

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HANGER PROSTHETICS AND)
ORTHOTICS, INC. AND HUGH J.)
PANTON,)
)
Petitioners,)
)
vs.) Case No. 05-4350RP
)
DEPARTMENT OF HEALTH, BOARD OF)
ORTHOTISTS AND PROSTHETISTS,)
)
Respondent.)
_____)

SUMMARY FINAL ORDER

This cause came on for consideration before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings, for disposition through summary final proceedings pursuant to Sections 120.56(1), 120.56(2), and 120.57(1)(h), Florida Statutes (2005).

APPEARANCES

For Petitioner: Nate Wesley Strickland, Esquire
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106 East College Avenue, Suite 900
Tallahassee, Florida 32301

For Respondent: Lee Ann Gustafson, Esquire
Office of the Attorney General
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STATEMENT OF THE ISSUES

The issues are as follows: (a) whether a proposed amendment to Florida Administrative Code Rule 64B14-3.001(12) constitutes an invalid exercise of delegated legislative authority in violation of Sections 120.52(8)(b) and/or 120.52(8)(c), Florida Statutes (2005); and (b) whether Petitioners are entitled to attorneys' fees pursuant to Section 120.595(2), Florida Statutes (2005).

PRELIMINARY STATEMENT

On November 28, 2005, Petitioners Hanger Prosthetics and Orthotics, Inc. and Hugh J. Panton (Petitioners) filed a Petition to Determine the Invalidity of a Proposed Rule with Respondent Department of Health, Board of Orthotists and Prosthetists (Respondent). Petitioners challenge whether a proposed amendment to Florida Administrative Code Rule 64B14-3.001(12) is invalid because Respondent has exceeded its grant of rulemaking authority contrary to Section 120.52(8)(b), Florida Statutes (2005), and/or because the proposed amendment enlarges, modifies, or contravenes the specific provisions of law implemented contrary to Section 120.52(8)(c), Florida Statutes (2005).

On November 29, 2005, the Division of Administrative Hearings issued an Order of Assignment. In a Notice of Hearing

dated December 1, 2005, the undersigned scheduled the hearing for December 28, 2005.

On December 22, 2005, Petitioners filed an unopposed Motion for Continuance of Final Hearing. On December 23, 2005, the undersigned issued an Order Granting Continuance and Rescheduling Hearing for January 31, 2005.

On January 26, 2006, the parties filed a Joint Motion to Submit Matter for Summary Final Proceedings in Lieu of a Final Hearing. On January 27, 2006, the undersigned issued an Order Canceling Hearing and Granting Joint Motion for Summary Final Proceedings. In accordance with the January 27, 2006, order, the parties filed a Joint Stipulation of Facts on February 15, 2006, and their Proposed Final Orders on March 3, 2006.

All citations hereinafter shall be to Florida Statutes (2005) unless otherwise specified.

FINDINGS OF FACT

1. This matter arises from Respondent's proposed amendment (the proposed rule) to Florida Administrative Code Rule 64B14-3.001(12), which defines the term "direct supervision" for purposes of Part XIV, Chapter 468, Florida Statutes (the O&P practice act.)

2. Respondent advertised the text of the proposed rule in Volume 31, Number 35, September 2, 2005, of the Florida

Administrative Weekly. The proposed rule states as follows in relevant part:

(12) Direct Supervision means:
~~supervision while the qualified supervisor is on the premises.~~

(a) The licensed orthotist, prosthetist, orthotist/prosthetist, or pedorthist will provide a physical evaluation of each patient's orthotic and or prosthetic needs and may delegate appropriate duties to support personnel. However, the licensed practitioner shall physically evaluate the effectiveness, appropriateness and fit of all devices within the scope of the licensed practitioner's licensure practice requirements, including those repaired devices in which the repairs affect the fit, physical structure or biomechanical function of the device, on every patient, prior to patient use of the device;

(b) For the purpose of replacement of worn or broken components which do not in any way alter the fit, physical structure or biomechanical functioning of the existing device, direct supervision of support personnel providing repairs to orthoses or prostheses means the aforementioned repair must be approved by the appropriately licensed practitioner prior to beginning of repairs. The responsible licensed practitioner must at all times be accessible by two way communication, enabling the supervisor to respond to questions relating to the repair.

* * *

Specific Authority 468.802, F.S. Law Implemented 468.802, 468.803, 468.807, 468.808, 468.809, F.S. History--New 10-21-99, Amended 2-19-04, 5-5-04.

3. Respondent conducted a final public hearing regarding the proposed rule on November 18, 2005.

4. Petitioners filed a petition challenging the proposed rule within 10 days after the final public hearing.

5. Petitioners would be substantially affected by the proposed rule.

6. The parties stipulate to the citation of official notices and other matters published in Florida Administrative Weekly.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.56, Florida Statutes.

8. Regarding the burden of proof, Section 120.56(2)(a), Florida Statutes, states as follows in pertinent part:

. . . The petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.

9. Section 120.52(8), Florida Statutes, states as follows in relevant part:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is invalid

exercise of delegated legislative authority if any one of the following applies:

* * *

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

* * *

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No Agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and function of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

10. In this case, Petitioners challenged the proposed rule based on Sections 120.52(8)(b) and 120.52(8)(c), Florida Statutes. Each of these potential reasons for invalidating the proposed rule is addressed below.

Section 120.52(8)(b), Florida Statutes.

11. The proposed rule identifies Respondent's specific statutory authority as Section 468.802, Florida Statutes, which states as follows:

468.802 Authority to adopt rules.--The board shall adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this act, including rules relating to standards of practice for orthotists, prosthetists, and pedorthists.

12. Section 468.80, Florida Statutes, defines terms such as orthosis, orthotics, orthotist, pedorthics, pedorthist, prosthesis, prosthetics, prosthetist, and prosthetist-orthotist. See Sections 468.80(4), 468.80(7), 468.80(8), and 468.80(10) through 468.80(15), Florida Statutes. Section 468.80, Florida Statutes, does not define "direct supervision." The only reference to "direct supervision" in the O&P practice act is located in Section 468.808, Florida Statutes, which states as follows:

468.808 Support personnel.--A person must be licensed to practice orthotics, prosthetics, or pedorthics in this state. However, a licensed orthotist, prosthetist or pedorthist may delegate duties to nonlicensed supportive personnel if those duties are performed under the direct supervision of a licensed orthotist, prosthetist, or pedorthist. In such instances the supervising licensee is responsible for all acts performed by such persons.

13. The legislature could have defined the term "direct supervision," as it did in the professional practice acts governing radiographers, athletic trainers, optometrists, dentists, physical therapists, and opticians. See §§ 468.301(6), 468.701(8), 463.002(6), 466.003(8), 486.021(9), and 484.002(5), Fla. Stat. Additionally, the legislature could have expressly directed Respondent to create a rule defining "direct supervision," as it did for the professional licensing boards that regulate speech pathologists, respiratory therapists and chiropractors. See §§ 468,1125, 468.352, and 460.403, Fla. Stat. On the other hand, the legislature could have refrained from referencing any level of supervision for support personnel as it did in the professional practice acts for medical doctors, podiatrists, nurses, and psychologists. See §§ 458.305, 461.003, 464,003, and 490.003, Fla. Stat.

14. In this case, the legislature gave Respondent the authority to create rules establishing the standards of practice for orthotic, prosthetic, or pedorthic professional services. The standards of practice necessarily include the circumstances and conditions under which a licensee may provide direct supervision to nonlicensed employees. Otherwise, there would be no way to ensure that supervising licensees are providing services, directly and indirectly, "with that level of care and skill which is recognized by a reasonably prudent licensed

practitioner with similar professional training as being acceptable under similar conditions and circumstances." See §§ 468.811(1)(h), Fla. Stat.

15. Only licensed professionals are permitted to evaluate, design, fabricate, and fit orthotic, pedorthic, and prosthetic devices. Therefore, the licensed professional's appropriate oversight and control of unlicensed personnel participating in the provision of those services is an essential standard of practice. Respondent did not exceed its rulemaking authority, in violation of Section 120.52(8)(b), Florida Statutes, when it proposed to amend Florida Administrative Rule 64B14-3.001(12) to create a standard of practice defining the term "direct supervision."

Section 120.52(8)(c), Florida Statutes.

16. The proposed rule identifies the laws it implements as Sections 468.802, 468.803, 468.807, 468.808, and 468.809, Florida Statutes. Respondent's general rulemaking authority, Section 468.802, Florida Statutes, is quoted above, along with the only other statutory that is relevant here, Section 468.808, Florida Statutes.

17. Section 468.808, Florida Statutes, specifically authorizes licensed O&P practitioners to utilize unlicensed support personnel to perform work under the licensees' direct

supervision and holds the supervising licensee responsible for all acts performed by unlicensed individuals. The proposed rule does not enlarge, modify, or contravene the statute, contrary to Section 120.52(8)(c), Florida Statutes, by describing the circumstances under which licensed practitioners must personally evaluate patient needs, approve repairs, and/or evaluate the fit and effectiveness of devices prior to patient use. The proposed rule does not enlarge, modify, or contravene the statute by requiring that two-way communication be available between the licensed professional and unlicensed employee making a repair that will not alter the fit of an existing device.

18. Petitioner argues that the proposed rule limits the discretion of licensed O&P practitioners to determine the appropriate level of supervision in their individual practices. This is true. However, Section 468.808, Florida Statutes, which forms the basis for rule adoption, limits the practitioner's discretion by requiring that unlicensed subordinates work under the "direct supervision" of licensed professionals.

19. Any restriction in professional judgment arises first in Section 468.808, Florida Statutes. Consistent with the statute, the proposed rule ensures that all work performed and services provided are directly supervised by a licensed orthotist, prosthetist, or pedorthist, no more or less.

Section 120.595(2), Florida Statutes.

20. Petitioner's request for attorney's fees pursuant to Section 120.595(2), Florida Statutes, is denied for two reasons. First, the proposed rule is not invalid. Second, Respondent's decision to amend Florida Administrative Code Rule 64B14-3.001(12) to define the term "direct supervision" was substantially justified, given Respondent's duty to create rules setting forth standards of practice and the statutory authority for unlicensed personnel to perform work under the "direct supervision" of a licensed professional.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

That the proposed amendment to Florida Administrative Code Rule 64B14-3.001(12) is not invalid under Sections 120.52(8)(b) and 120.52(8)(c), Florida Statutes, and the Petition to Determine the Invalidity of a Proposed Rule is dismissed.

DONE AND ORDERED this 9th day of March, 2006, in
Tallahassee, Leon County, Florida.

Suzanne F. Hood

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of March, 2006.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.