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**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.

Court of Appeals  
No. A148924

3/3/12

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**PETITIONERS' OPENING BRIEF AND EXCERPT OF RECORD**

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**Judicial Review of an Administrative Rule of the  
Oregon Board of Chiropractic Examiners**

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## STATEMENT OF THE CASE

### **Nature of the Proceedings and Relief Sought**

This is an action for judicial review to determine the validity of a rule under ORS 183.400. Petitioners Oregon Association of Acupuncture (OAAOM), Alfred Thieme, and E. Christo Gorawski (collectively "Petitioners") seek an order declaring a rule of the Oregon Board of Chiropractic Examiners (OBCE), OAR 811-015-0036, invalid on the basis that the rule exceeds the statutory authority delegated to the Board.

### **Nature of the Rule Sought to Be Reviewed**

This is a direct challenge to the validity of an administrative rule under ORS 183.400; therefore, there is no judgment or final agency order involved.

### **Basis of Appellate Jurisdiction**

The Court of Appeals has jurisdiction to review the validity of an agency rule under ORS 183.400 upon the filing of a petition by "any person." Petitioners are not a party to a contested case in which the validity of the rule could be determined. Petitioners are a non-profit association and acupuncturists and thus "persons" entitled to seek review under ORS 183.310(8); *see also Kellas v. Department of Corrections*, 341 Or 471, 145 P3d 139 (2006) (court erred in concluding that petitioner, a "person," lacked standing to challenge administrative rule under ORS 183.400).

### **Relevant Dates for Appellate Jurisdiction**

The rule in question, OAR 811-015-0036, was adopted by the Oregon Board of Chiropractic Examiners on May 17, 2011. It became effective on June 13, 2011. The Petition for Judicial Review was filed on June 23, 2011.

### **Question Presented**

Did the OBCE exceed its statutory authority by promulgating OAR 811-015-0036, the dry needling rule, in contravention of ORS Chapter 684 and ORS Chapter 677, thus rendering the rule invalid?

### **Summary of Arguments**

In promulgating the dry needling rule, the OBCE exceeded its statutory authority by:

- (1) Unlawfully expanding the OBCE's authority to regulate a treatment modality that conflicts with the definition of "chiropractic" as set forth in ORS 684.010(2);
- (2) Authorizing the administration of a "substance by the penetration of the skin or mucous membrane" in express violation of ORS 684.025(2);
- (3) Interfering with "other methods or science of healing" in violation of ORS 684.035;
- (4) Usurping the Oregon Medical Board's statutory authority to govern the license and practice of acupuncture in violation of ORS 677.759(1); and

- (5) Authorizing chiropractic physicians to practice acupuncture in violation of ORS 677.759(1), ORS 684.100(1)(f)(B) and OAR 811-0035-0015(4).

Furthermore, the OBCE's dry needling rule contravenes its own interpretation of Oregon law and its previous orders disciplining chiropractors who used dry needling treatments on patients.

#### **Summary of the Rule**

The OBCE adopted OAR 811-015-0036 on May 17, 2011 (ER-1). The rule permits chiropractic physicians to perform "dry needling" which is defined by the rule, in relevant part, 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 that has been identified by examination in accordance with OAR 811-015-0010 with the goal of releasing/inactivating the trigger points, relieving pain and/or improving function." OAR 811-015-0036(1) (the "dry needling rule") (ER-1).

#### **Significant Motions in the Appeal**

After filing the petition for judicial review on June 23, 2011, petitioners filed a motion for stay pending judicial review on July 7, 2011. On July 29, 2011, the Appellate Commissioner ordered the administrative rule stayed pending judicial review. On September 21, 2011, the University of Western States and John L.V. Platt, D.C., P.C., dba Woodstock Chiropractic Clinic,

successfully moved to intervene as additional respondents in the appeal. On September 22, 2011, respondent OBCE filed a motion for reconsideration of the stay. On October 14, 2011, intervenor-respondent John L.V. Platt, D.C., P.C. dba Woodstock Chiropractic Clinic, similarly filed a motion for reconsideration of the stay. On November 10, 2011, the Court issued an order denying respondents' motions for reconsideration ruling that the stay was proper because petitioners showed irreparable harm and a likelihood of prevailing on the merits.

#### **ASSIGNMENT OF ERROR**

By promulgating OAR 811-015-0036, the OBCE exceeded its statutory authority thus rendering the rule invalid.

#### **Preservation of Error**

On November 18, 2010, Stephen Kafoury, on behalf of petitioner OAAOM, presented testimony in opposition to the proposed rule. (ER-5, ER-6, and ER-7). On January 20, 2011, petitioner E. Christo Gowarski presented testimony in opposition of the proposed rule. (ER-8, ER-9, ER-10, ER-11, ER-12, ER-13, and ER-14,). On May 17, 2011, in response to OBCE's Notice of Proposed Rulemaking, petitioners E. Christo Gowarski, Al Thieme, and OAAOM, through its attorney, submitted testimony and statements in opposition to the proposed rule. (ER-15, ER-16, ER-17, ER-18, ER-19, ER-20,

ER-21, ER-22, ER-23, ER-24, ER-25, ER-26, ER-27, ER-28, ER-29, ER-30, ER-31, ER-33, ER-34, ER-35, ER-36, ER-37, ER-38, ER-39, ER-40, ER-41, ER-42, and ER-43). In testimony presented at the OBCE's May 17, 2011 public hearing, the petitioners argued that the OBCE's proposed dry needling rule exceeded the OBCE's statutory mandate under ORS Chapter 684. *Id.*

### **Standard of Review**

“An administrative agency may not, by its rules, amend, alter, enlarge, or limit the terms of a legislative enactment.” *University of Oregon Co-Op. Store v. State Dept. of Revenue*, 273 Or 539, 550, 542 P2d 900 (1975). The court shall declare an agency rule invalid if it concludes that the rule exceeds the statutory authority of the agency. ORS 183.400(4)(b). To determine whether an agency exceeded its statutory authority, the court must consider whether the agency “departed from a legal standard expressed or implied in the particular law being administered, or contravened some other applicable statute.” *Friends of Columbia River Gorge v. Columbia River*, 346 Or 366, 377, 213 P3d 1164 (2009) (quoting *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984)); *Industrial Customers of Northwest Utilities v. Oregon Department of Energy*, 238 Or App 127, 130, 241 P3d 352 (2010). The court must also consider whether “the rule corresponds to the statutory policy as [the court] understand[s] it.” *Planned Parenthood Assn.*, 297 Or at 573.

## ARGUMENT

### I. **OAR 811-015-0036, Authorizing Chiropractic Physicians to Perform Dry Needling, Exceeds the OBCE's Statutory Authority and is Therefore Invalid.**

OAR 811-015-0036 (the "dry needling rule"), adopted by the OBCE on May 17, 2011, provides:

Dry needling is within the chiropractic physicians scope of practice for the treatment of myofascial triggerpoint pursuant to ORS 684.010(2).

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

(2) A chiropractic physician licensed in Oregon who wishes to practice dry needling must,

(a) Register with the Board on the form prescribed by the Board and,

(b) Provide proof of the basic Board approved course hour requirements before engaging in the practice of dry needling, and

(c) Perform all aspects of needle insertion and removal.

(3) In order to perform dry needling, chiropractic physicians must complete a minimum of 24 hours of education with practicum specific to dry needling within the curriculum of an accredited chiropractic college, or through post graduate continuing education on dry needling approved by the Oregon Board of Chiropractic Examiners.

(4) Chiropractic physicians must obtain a written Board approved informed consent from every patient treated with dry needling

regarding the clinical purpose of dry needling and must state clearly that dry needling is not acupuncture.

(ER-1).

ORS Chapter 684 sets forth the statutory provisions governing chiropractors and identifies three criteria that must be satisfied before the OBCE has statutory authority to promulgate a rule authorizing chiropractors to practice dry needling. First, dry needling must fall within the definition of “chiropractic” under ORS 684.010(2). Second, dry needling must not involve the administration of a substance by the penetration of the skin for a therapeutic purpose under ORS 684.025(2). Finally, the dry needling must not interfere with other methods or science of healing in Oregon under ORS 684.035. Here, the OBCE has exceeded its statutory mandate in each respect by:

- Unlawfully expanding OBCE’s authority to regulate a practice that is not encompassed within the definition of “chiropractic” as set forth in ORS 684.010(2);
- Authorizing the administration of a “substance by the penetration of the skin or mucous membrane” in express violation of ORS 684.025(2); and
- Interfering with “other methods or science of healing” in violation of ORS 684.035.

Under Oregon law, a rule is invalid where it exceeds the scope of an agency's statutory grant of authority. *Oregon Newspaper Publishers Ass'n v. Peterson*, 244 Or 116, 123-124, 415 P2d 21 (1966) (Board of Pharmacy's regulation prohibiting advertising of prescription drugs exceeded Board's statutory authority). *See also University of Oregon Co-Op. Store v. State Dept. of Revenue*, 273 Or 539, 550, 542 P2d 900 (1975) (where an administrative agency enlarges the terms of its legislative enactment, the agency's rule is invalid). Under ORS 183.400(3), the court may invalidate a rule if it finds that, in adopting the rule, the agency violated the constitution, exceeded its statutory authority, or failed to comply with applicable rulemaking procedures. *Wolf v. Oregon Lottery Commission*, 344 Or 345, 355, 182 P3d 180 (2008).

Here, the OBCE exceeded its statutory authority and "departed from a legal standard expressed or implied in the particular law being administered" as well as contravened other applicable statutes. *Friends of Columbia Gorge v. Columbia River*, 346 Or 366, 377, 213 P3d 1164 (2009); *Industrial Customers of Northwest Utilities v. Oregon Department of Energy*, 238 Or App 127, 130, 241 P3d 352 (2010). In determining whether an agency exceeded its statutory authority in adopting a rule, it is appropriate for the court to examine affected statutes to determine the scope of the agency's rulemaking authority and "whether the rule corresponds to statutory policy as [the court] understand[s]

it.” *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 573, 687 P2d 785 (1984).

**A. Dry Needling is Not Encompassed in the Statutory Definition of “Chiropractic” Under ORS 684.010.**

ORS 684.010(2) provides two statutory definitions of chiropractic treatment. To determine the legal standard imposed by this statute, the court must examine the statute’s text and context, giving words of common usage “their plain, natural, and ordinary meaning.” *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). So examined, it is evident that dry needling does not fall within the ambit of “chiropractic” under either subsection (a) or (b) of the statute.

ORS 684.010(2)(a), defines “chiropractic” as:

That system of adjusting with the hands the articulations of the bony framework of the human body, and the employment and practice of physiotherapy, electrotherapy, hydrotherapy and minor surgery.” ORS 684.010(2)(a).

ORS 684.010(2)(b) also defines “chiropractic” to include:

The chiropractic diagnosis, treatment and prevention of body dysfunction; correction, maintenance of the structural and functional integrity of the neuro-musculoskeletal system and the effects thereof or interferences therewith by the utilization of all recognized and accepted chiropractic diagnostic procedures and the employment of all rational therapeutic measures as taught in approved chiropractic colleges. ORS 684.010(2)(b).

**1. Dry Needling is Not “Chiropractic” Under the Statutory Definition Set Forth in ORS 684.010(2)(a).**

As defined, in relevant part, by the challenged rule, dry needling is:

[A] technique used to evaluate and treat myofascial trigger points that uses a dry needle, without medication, that is inserted into a trigger point that has been identified by examination in accordance with OAR 811-015-0010 with the goal of releasing/inactivating the trigger points, relieving pain and/or improving function.

OAR 811-015-0036(1).

Under a plain language reading of the rule, then, dry needling is not a “system of adjusting with the hands the articulations of the bony framework of the human body” as “chiropractic” is defined by ORS 684.010(2)(a). Instead, dry needling involves the administration of a needle inserted into trigger points beneath the skin and mucous membrane of the body as defined by OAR 811-015-0036. Furthermore, dry needling does not involve the practice of physiotherapy, (“physical therapy”<sup>1</sup>), electrotherapy, (“treatment of disease by means of electricity”<sup>2</sup>), hydrotherapy (“treatment of disease or disability by the external application of water”<sup>3</sup>), or minor surgery (“the use of electrical or other methods for the surgical repair and care incident thereto of superficial

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<sup>1</sup> *Webster’s Third New Int’l Dictionary* 1707 (unabridged ed 2002).

<sup>2</sup> *Id.* at 733.

<sup>3</sup> *Id.* at 1110.

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”<sup>4</sup>). In fact, nothing in these statutorily authorized medical procedures encompass the “insertion of a needle” for “the goal of releasing/inactivating [myofascial] trigger points, relieving pain and/or improving function” as permitted by the dry needling rule.

**2. Dry Needling is Not “Chiropractic” Under the Statutory Definition Set Forth in ORS 684.010(2)(b).**

Dry needling treatments are also excluded from the definition of “chiropractic” under ORS 684.010(2)(b) for several reasons. First, dry needling, by definition, is not “chiropractic diagnosis, treatment and prevention of body dysfunction” as set forth in the statute. Although the term, “chiropractic” is, itself, being defined by ORS 684.010(2), the use of the term “chiropractic” in subsection (b) must, as a matter of both plain meaning and statutory construction, refer to subsection (a), or to “that system of adjusting with the hands the articulations of the bony framework of the human body” and the practices of “physiotherapy, electrotherapy, hydrotherapy, and minor surgery.” If the term “chiropractic diagnosis” were to encompass other

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<sup>4</sup> ORS 684.010(5).

meanings of “chiropractic,” the legislature certainly has not so provided. Accordingly, the term must refer to the definition set forth in subsection (2)(a). *See State v. Stamper*, 197 Or App 413, 106 P3d 172 (2005) (statutes must be read in a manner giving effect to related statutes); *State v. Holloway*, 138 Or App 260, 267, 908 P2d 316 (1981) (courts must assume that the legislature intends words to be used consistently). Thus, dry needling is not encompassed within ORS 684.010(2)(b) as “chiropractic diagnosis, treatment and prevention of body dysfunction.”

Furthermore, the statutory mandate for chiropractic does not permit the insertion of dry needles for the purposes of “correction [or] maintenance of the structural and functional integrity of the neuro-musculoskeletal system” or “the effects thereof or interferences therewith” under ORS 684.010(2)(b). Chiropractic medicine and acupuncture each focus on the “neuro-musculoskeletal system” involving “both nerves and muscles or nervous and muscular tissue.” *Webster’s Third New Int’l Dictionary* 1521 (unabridged ed 2002). However, under subsection (2)(b), the dry needling treatment modality can be authorized only if that modality was “taught in approved chiropractic colleges” at the time of the adoption of the rule. Yet, as the testimony and exhibits introduced at the OBCE rulemaking hearings made clear, dry needling was not being taught in any OBCE-approved chiropractic college in the United

States. (ER-3, ER-4, ER-17, ER-18, ER-24, ER-30, ER-42, ER-43, ER-44, and ER-45). Instead, what little course offerings and training sessions are available to chiropractic physicians in acupuncture or dry needling are extremely limited in scope and number, not clinically based, and not presently taught in an approved chiropractic college. *Id.*

Reference to the administrative record is appropriate in this instance to determine whether the dry needling rule comports with the definition of chiropractic in ORS 684.010(2)(b). *See Waterwatch of Oregon, Inc. v. Water Resources Com'n*, 199 Or App 598, 614-615, 112 P3d 443 (2005) (court looked to administrative record to hold agency rules invalid because water monitoring standards failed to “ensure maintenance of free-flowing character of the flows” of scenic waterways). Here, as in *Waterwatch*, evidence that ORS 684.010(2)(b) is contravened by the dry needling rule can be demonstrated only by reference to the record. Without such reference, there is no practicable means for the court to determine whether the rule contravened a particular statute. In this instance, the legislature has mandated that all chiropractic therapeutic measures be “taught in approved chiropractic colleges.” But the record demonstrates that dry needling was not taught in approved chiropractic colleges when the rule was promulgated. Consequently, the OBCE violated

ORS 684.010(2)(b) and exceeded its rulemaking authority in adopting the subject rule authorizing chiropractors to practice dry needling.

**B. The Dry Needling Rule, as Defined in OAR 811-015-0036, Violates ORS 684.025(2).**

By its very terms, ORS 684.025(2) explicitly prohibits chiropractors from performing dry needling or any procedure involving the penetration of the skin of a patient for a therapeutic purpose.

ORS 684.025(2) provides:

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.

The statute does not define the terms “administration,” “penetration,” “substance,” or “therapeutic.” In the absence of these definitions, the Court must assume that the legislature intended to give words of common usage their “plain, natural, and ordinary meaning.” *Gaines*, 346 Or at 175. Here, “administration” means “application or dosage of a medicine.” *Webster's Third New Int'l Dictionary* 28. In the dry needling procedure, an acupuncture needle is “administered” when the tip of the needle is applied to a “human body’s” myofascial trigger point. “Penetration” means “the act or process of penetrating” (*Id.* at 1670) while “penetrate” means “to pass into or through; to enter or go through by overcoming resistance.” *Id.* In dry needling treatments,

“penetration” occurs when the acupuncture needle passes into or through the patient’s skin into the myofascial trigger point.

The term “substance” means “a material from which something is made and to which it owes its characteristic qualities” or a “piece or mass of such substance.” *Id.* at 2279. *See also The American Heritage Dictionary* 1386 (4<sup>th</sup> ed. 2000) (a “substance” is “[t]hat which has mass and occupies space; matter. A material of a particular kind or constitution.”); *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009) (adopting definition). Thus, under the plain meaning of the term, the tip of an acupuncture needle is a “substance” under ORS 684.025(2) because the needle is a “mass” that “occupies space.”

Finally, the Oregon Attorney General has defined “therapeutic” as “of or relating to the treatment of disease or disorders by remedial agents or methods.” 40 Or Op Atty Gen 392 (1980). *See also Webster’s Third New International Dictionary* 2372 (same). In dry needling, the needle is used as a “remedial agent or method” to treat disorders.

Therefore, under a plain reading of ORS 684.025(2), the legislature has explicitly barred chiropractors from all treatments involving the administration of any substance (which includes acupuncture needles) by the penetration of the skin or mucous membrane of the human body (*i.e.*, passing through into trigger points) for a therapeutic purpose (*i.e.*, treatment). Thus, the OBCE’s dry

needling rule which explicitly permits such treatment in derogation of ORS 684.025(2) is invalid.

**C. The OBCE's Dry Needling Rule Violates ORS 684.035 by Interfering with "Other Methods or Science of Healing."**

Under ORS 684.035:

Nothing in this chapter shall be construed to interfere with any other method or science of healing in this state.

Yet, this is precisely what the dry needling rule does.

ORS 677.757-ORS 677.785 sets forth the laws governing acupuncturists.

Under Oregon law, acupuncture is the practice of medicine and is overseen by the Oregon Medical Board. ORS 677.765. The Oregon legislature defines "acupuncture," in relevant part, as:

...an Oriental health care practice used to promote health and to treat neurological, organic or functional disorders *by the stimulation of specific points on the surface of the body by the insertion of needles.*

ORS 677.757(1)(a) (emphasis supplied).

As defined, in relevant part, by OAR 811-015-0036, "dry needling" means "a technique used to evaluate and treat myofascial trigger points that uses a dry needle, without medication, that is inserted into a trigger point...with the goal of releasing/inactivating the trigger points, relieving pain and/or improving function." In other words, both dry needling and acupuncture

require (1) the “insertion of needles,” (2) into “trigger points” (i.e., “specific points on the surface of the body”) for (3) the purpose of “relieving pain and/or improving function” (i.e., “to treat...disorders.”). The OBCE’s definition of dry needling fits precisely within the statutory definition of acupuncture. There are no practical or semantic differences. Thus, under Oregon law “dry needling” is “acupuncture.”

By promulgating the dry needling rule, the OBCE has interfered with the practice of acupuncture which the OBCE’s own statute, ORS 684.035, explicitly bars and which is further prohibited by ORS 684.100(1)(f)(B) (barring chiropractors’ willful performance of treatments “contrary to recognized standards of practice of the chiropractic profession”) and OAR 811-0035-0015(4) (barring practice “outside the scope of the practice of chiropractic in Oregon).

## **II. OBCE’s Dry Needling Rule Usurps the Oregon Medical Board’s Statutory Authority Under ORS Chapter 677 to Govern the License and Practice of Acupuncture and Improperly Authorizes Chiropractic Physicians to Practice Acupuncture.**

As noted above, the OBCE’s definition of dry needling fits precisely within the statutory definition of acupuncture. ORS 677.759(1), which governs the practice of acupuncture, provides, in relevant part: “no person shall practice

acupuncture without first obtaining a license to practice medicine and surgery or a license to practice acupuncture from the Oregon Medical Board (OMB). ORS 677.759(1). Here, the dry needling rule circumvents ORS Chapter 677 and usurps the OMB's authority by permitting chiropractic physicians to practice acupuncture without adhering to the rigorous training and public health and safety standards required under ORS 677.759. Furthermore, under ORS 677.765, "performance of acupuncture without licensure or after the termination of licensure by the Oregon Medical Board or in the absence of renewal of licensure constitutes the unauthorized practice of medicine and subjects the person to the penalties provided by ORS 677.990."

The Oregon legislature has delegated to the Oregon Medical Board the exclusive authority to adopt rules "governing the issuance of a license to practice acupuncture." ORS 677.759(5). This rulemaking authority is limited solely to the OMB which has taken "the position that 'dry needling' is 'acupuncture'" and, therefore, requires practitioners of this treatment to obtain an acupuncture license, "which can only be granted by the OMB." (ER-39).

Therefore, under Oregon law, exclusive authority to authorize acupuncture and to license its practitioners rests with the OMB. The dry needling rule divests the OMB of its legislative authority to govern acupuncture

in this state. The OBCE has no statutory authority to authorize its practitioners to practice acupuncture simply by re-labeling acupuncture as “dry needling.” Accordingly, OAR 811-015-0036, is invalid.

### **III. The OBCE Has Consistently and Uniformly Recognized its Lack of Statutory Authority to Authorize Dry Needling.**

For years, the OBCE consistently recognized that, under Oregon law, chiropractors were barred from performing dry needling treatments. The OBCE’s acknowledged recognition that statutes expressly prohibited chiropractors from practicing dry needling should be considered by the court. *See Thomas Creek Lumber and Log Co. v. Board of Forestry*, 188 Or App 10, 19, 69 P3d 1238 (2003) (in a contested state case, an agency’s interpretation of a statute may be entitled to some measure of deference).

In a public session held on September 17, 2009, the OBCE responded to a question from William Hartje, DC, about whether dry needling was in the scope of a chiropractor’s scope of treatment. The OBCE declared:

With his request, Dr. Hartje provided an article wherein Maryland announced that dry needling is now within their chiropractic scope of practice. Dr. Hartje argues that it is both diagnostic and therapeutic. ***The Board determined this is NOT allowed within Oregon’s scope of chiropractic practice as breaking the skin for a therapeutic purpose is not allowed by ORS 684. Also, this would be construed as the practice of acupuncture; previously, the Board sanctioned the licensee for practicing this technique.***

(ER-33) (capitalization in original, other emphasis supplied).

The OBCE's reasoning is consistent with its earlier 2003 order in which it disciplined a licensed chiropractor for performing dry needling. *In the Matter of James Olshove, D.C. License # 764*, State of Oregon Board of Chiropractic Examiners, Case No. 2003-1002 (ER-36, ER-37, and ER-38). The OBCE's order in that proceeding noted that Dr. Olshove admitted "to his inappropriate treatment in the 'dry needling' of patients and that [dry needling violates] the OBCE statutes and rules." (ER-37). The OBCE ruled:

The definition of acupuncture is to promote and treat neurological, organic or functional disorders by the stimulation of specific points on the surface of the body by the **insertion of needles**. (ORS 677.757, emphasis added). The definition of Chiropractic Treatment is: a system of adjusting with the hands the articulations of the bony framework of the human body, and the employment and practice of physiotherapy, electrotherapy, hydrotherapy, and minor surgery (ORS 684.010) while ORS 684.035 states "nothing in this chapter shall be construed to interfere with any other method of science of healing in this state.

(ER-37) (emphasis in original).

Accordingly, the OBCE correctly concluded:

The Board finds that [Dr. Olshove's dry needling] is contrary to recognized standards within the practice of Chiropractic in Oregon. This is a violation of ORS 684.010(2)(a) and (b) [practicing treatments not authorized by statutory definition of "chiropractic"], and [sic] OAR 811-035-0015(4) [practicing outside the scope of the practice of chiropractic in Oregon], OAR 811-035-0005(1) [not placing the health and welfare of the patient as the first priority of a chiropractic physician regardless of payment], ORS 684.035 [interfering with "other methods or science of healing"], and

[former] ORS 684.100(1)(g)(B) [providing treatment that is contrary to recognized standards of practice of the chiropractic profession].

(ER-37).

The OBCE promulgated the dry needling rule under ORS 684.155 (authorizing the OBCE to “adopt necessary and proper rules”). But there has been no statutory expansion of the OBCE’s rulemaking authority since the 2003 *Olshove* decision. The OBCE’s dry needling rule directly interferes with the practice of acupuncture by allowing chiropractic physicians to perform acupuncture which is barred under ORS Chapter 684 and under the OBCE’s own rulings and decisions. Despite the OBCE’s evident “about face” on this issue, the adoption of OAR 811-015-0036 exceeds the OBCE’s statutory authority and is therefore invalid under ORS 183.400.

### CONCLUSION

The OBCE has disregarded the Oregon Legislature’s express mandates concerning the practices of chiropractic and acupuncture and has exceeded its

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH  
AND TYPE SIZE REQUIREMENTS**

**Brief Length**

I certify that: (1) this brief complies with the word count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described by ORAP 5.05(2)(a)) is 4,403 words.

**Type Size**

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED this 14<sup>th</sup> day of March 2012.

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## EXCERPTS OF RECORD

### INDEX

ER	DESCRIPTION	RECORD
1	Oregon Administrative Rule 811-015-0036 (as Promulgated)	Ex. 7 (p. 699)
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29-38	Testimony and Statement of Thane Tienson in Opposition to Adoption of Proposed Dry Needling Rule	Ex. 13 (pp. 667-76)
39-40	Kathleen Haley, JD, Executive Director, Oregon Medical Board Testimony Re OAR 811-015-0036 OBCE Proposed Rule on Dry Needling (May 17, 2011)	Ex. 11 (pp. 687-88)
41-44	Evidence that "Dry Needling" is Not in the Oregon Chiropractic Scope of Practice (May 17, 2011)	Ex. 15 (pp. 664-65); Ex. 29 (pp. 590-91)
45-46	Letter from Joseph Brimhall, D.C., President of University of Western States to Dave McTeague, Executive Director, OBCE (January 19, 2011)	Ex. 70 (pp. 480-81)

Chapter 811  
New Administrative Rule  
Adopted by the OBCE on May 17, 2011  
(Effective: June 13, 2011)

**811-015-0036 Dry Needling**

Dry needling is within the chiropractic physicians' scope of practice for the treatment of myofascial triggerpoint pursuant to ORS 684.010(2).

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

(2) A chiropractic physician licensed in Oregon who wishes to practice dry needling must,

(a) Register with the Board on the form prescribed by the Board and,

(b) Provide proof of the basic Board approved course hour requirements before engaging in the practice of dry needling, and

(c) Perform all aspects of needle insertion and removal.

(3) In order to perform dry needling, chiropractic physicians must complete a minimum of 24 hours of education with practicum specific to dry needling within the curriculum of an accredited chiropractic college, or through post graduate continuing education on dry needling approved by the Oregon Board of Chiropractic Examiners.

(4) Chiropractic physicians must obtain a written Board approved informed consent from every patient treated with dry needling regarding the clinical purpose of dry needling and must state clearly that dry needling is not acupuncture.

1 OREGON BOARD OF CHIROPRACTIC EXAMINERS

2  
3  
4 TRANSCRIPTION FROM CD OF

5 DIGITALLY RECORDED AUDIO CLIPS FROM PUBLIC MEETINGS

6 RE: DRY NEEDLING

7 VOLUME I

8 Pages 1 through 378

9  
10

11	SEGMENT NO.	(LENGTH)	PUBLIC MEETING HELD	PAGE
12	9	(5:34)	September 17, 2009	2
13	8	(6:28)	November 19, 2009	8
14	7	(35:34)	January 21, 2010	16
15	6	(1:07:08)	March 18, 2010	47
16	5	(1:21:59)	November 18, 2010	101
17	4	(1:53:55)	January 20, 2011	161
18	3	(13:00)	March 17, 2011	261
19	2	(1:34:32)	May 17, 2011	277
20	1	(13:37)	July 21, 2011	362

21  
22 (Transcriber's note: Asterisk (\*) before speaker ID denotes  
23 speaker ID provided by Kelly J. Beringer, Administrative  
Assistant, Oregon Board of Chiropractic Examiners.)

24  
25  
TRANSCRIBED BY:  
MELISSA A. BERMAN  
OREGON CSR NO. 90-218

BERMAN COURT REPORTING  
POST OFFICE BOX 1011  
SALEM, OREGON 97308

1 you have, you know, discretion to apply that. If just this  
2 one college teaches something and eleven colleges don't and  
3 have a different point of view, you have some discretion to  
4 apply that --

5 \*MICHAEL VISSERS, DC: What college teaches  
6 it, though?

7 \*DAVE McTEAGUE: Well, it says -- Western  
8 States and National were making sounds about it could be  
9 taught in the future. I mean, and other colleges said,  
10 yeah, we could get into the maybe physical therapy  
11 (unintelligible), we just don't teach it at this time.

12 \*ANN GOLDEEN, DC: The problem with this  
13 approach is it doesn't address the doctor who wants to know  
14 is this in our scope. Don't we need to address it?

15 \*STEVE KOC, DC: But it's not defined yet. We  
16 can't answer that because if -- we don't have --

17 \*ANN GOLDEEN, DC: So that we could -- well,  
18 we could say we don't know.

19 \*DAVE McTEAGUE: But is it --

20 \*ANN GOLDEEN, DC: Is it in the scope of  
21 practice right now?

22 \*JOYCE McCLURE, DC: Well, okay, here's the  
23 question. Could we put it in -- I mean, the other option is  
24 it could go the direction of experimental.

25 \*LORI LINDLEY, AAG: Investigational.

1 that's a part of the curriculum. Not we're going to bring  
2 this guy in once a year, teach it and then --

3 \*SHARRON FUCHS, DC: Well, Dr. Irving  
4 (unintelligible) knows (unintelligible) from osteopaths when  
5 he practiced in Colorado. So he always (unintelligible).

6 \*DOUGLAS DICK: I thought it interesting that  
7 the school that uses (unintelligible) the New York  
8 Chiropractic College School of Acupuncture and Oriental  
9 Medicine doesn't endorse it. So I mean here you've got a  
10 school in their heading talks about it and they say dry  
11 needling is not taught in our acupuncture master degree  
12 program and I cannot comment on the fact that it's a  
13 physical therapy. This thing's up in the air and it's not  
14 -- it's not ready to go.

15 \*SHARRON FUCHS, DC: I (unintelligible)  
16 because (unintelligible) acupuncture (unintelligible).

17 \*DOUGLAS DICK: Well, I mean, there's what I  
18 have to go by as a public member. I see what they say and I  
19 go, you know what, this isn't ready. This isn't ready.  
20 It's nice discussion, but it's not ready.

21 \*STEVE KOC, DC: So the motion we had on the  
22 floor is to put it on the --

23 MALE SPEAKER: Table it.

24 \*STEVE KOC, DC: The association is -- get it  
25 taught in colleges and we'll get -- revisit it when

1 a minimum for learning and understanding the full  
2 implications of the practice of what is now called dry  
3 needling, which he has also stated should more correctly be  
4 called acupuncture.

5 For the safety and the trust of the public we  
6 find that physical therapy or physiotherapy form of dry  
7 needling should be limited, an incomplete form of medical  
8 practice, and hope you will carefully consider the potential  
9 liabilities in the use of acupuncture without adequate  
10 training or licensure. Thank you.

11 \*JOYCE McCLURE, DC: Thank you.

12 Doctor, do you have --

13 STEPHEN KAFOURY: Me?

14 \*JOYCE McCLURE, DC: Yeah.

15 STEPHEN KAFOURY, ESQ.: No, my name is Stephen  
16 Kafoury. I'm the lobbyist of the Oregon Association of  
17 Acupuncture and Oriental Medicine. I'm not a doctor. I'm  
18 not a chiropractor. I'm not an acupuncturist. I've trained  
19 as a lawyer and --

20 \*JOYCE McCLURE, DC: Thank you.

21 \*ANN GOLDEEN, DC: I'm sorry.

22 (Laughter.)

23 \*DANIEL COTE, DC: Have a good day.

24 STEPHEN KAFOURY, ESQ.: So let me take a look  
25 at this from a lucid point of view, if I may. The function

1 of administrative agencies such as the Oregon Board of  
2 Chiropractic Examiners is to interpret and to enforce  
3 statutory laws as passed by the legislature. As such they  
4 are creators of administrative law to the same degree that  
5 the legislature creates statutory law. The basic principle  
6 of administrative law is the concept of deference.  
7 Deference means that if a statute administered by an agency  
8 is ambiguous -- (cell phone rings) -- sorry -- the courts  
9 will defer to the agency's reasonable interpretation of the  
10 statute.

11 The policy behind this concept is that  
12 agencies are presumed to have expertise in the area in which  
13 they administer. In other words, the Oregon Board of  
14 Chiropractic Examiners is presumed, legally presumed, to  
15 have expertise in the field of chiropractic practice and  
16 where -- in cases where your decisions are not arbitrary or  
17 capricious and do not receive the authority granted to,  
18 courts will defer to your decision. Similarly the Oregon  
19 Medical Board with the advice of the Acupuncture Advisory  
20 Committee is presumed legally to have an expertise in the  
21 field of acupuncture and courts will defer to these  
22 decisions.

23 The OMB has formally declared that, quote,  
24 acupuncture is clearly defined by its technique, inserting  
25 needles, and its purpose, treatment of disease and pain.

1 The board has further stated that the treatment of  
2 acupuncture regardless of the theoretical basis, my  
3 emphasis, regardless of the theoretical basis is the  
4 insertion of needles to create -- to treat disease and pain.  
5 In other words, the dispute as to whether dry needling is  
6 based on Western medical theory or whether it's based on  
7 Oriental Medicine theory is very interesting but totally  
8 irrelevant legally.

9           Practically speaking I would suggest that you  
10 extrapolate this concept of deference, court given deference  
11 to administrative decisions to one board giving deference to  
12 another board. You should ask yourself, what assurances do  
13 you have that this board, the Oregon Board of Chiropractic  
14 Examiners, would have your own findings be respected by  
15 other licensing agencies? So how would you feel, for  
16 example, if you said this is what chiropractic is and some  
17 other board says, no, no, we don't think that's chiropractic  
18 because we think it's something different. Or how would you  
19 feel if other licensing boards attempted to say what  
20 chiropractic is? I think you guys would be unhappy in that  
21 situation.

22           I see a potentially dangerous precedent if the  
23 licensing boards do not grant other licensing boards  
24 deference in their areas of responsibility and authority.  
25 Please keep off this slippery slope.