

FILED: January 23, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

OREGON ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE,
ALFRED THIEME, and E. CHRISTO GORAWSKI,
Petitioners,

v.

BOARD OF CHIROPRACTIC EXAMINERS,
Respondent,

and,

UNIVERSITY OF WESTERN STATES;
and JOHN L. V. PLATT, D.C., P.C., dba Woodstock Chiropractic Clinic,
Intervenors-Respondents.

Board of Chiropractic Examiners

A148924

Argued and submitted on July 17, 2013.

Patrick T. Foran argued the cause for petitioners. With him on the briefs were Thane W. Tienson and Landye Bennett Blumstein LLP.

Judy C. Lucas, Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

James E. Mountain, Jr., argued the cause for intervenor-respondent University of Western States. With him on the brief were Jona J. Maukonen, Frank A. Moscato, and Harrang Long Gary Rudnick P.C.

Andrew T. Reilly and Black Helterline LLP filed the brief for intervenor-respondent John L. V. Platt, D.C., P.C., dba Woodstock Chiropractic Clinic.

Before Schuman, Presiding Judge, and Duncan, Judge, and Tookey, Judge.*

TOOKEY, J.

OAR 811-015-0036 held invalid.

*Tookey, J., *vice* Wollheim, J.

1 TOOKEY, J.

2 Petitioners challenge the validity of OAR 811-015-0036, a rule adopted by
3 the State Board of Chiropractic Examiners (the board) that authorizes chiropractic
4 physicians to perform "dry needling." Petitioners assert that the rule exceeds the board's
5 statutory authority, and they make several arguments to support that contention. We
6 address only petitioners' first argument--that the challenged rule authorizes a technique
7 that is not encompassed within the practice of "chiropractic," as defined by ORS
8 684.010(2)--which is dispositive. Because we conclude that dry needling does not fall
9 within the practice of chiropractic, we declare OAR 811-015-0036 invalid.

10 Under ORS 183.400(1), "any person" may petition this court to determine
11 the validity of a rule. In reviewing a rule challenge under that statute, we may declare the
12 rule invalid only if we conclude that it violates constitutional provisions, exceeds the
13 statutory authority of the agency that adopted the rule, or was adopted without complying
14 with rulemaking procedures. ORS 183.400(4). Here, petitioners do not argue that OAR
15 811-015-0036 is unconstitutional or that its adoption was procedurally flawed; they assert
16 only that the rule exceeds the board's statutory authority.

17 To determine whether a challenged rule exceeds the agency's statutory
18 authority, we may consider only "the wording of the rule itself (read in context) and the
19 statutory provisions authorizing the rule." *Wolf v. Oregon Lottery Commission*, 344 Or
20 345, 355, 182 P3d 180 (2008) (citing ORS 183.400(3)(a), (b)). Based on those sources,
21 we consider whether the agency's adoption of the rule exceeded the authority granted by

1 statute and, further, whether the agency "departed from a legal standard expressed or
2 implied in the particular law being administered, or contravened some other applicable
3 statute." *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d
4 785 (1984). In making that determination, we seek to discern the legislature's intent by
5 examining the text and context of the relevant statutes and, if useful to the analysis,
6 pertinent legislative history. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042
7 (2009) (describing statutory analysis).

8 We begin with the statutory provisions authorizing the board to adopt rules
9 related to the practice of chiropractic in Oregon. The board has the authority "[t]o
10 enforce the provisions of [ORS chapter 684] and to exercise general supervision over the
11 practice of chiropractic within this state," ORS 684.155(1)(b) and "shall from time to
12 time adopt such rules as it deems proper and necessary for the administration of this
13 chapter and the performance of its work," ORS 684.150(1). Thus, for the board to adopt
14 a valid rule under ORS chapter 684, the rule must relate to the practice of "chiropractic."
15 ORS 684.010(2) defines "chiropractic" as

16 "(a) That system of adjusting with the hands the articulations of the
17 bony framework of the human body, and the employment and practice of
18 physiotherapy, electrotherapy, hydrotherapy and minor surgery.

19 "(b) The chiropractic diagnosis, treatment and prevention of body
20 dysfunction; correction, maintenance of the structural and functional
21 integrity of the neuro-musculoskeletal system and the effects thereof or
22 interferences therewith by the utilization of all recognized and accepted
23 chiropractic diagnostic procedures and the employment of all rational
24 therapeutic measures as taught in approved chiropractic colleges."

25 Here, the challenged rule defines dry needling and explicitly states that the

1 technique falls within the statutory definition of "chiropractic." The rule provides, in
2 relevant part,

3 "Dry needling is within the chiropractic physicians [*sic*] scope of
4 practice for the treatment of myofascial triggerpoint [*sic*] pursuant to ORS
5 684.010(2).

6 "(1) Dry Needling is a technique used to evaluate and treat
7 myofascial trigger points that uses a dry needle, without medication, that is
8 inserted into a trigger point that has been identified by examination in
9 accordance with OAR 811-015-0010 with the goal of releasing/inactivating
10 the trigger points, relieving pain and/or improving function."

11 OAR 811-015-0036. Petitioners argue that dry needling does not fall within the statutory
12 definition of "chiropractic" under ORS 684.010(2)(a) because it does not fall within any
13 of the enumerated categories of treatment. Further, petitioners argue that, because dry
14 needling does not fit within the definition of "chiropractic" in subsection (a), it cannot fall
15 within the definition of "*chiropractic* diagnosis, treatment and prevention of body
16 dysfunction" under subsection (b). (Emphasis added.) Respondents argue that dry
17 needling fits within the statutory definition of "chiropractic" because it is a form of
18 "physiotherapy" under ORS 684.010(2)(a),¹ and it is performed for the "treatment and
19 prevention of body dysfunction" under subsection (b).

20 As noted, when interpreting a statute, we seek to discern the legislature's

¹ Respondents do not contend that dry needling involves "adjusting with the hands the articulations of the bony framework of the human body" or that it is a form of electrotherapy, hydrotherapy, or minor surgery. ORS 684.010(2)(a). The term "[m]inor surgery" is defined as "the use of electrical or other methods for the surgical repair and care incident thereto of superficial lacerations and abrasions, benign superficial lesions, and the removal of foreign bodies located in the superficial structures; and the use of antiseptics and local anesthetics in connection therewith." ORS 684.010(5).

1 intent by examining the text and context of the statute and, if useful to the analysis,
2 pertinent legislative history. *Gaines*, 346 Or at 171-72. The question here is whether dry
3 needling falls within the definition of "chiropractic" under ORS 684.010(2)(a) as a form
4 of "physiotherapy." We begin by observing that the term "physiotherapy" was added to
5 the law as an amendment in 1927, and there is no available legislative history relating to
6 that amendment. However, based on the statute's text and context, we conclude that the
7 dry needling technique does not fall within the intended meaning of "physiotherapy."

8 The term "physiotherapy" is not defined in ORS chapter 684 or other
9 related statutes; thus, dictionary definitions can help us discern the term's plain, natural
10 and ordinary meaning. *See Gaines*, 346 Or at 175. When "interpreting the words of a
11 statute enacted many years ago, we may seek guidance from dictionaries that were in use
12 at the time." *State v. Perry*, 336 Or 49, 53, 77 P3d 313 (2003); *see also Hopkins v. SAIF*,
13 349 Or 348, 360-64, 245 P3d 90 (2010) (interpreting the statutory term "arthritis" using
14 *Webster's Third New Int'l Dictionary* and medical dictionaries that were in use when the
15 statutory provision was enacted).

16 Citing *Webster's Third New Int'l Dictionary*, respondents assert that the
17 term "physiotherapy" is synonymous with "physical therapy." *See Webster's Third New*
18 *Int'l Dictionary* 1707 (unabridged ed 2002) (defining "physiotherapy" as ": PHYSICAL
19 THERAPY"). Respondents point out that the term "physical therapy" is defined by
20 *Webster's* as "the treatment of disease by physical and mechanical means (as massage,
21 regulated exercise, water, light, heat, electricity)." *Id.* Based on that definition,

1 respondents assert, without further explanation, that "[d]ry needling falls within the
2 category of treatment by physical or mechanical means, *i.e.*, of physiotherapy."

3 As noted, the term "physiotherapy" was added to the law in 1927. At that
4 time, *The American Illustrated Medical Dictionary* defined "physiotherapy" as "[t]he use
5 of natural forces, such as light, heat, air, water, and exercise, in the treatment of disease."
6 W. A. Newman Dorland, *The American Illustrated Medical Dictionary* 801 (11th ed
7 1922). Similarly, *A Practical Medical Dictionary* defined "physiotherapy" as
8 "physiatrics," which in turn was defined as "[t]he use of natural forces in the treatment of
9 disease." Thomas Lathrop Stedman, *A Practical Medical Dictionary* 775, 774 (7th rev ed
10 1922). Those definitions would suggest that physiotherapy uses "natural forces" similar
11 to "light, heat, air, water, and exercise."²

12 We now turn to the context of the statute. Petitioners contend that dry
13 needling cannot lawfully be considered physiotherapy in Oregon because physical
14 therapists in this state are not authorized to practice that technique. The essence of
15 petitioners' argument is that, because the term "physiotherapy" is synonymous with
16 "physical therapy," the statutes regulating the practice of physical therapy in Oregon, set
17 forth in ORS chapter 688, provide helpful context for interpreting the term
18 "physiotherapy" in ORS 684.010(2)(a). In this instance, we decline to consider the
19 definitions and rules relating to the practice of physical therapy, because the term we seek

² The versions of Webster's dictionary available in 1927 did not include a definition of "physiotherapy."

1 to define in this case is "physiotherapy," not "physical therapy." Even if we were to
2 conclude that the legal definition of "physical therapy" excludes dry needling (which we
3 do not decide here), we would not be compelled to conclude that the legislature intended
4 for the two different terms to have the same legal meaning.

5 We do find other provisions of the same statute helpful to our analysis.
6 *Perry*, 336 Or at 55-56. When the legislature added the category of physiotherapy to the
7 definition of "chiropractic" in 1927, it also added the categories of "electrotherapy" and
8 "hydrotherapy." *See* Or Laws 1927, ch 450, § 3.³ Electrotherapy was defined at the time
9 as "[t]he employment of electricity in the treatment of disease[.]" and hydrotherapy was
10 defined as "[t]reatment of disease by means of water applied in various ways[.]"

³ In 1927, the law was amended to provide, in relevant part (with deletions in bracketed italics and additions in bold):

"(b) Chiropractic is defined as that system of adjusting **with the hand or hands** the articulations of the bony framework of the human body, [*especially asymmetries of the vertebrae, for the purpose of removing the cause of diseases by the correction of subluxations, thereby removing the pressure, impingement, or tension from the nerves having their passage between, through, or around the structures subluxated. The subluxation is corrected with the hands, using the bones of the body, more particularly the spinous and transverse processes of the vertebrae, as levers to which is applied a peculiar adjustic movement--the Chiropractic thrust*] **and the employment and practice of physiotherapy, electrotherapy and hydrotherapy; provided, no person practicing under this act shall write prescriptions for, or dispense drugs, practice optometry, or do major surgery; provided further, this act shall not be construed so as to interfere with or prevent the practice of, or use of massage, Swedish movement, physical culture, neuropathy, naturopathy, or other natural methods requiring the use of hand or hands.**"

Or Laws 1915, ch 325, § 8; Or Laws 1927, ch 450, § 3.

1 Stedman, *A Practical Medical Dictionary* at 308, 468. The addition of physiotherapy,
2 electrotherapy, and hydrotherapy to the definition of "chiropractic" indicates an
3 expansion of the practice to include not just "that system of adjusting with the hands the
4 articulations of the bony framework of the human body," but also treatment methods that
5 include other tools and sources of energy--those involved in physiotherapy (light, heat,
6 air, water, and exercise), electrotherapy (electricity), and hydrotherapy (water).

7 With that understanding of the text and context of the statute, we turn to the
8 question whether dry needling is a form of "physiotherapy," as that term is used in ORS
9 684.010(2)(a), and is therefore "chiropractic." The challenged rule defines dry needling
10 as "a technique used to evaluate and treat myofascial trigger points that uses a dry needle,
11 without medication, that is inserted into a trigger point that has been identified by
12 examination * * * with the goal of releasing/inactivating the trigger points, relieving pain
13 and/or improving function." OAR 811-015-0036(1). A "trigger point" is a small,
14 sensitive area that, when stimulated, gives rise to a reaction elsewhere in the body.
15 *Webster's* at 2444 (defining "trigger point" as "a small trigger area[,] where a "trigger
16 area" is defined as "a sensitive area of the body stimulation of which gives rise to reaction
17 elsewhere in the body * * *"). The term "myofascial" refers to a sheet of fibrous tissue
18 surrounding and separating muscle tissue. *Stedman's Medical Dictionary* 1173, 647
19 (27th ed 2000) (defining "myofascial" as "[o]f or relating to the fascia surrounding and
20 separating muscle tissue[,] where "fascia" is defined as "[a] sheet of fibrous tissue that
21 envelops the body beneath the skin; it also encloses muscles and groups of muscles, and

1 separates their several layers or groups"). Thus, plainly stated, dry needling is the
2 insertion of a needle, without medication, into the tissue surrounding or separating the
3 muscles within an identified, sensitive area, to relieve pain or improve function.

4 Based on that definition of dry needling, the question reduces to whether
5 the insertion of a needle into the tissue surrounding a muscle uses a "natural force"
6 similar to "light, heat, air, water, and exercise"--that is, whether a needle is a natural
7 force. We conclude that it is not. A needle used in dry needling is neither "natural" nor
8 is it a "force." In contrast to light, heat, air, water, and exercise--as well as the electricity
9 and water used in electrotherapy and hydrotherapy--a needle is a man-made *object*.
10 Moreover, although the use of natural forces may involve man-made objects and devices,
11 we find nothing in the definition of physiotherapy suggesting that the practice of
12 physiotherapy would include the application of a man-made object directly to the internal
13 tissues of a patient.

14 Because dry needling is not a form of physiotherapy, and respondents do
15 not contend that it falls within any other category of treatment listed in ORS
16 684.010(2)(a), we conclude that dry needling is not within the practice of chiropractic.
17 Thus, the challenged rule exceeds the scope of the board's statutory authority and is
18 invalid.

19 OAR 811-015-0036 held invalid.