IN THE COURT OF APPEALS OF THE STATE OF OREGON

OREGON ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE,
Petitioner,

v.

BOARD OF CHIROPRACTIC EXAMINERS,
Respondent.

Board of Chiropractic Examiners

Court of Appeals No. A148924

ORDER STAYING ADMINISTRATIVE RULE PENDING JUDICIAL REVIEW

Petitioner has moved to stay an administrative rule adopted by respondent Board of Chiropractic Examiners, OAR 811-015-0036, which permits chiropractors to practice "dry needling," pending this judicial review of the Board's authority to adopt the rule.

The court has the inherent authority to stay enforcement of an administrative rule based on a showing of irreparable harm. *See Northwestern Title Loans v. Division. of Finance and Corporate Securities*, 180 Or App 1, 11-12, 42 P3d 313 (2002), *vacated as moot by order dated June 12, 2002.* In addition to requiring a showing that the failure to stay enforcement of the rule pending judicial review will result in irreparable harm, the court also considers the likelihood that petitioner will prevail on judicial review.

The court determines that petitioner has made a showing that it is reasonably likely to prevail on judicial review. Petitioner has made a *prima facie* showing that "dry needling" is substantially the same as acupuncture. Respondent argues that, because the practice of acupuncture can include additional techniques and modalities, dry needling is not acupuncture. Regardless of whether acupuncture includes additional techniques and modalities, acupuncture also includes the insertion of needles to stimulate acupuncture points and meridians. ORS 677.757(1)(a). OAR 811-015-0036 defines "dry needling" as "a technique used to evaluate and treat myofascial trigger points that uses a dry needle, without medication, that is inserted into a trigger point * * *." Petitioner has shown that there is a 93.3% concurrence between "acupuncture points" and "myofascial trigger points" and a 76-90% concurrence between acupuncture meridians and myofascial referred pain patterns. Thus, it appears, dry needling is substantially the same as the insertion of needles treatment modality of acupuncture.

RECEIVED
JUL 29 2011
APPELLATE DIVISION
SALEM, OR 97301

Petitioner has shown that virtually no approved chiropractic school regularly teaches acupuncture or dry needling as a regular part of its curriculum, which is important because part of the definition of "chiropractic" is that it include "employment of all rational therapeutic measures as taught in approved chiropractic colleges." ORS 684.010(2)(b). Petitioner also has shown that ORS 677.759 confers authority on the Oregon Medical Board to regulate the practice of acupuncture, that respondent previously considered acupuncture outside chiropractic medicine, and that respondent previously disciplined chiropractors who have treated patients with acupuncture.

Even if the practice of dry needling or acupuncture could reasonably be construed as within the meaning of chiropractic medicine generally as defined in ORS 684.010, any attempt by respondent to authorize "dry needling" appears to run afoul of ORS 684.025(2):

> "Neither this section nor ORS 684.010 authorizes the administration of any substance by the penetration of the skin or mucous membrane of the human body for a therapeutic purpose."

Respondent has not argued that needles used in "dry needling" are not a substance within the meaning of ORS 684.025(2), or that dry needling is not administered for a therapeutic purpose.

Respecting whether petitioner has shown that irreparable harm will result if the administrative rule is not stayed pending judicial review, the court concurs with respondent that petitioner has not shown that the association itself or even its individual practitioner members are likely to suffer irreparable harm as the court applied that term in *Northwestern Title Loans*, 180 Or App at 13 (petitioner did not show that failure to stay enforcement of the administrative rule would force petitioner out of business). *But see Arlington Sch. Dist.No. 3 v. Arlington Ed. Assoc.*, 184 Or App 97, 101-02, 55 P3d 546 (2002) ("irreparable harm" means injury that reasonably cannot be completely remedied in court of law).

In addition to potential harm to the party invoking the court's jurisdiction, the court also may consider whether the failure to act could irreparably harm others. Petitioner contends that the failure to stay the rule in question will result in irreparable harm to patients of chiropractic practitioners who engage in dry needling because the amount of training required of a chiropractor to engage in that practice is inadequate. The administrative rule requires practitioners to complete a 24-hour practicum, with no clinical component. According to the declaration of Alfred Thieme, an expert in the practice of acupuncture, adverse effects of the practice of dry needling can include small bleeding, hemotoma, dizziness, fainting, nausea, increase in pain symptoms, infection, and pneumothorax (puncturing of the lung), which can be particularly serious. Respondent has attempted to minimize the significant of the potential adverse effects, but has not rebutted that those conditions are recognized potential adverse effects of improper dry needling.

Petitioner also has shown that the Accreditation Commission for Acupuncture and Oriental Medicine requires 705 hours devoted to acupuncture theory and 660 hours of clinical practice in its training program. The American Board of Chiropractic Acupuncturists requires 300 hours of training, and the National Board of Chiropractic Examiners requires 100 hours of training. Even recognizing that "dry needling" is but one technique or modality within the broader practice of acupuncture, respondent has not explained how 24 hours of training, with no clinical component, provides sufficient training to chiropractors to adequately protect patients.

For the foregoing reasons, petitioner's motion is granted and OAR 811-015-0036 is stayed pending further order of this court or upon issuance of the appellate judgment terminating this judicial review.

JUL 29 2011
DATE

James W. Nass
James W. Nass, Appellate Commissioner

c: Thane W Tienson
Judy C Lucas

Ej\a148924oral110726.docx