Texas State Board of Medical Examiners

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RQ-0025-JC

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Opinion Committee

Hon. John Cornyn
Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711

FILE # ML-40686-99
I.D. # 40686

Re: Request for reconsideration of Opinion No. DM-425

Dear General Cornyn:

The Texas State Board of Medical Examiners respectfully requests your reconsideration of Opinion DM-425, issued on November 22, 1996. This Opinion was issued in response to an opinion request from the Texas Department of Health dated March 26, 1996, asking whether a "therapeutic optometrist " could, legally, perform eleven procedures listed in the request.

The request pointed out that the Legislature defined the practice of "therapeutic optometry" in subsection (7) of Article 4552-1.02, V.T.C.S., the Texas Optometry Act. That subsection provides specifically that the practice of therapeutic optometry must be conducted "without the use of surgery or laser surgery."

The request also indicates that the Texas Optometry Board had begun to approve the procedures inquired about in the request (except for laser surgery) for performance by therapeutic optometrists.

In October of 1995, a bulletin of the Texas Optometric Association referred to steps the optometrists were taking to receive reimbursement for "surgical procedures" under Medicaid. It is our understanding the procedures referred to were those listed in the opinion request. The Attorney General's letter of May 1, 1996, acknowledging the opinion request, and assigning it RQ-884, stated the question presented was whether a therapeutic optometrist could perform certain "surgical procedures."

Opinion DM-425 declined to opine whether the particular procedures inquired about could be performed by therapeutic optometrists, stating that such a decision was a question of fact. The critical and erroneous holding of the Opinion, which should be reversed, was that, "[F]or purposes

of the Texas Optometry Act, V.T.C.S. articles 4552-1.01 through 4552-7.02, the term 'surgery' refers only to cutting operations."

The Opinion's holding on this critical issue was caused by several errors in the legal analysis found in the Opinion.

First, the opinion relies completely on dicta in the case of Truck Insurance Exchange v. Seelbach, 339 S.W.2d 521, 526 (Tex. 1960) for its holding that the term surgery refers only to cutting operations. The only issue in Seelbach was whether the trial court erred in excluding evidence tendered by an insurer as to the probable effects of a surgical procedure for a herniated disc. The Supreme Court held the evidence properly was excluded because the insurer did not admit liability, no operation was tendered or requested in the proceedings before the Industrial Accident Board and no surgery was indicated prior to rendition of the final award of the Board. (339 S.W.2d at 522). Admission of such evidence in the trial court would have been contrary to the statutory scheme to have such matters first presented to and decided by the Industrial Accident Board, and would have enabled the insurer to do indirectly that which it could not do directly. (339 S.W.2d at 525). The Court's statement that "surgery" would "embrace only cutting operations" was not involved in or essential to the decision in the case.

Second, Opinion No. DM-425 concludes that the definition of surgery found in Section 1.03(a)(15) of the Medical Practice Act (Art. 4495b, V.A.T.S.) does not apply to the Texas Optometry Act for three reasons. The Opinion argues as follows: (1) Sec. 1.03(a) of the MPA begins, "In this Act:"; (2) Sec. 3.06(b) of the MPA provides that it does not apply to "(2) duly licensed optometrists who confine their practice strictly to optometry as defined by law:" and (3) that because in 1991 the Legislature forbade therapeutic optometrists to perform surgery, and then defined "surgery" in the MPA in 1993, the two statutes could not be considered together. As authority for these arguments, the Opinion cites Brookshire v. Houston Independent School District, 508 S.W.2d 675, 677-78 (Tex. Civ. App. - Houston [14th Dist.] 1974, no writ) for the proposition that a statutory definition may be "imported" only into a later-enacted statute. (Op., p. 3).

Brookshire does not support this argument. That case holds that "[w]hen the Legislature defines a term in one statute and uses the same term in relation to the same subject matter in a later statute, it will be presumed that the latter use of the term is in the same sense as previously defined." (508 S.W.2d at 677-78). Thus, the Opinion argues that the definition of surgery made by the Legislature in the Medical Practice Act in 1993 cannot be considered when construing the word "surgery" when the Legislature forbade that practice to therapeutic optometrists in 1991.

The citation to Brookshire is inapposite. As used in Opinion DM-425, it applies only when the Legislature defines a term in the statute that is first enacted. The Legislature did not define

"surgery" in the 1991 amendment to the Optometry Act. It simply prohibited therapeutic optometrists from performing surgery.

The applicable, black letter law overlooked in Opinion DM 425 is expressed in 67 Tex.Jur.3d, Statutes, § 136: "Statutes that deal with the same general subject...or relate to the same class of persons or things, are construed together though they contain no reference to one another, and though they were passed at different times, or at different sessions of the legislature."

Clearly the Medical Practice Act deals with the same subject - surgery - and relates to the classes of persons who may - and may not - perform surgery. And the Optometry Act clearly forbids the performance of surgery by therapeutic optometrists. In fact, the Optometry Act provides that it is a violation of the Act for a therapeutic optometrist to provide treatment to a person except as authorized by the Act, or otherwise by law, and a therapeutic optometrist who provides treatment in violation of the Act "shall be considered to be practicing medicine without a license." (Art. 4552-5.05).

When these statutes are construed together, as they should be, it is clear that Opinion No. DM-425 errs in holding that surgery involves only "cutting operations" and that therapeutic optometrists are not forbidden to perform the acts of surgery defined in Sec. 1.03(a)(15) of the Medical Practice Act.

The term "surgery" is not limited solely to "cutting operations;" while it clearly encompasses cutting operations, it is not limited to those specific activities. The Oxford English Dictionary (1971) defines surgery as "The art or practice of treating injuries, deformities and other disorders by manual operation or, instrumental appliances. Optometry statutes of other states demonstrate that surgery is not limited to "cutting operations." The following examples of how "surgery" is defined are but five of many similar statutory definitions:

1. The California Optometric Act states that "surgery" means any procedure in which "human tissue is cut, altered, or otherwise infiltrated by mechanical or laser means in a manner not specifically authorized by this act."

2. The New Hampshire Optometric Practice Act provides that "surgery means any procedure in which human tissue is cut, altered, or otherwise infiltrated by mechanical means ..."

3. The Hawaii Optometric Act defines surgery as meaning: "any procedure in which human tissue is cut, altered, or otherwise infiltrated by laser or mechanical means."

4. The South Carolina Optometric Act states as follows:

> "An optometrist is prohibited from surgery. For purposes of this subsection, surgery includes, but is not limited to, an invasive procedure using instruments which requires closure by suturing, clamping, or other similar devices or a procedure...Surgery by laser is prohibited."

5. The Utah Optometric Act states that an "Optometrist may not: (a) perform surgery, including laser surgery...'Laser surgery' means surgery in which human tissue is cut, burned, or vaporized by means of laser or ionizing radiation."

Recently the Texas Optometry Board proposed a rule, 22 T.A.C. 217(b), defining surgery as meaning only cutting operations. This action indicates that therapeutic optometrists may perform procedures forbidden to them by the Texas Optometry Act. The rule proposed by the Texas Optometry Board presents the unacceptable result that an agency which regulates individuals who are forbidden to practice "surgery," has undertaken to define that term, contrary to the legislative definition of surgery found in the Medical Practice Act.

Furthermore, on July 8, 1997 in Attorney General Opinion DM-443, it was acknowledged that the Board of Medical Examiners has the statutory authority to define the practice of medicine. It appears that in addition to the definition of surgery, the practice of medicine as defined by the Board of Medical Examiners clearly encompasses those acts which are not addressed or preempted by other specific statutory authority. Certain procedures, including laser procedures, may in fact entail the practice of medicine in addition to or corollary to the definition of "surgery".

Your consideration of this request for reconsideration of Opinion DM-425 is greatly appreciated.

Sincerely,

Bruce Levy, M.D., J.D.
Executive Director