have no requirements for training in the practice of acupuncture to practice acupuncture would be a departure from the entire scheme of regulation of the healing arts branches through the Occupations Code, which sets out stringent educational and training requirements for all healing arts licensees in order to protect the public health and safety. See Occupations Code Chapters 201 (Chiropractors), 202 (Podiatrists), 203 (Midwives), 206 (Surgical Assistants), 252 (Dentists), 301 (Nurses), and 501 (psychologists).

The most generous interpretation of the language of Chapter 453 is that it does not explicitly prohibit the practice of acupuncture from the scope of practice of physical therapists. However, upon closer reading, Texas Occupations Code §453.006(a) does prohibit physical therapists from practicing acupuncture. This section states "A person may not engage in diagnosing diseases or in practicing medicine as defined by law on the basis of a license issued under this chapter." Tex. Occ. Code §453.006(a). As discussed below acupuncture in Texas is regulated as the practice of medicine.

The Practice of Acupuncture is Regulated as the Practice of Medicine

In Texas, historically only licensed physicians were allowed to practice acupuncture. *Thompson v. State Bd. of Med. Exam'rs*, 570 S.W.2d 123, 130. In *Thompson*, the Tyler Court of Civil Appeals, Tyler, held that:

[I]t is properly within the power of the Board of Medical Examiners to regulate acupuncture as the practice of medicine. it is properly within the power of the Board of Medical Examiners to regulate acupuncture as the practice of medicine. In our opinion the State of Texas and the Board of Medical Examiners would betray their public trust to permit unlicensed persons to practice medicine. In the future acupuncturists may be licensed to practice their art in Texas. However, the Legislature should make that determination, not the courts. *Id.* at 130.

The legislature did eventually allow the separate licensing of acupuncturists subject to stringent education and training requirements under §205 of the Occupations Code, but did not exempt the practice of acupuncture from the application of the Medical Practice Act. See Tex. Occ. Code §§151.052, 205.101. This contrasts with the Texas legislature's choice to exclude other healing

⁶ *Physical Therapists & the Performance of Dry Needling : An Educational Resource Paper*, American Board of Physical Therapy ("APTA"), APTA Department of Practice and APTA State Government Affairs, January 2012, page 2. See Exhibit C.

arts from the definition of the practice of medicine and regulation under the Medical Practice Act. The Acupuncture Board remains subject to supervision by the Texas Medical Board with its rule making authority subject to Board approval. See Tex. Occ Code §205.101. The legislature left open the possibility that another healing arts occupation might encompass acupuncture, presumably if they required comparable training.

Because the legislature has chosen not to exempt the Acupuncture Board from the application of the Medical Practice Act and left it subject to the supervision of the Medical Board, acupuncture continues to be regulated as the practice of medicine, by the Acupuncture Board under the supervision of the Texas Medical Board.

That acupuncture remains subject to regulation of the practice of medicine becomes clear when examining the manner in which the legislature structured the exemption for licensed physicians. Section 205.003 (b) states “this chapter does not: (1) limit the practice of medicine by a physician.” This shows that the legislature views acupuncture as part of the practice of medicine as the legislature would have otherwise used language similar to the exemption in subsection (b) that refers to a licensed health care professional acting and practicing within the scope of their license to exempt physicians from the requirement of an acupuncture license. Because acupuncture is part of the medicine, the legislature only needed to state that “this chapter does not limit the practice of medicine by a physician.” This exemption for physicians is in contrast to the exception in §205.003(a) which states, “this chapter does apply to a health care professional licensed under another statute of this state and acting within the scope of their license.” As interpreted by the Attorney General, this requires a showing that the legislature intended that the licensed health occupations exempt from Chapter 205 clearly encompass the practice of acupuncture. See DM-417. This showing is not required for physicians as acupuncture is regulated as part of the practice of medicine and physicians are licensed to practice medicine. Therefore, physical therapists, who are prohibited from practicing medicine by Chapter 453.006, are likewise prohibited from practicing acupuncture, which is still regulated as the practice of medicine.



Allen Cline, L.Ac.

Chairman, Texas Acupuncture Board

C: **Via E-Mail**
Scott Freshour (w/enclosures)
General Counsel
Texas Medical Board

Via E-Mail
Robert Blech (w/enclosures)
Assistant General Counsel
Texas Medical Board