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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

TYLER ARNOLD and JASON SWANSON,

Petitioners,

vs.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

PETITIONERS' REPLY BRIEF

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I. ARGUMENT:

1. The Department of Health Cannot Expand the Definition of the Practice of Medicine Under Washington Law by Promulgating Rules Inconsistent With the Plain Meaning of the Statute.

An agency cannot promulgate a rule that amends or alters a legislative enactment. *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 591, 99 P.3d 386 (2004)(citing *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wn.2d 615, 634, 999 P.2d 602 (2000)). When the words used in a statute are undefined, an agency rule that is inconsistent with the ordinary meaning of those words is an invalid exercise of rule making authority. *Delagrave v. Empl Security Dept.*, 127 Wn.App. 596, 886-87, 111 P.3d 879 (2005).

As interpreted and applied here by the Health Law Judge, WAC 246-919-605 is invalid because it expands the definition of medicine found in RCW 18.71.011 beyond the plain meaning of the words used in the statute. First, WAC 246-919-605 purports to define the practice of medicine by the type of device used rather than by the nature of the procedure, its intended purpose, or its effect on the human body. WAC 246-919-605(2) states:

Because and LLRP device penetrates and alters human tissue, the use of an LLRP device is the practice of medicine under RCW 18.71.011. The use of an LLRP device can result in complications such as visual impairment, blindness, inflammation, burns, scarring, hypopigmentation and hyperpigmentation. (emphasis added)

However, nothing in RCW 18.71.011 even remotely suggests that the Legislature intended to define the practice of medicine by the type of device used. On the contrary, RCW 18.71.011 defines the practice of medicine in four separate ways, none of which

refer to the device used. Subsection (1) defines the practice of medicine based upon the actor's purpose and intent in offering or undertaking to "diagnose, cure, advise, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary," regardless of the "means or instrumentality" used. Subsection (2) defines the practice of medicine as administering or prescribing "drugs or medicinal preparations to be used by another person." Subsection (3) defines the practice of medicine as the severing or penetrating "the tissues of human beings." Subsection (4) defines the practice of medicine as advertising or otherwise holding oneself out as being a "doctor of medicine," a "physician," a "surgeon," an "M.D.," or the like.

The Department does not argue that subsections (1), (2), or (4) apply to Petitioners. Thus, Petitioners' conduct constitutes the practice of medicine only if it falls within the ordinary meaning of the language used in subsection (3). The ordinary meaning of the word "penetrate" suggests a physical passing through of one object by another. That meaning is re-enforced by the use of the phrase "severs or penetrates," since the word "sever" clearly denotes a complete physical cutting and dividing of human tissue. The word "sever" means to cut off or to remove or separate by cutting.

<http://www.merriam-webster.com/dictionary/sever>.

While objects such as human tissue can be penetrated by light, radio waves, gamma rays, etc., the word "penetrate" is not ordinarily used to describe the effect of light energy on human skin or tissue. For example, when a person's skin shows signs of redness from being out in the sun, one does not ordinarily say, "You really got penetrated by the sun today!" Although it would be technically correct to do so, one does not

ordinarily say, "I am penetrating you," when shining a light at another person. Instead, we ordinarily say we are shining a light "on" them.

Similarly, when one suffers a minor injury, such as an abrasion or slight burn, we do not ordinarily describe such an injury as "penetrating" the skin, unless the skin itself is broken so as to expose the tissue below. When only the outer layer of skin is affected, we would ordinarily say, "It's only a scratch," to indicate that the protection provided by the skin was not compromised. If one is poked with an object, but the poking does not draw blood, one would ordinarily say that the object did not "penetrate" the skin.

Here, the Department gives a hyper technical meaning to the phrase "severs or penetrates" to include anything that invades even the outermost layers of the skin, including waves of light. As previously noted, that interpretation yields absurd results. If partial penetration of human skin by light, regardless of the purpose or effect, constitutes the practice of medicine, then many types of conduct that clearly were not intended to fall within the scope of RCW 18.71.011 would be subject to regulation by the Department, including tattooing, tanning, piercing, cosmetology, massage, etc. Even the application of commonly used creams or ointments would constitute the practice of medicine, since such creams and ointments can be said to "topically penetrate" the skin by being absorbed into the outer layers of the skin.

To the extent such conduct, including the use of creams or ointments, might constitute the practice of medicine when done with the purpose of treating some ailment or medical condition, such conduct would be covered by subsection (1), which includes offering or undertaking to diagnose or treat illness or disease. If such conduct were to involve the use of a "drug or medicinal preparation," it would be covered by subsection

(2).

The same is true when it comes to the application of light, or other form of energy, to the skin. Whether such conduct constitutes the practice of medicine should be determined by whether the purpose is to treat an illness, disease or other medical condition, or whether it involves the use of a drug or other medicinal preparation, not by whether light, in any form, "penetrates" human tissue. The wholesale application of subsection (3) to any conduct that involves applying something to human skin that can be said to "penetrate" the skin in some way simply casts too wide a net.

2. The Practice of Medicine as Defined by the Legislature Does Not Depend on Whether a Particular Procedure May Have "Side Effects."

The Department argues that the use of the Palomar Q Yag 5 "penetrates and alters" human tissue when used to remove tattoo ink because the procedure can have certain side effects. Again, the Department proposes a definition of the practice of medicine that goes beyond the plain meaning of the language of the statute and covers many types of procedures the Legislature clearly did not intend to be regulated by the Department. All kinds of processes and procedures can have side effects similar to those that can sometimes occur with laser tattoo removal. In fact, the record here establishes that the act of creating a tattoo causes the same side effects to an even greater degree and with greater regularity. Nevertheless, the Department does not suggest that tattoo artists, who use a needle to physically penetrate the outer layers of the skin in order to deposit ink within the skin, are engaged in the practice of medicine.

It simply defies logic and common sense to argue that a procedure for removing

tattoos that is less invasive and has less severe and frequent side effects than the process used to create a tattoo somehow constitutes the practice of medicine when the act of creating a tattoo in the first place does not.

Furthermore, the Department's reliance on potential "side effects" sweeps much too broadly with respect to what constitutes the altering of human tissue. As noted by the Department, the side effects of laser tattoo removal can include blistering, swelling, discoloration, hyperpigmentation, hypopigmentation, and other similar reactions. Such side effects can also result from many procedures, such as tanning, piercing, coloring hair, etc.. None of those activities are regulated by the Department as the practice of medicine, and the Legislature clearly not intended that such activities would be covered by RCW 18.71.011.

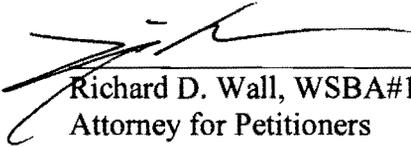
One could argue that any procedure or process that has or could have such side effects should be regulated by the Department for public health and safety reasons. But, the Legislature did not choose to define the practice of medicine in terms of side effects. Rather the Legislature chose to define the practice of medicine by what effect a particular procedure actually has on human tissue. Here, the record establishes that the procedure used for laser tattoo removal has no effect on human tissue because the light energy applied to the skin interacts only with the tattoo ink. Thus, the procedure does not result in the severing or penetrating of the skin and does not alter or change the skin in any way.

V. CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant's Opening Brief, this Court should reverse the decision of the Health Law Judge and vacate the Final

Orders of the Department.

Respectfully submitted this 17th day of September, 2014.


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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on this date the foregoing was caused to be served on the following person(s) in the manner indicated:

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Dated this 17th day of September, 2014.

