ALAN WILSON
ATTORNEY GENERAL

January 31, 2020

Melina Mann, Esquire
General Counsel
South Carolina Department of Labor, Licensing and Regulation
Post Office Box 11329
Columbia, South Carolina 29211-1329

Dear Ms. Mann:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter asks the following:

> On behalf of the South Carolina Department of Labor, Licensing and Regulation, I respectfully request an advisory opinion concerning the South Carolina Board of Chiropractic Examiners' (Board) recent decision to endorse intramuscular therapy, commonly referred to as dry needling, as a modality for South Carolina chiropractors; specifically, is intramuscular therapy within the scope of practice of chiropractic as established by the General Assembly?
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> ...
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> At its regularly-scheduled board meeting on November 14, 2019, the Board adopted a "Frequently Asked Question" (FAQ) to be placed on its web page regarding the topic of intramuscular therapy. In relevant part, the FAQ provides: "It is the opinion of the Board that intramuscular therapy is a treatment that falls in the scope of practice of chiropractic in SC." The rationale for the Board's decision is that intramuscular therapy is a permitted "machine" for use in therapeutic modalities for rehabilitation and rehabilitative procedures. Moreover, the Board reasons that intramuscular therapy is a very commonly used modality that helps patients, and that pursuant to the Board's Code of Ethics, a Chiropractor has a "duty to maintain the highest degree of skill and care by keeping abreast of all new developments in Chiropractic to improve knowledge and Skill in the Science, Art and Philosophy of Chiropractic." S.C. Code Ann. Regs. 25-7(C) (2013).

> Under this rationale, intramuscular therapy is within the scope of chiropractic if it is a "machine." It is upon this issue that the Department seeks clarification and guidance. ...
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> In addition to the Department's concern of whether or not intramuscular therapy is appropriately considered a machine, the Department further seeks guidance as to whether the act of intramuscular therapy is consistent with the practice of chiropractic as established by the General Assembly in statute. In Bauer v. State of South Carolina, 267 S.C. 224 (1976), the South Carolina Supreme Court considered the scope of practice for chiropractors before machines were added as a therapeutic modality for use by chiropractors. At issue in Bauer was the limitation of the words "by hand only" at the end of the statutory definition of chiropractic. The Board took the position that the statute limited the scope of practice to palpitation and adjustment by hand only, as provided in the statute. The Supreme Court agreed with the Board "finding irrelevant what was taught at chiropractic schools and the customs, and practices of other chiropractors, because 'the practice of chiropractic is subject to the control of the legislature.'" The Court stated that the briefs set forth "good reasons for the legislature to review the law as it relates to chiropractors, but cautioned that the plaintiffs should not yield "to the temptation to seek a change in the law by interpretation rather than by legislative amendment."
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> Despite its focus being on the use of hands as opposed to machines, Bauer did define both articulation – "a joint or juncture between bones or cartilages in the skeleton of a vertebrate" - and adjust – "to bring the parts of (a thing) to a true or more effective relative position." The General Assembly, then, may have limited the physical aspects of the practice of chiropractic to adjustment to the articulations of the vertebral column and its immediate articulations. Intramuscular therapy does not appear to be so limited; its focus is on the entire body - the skin and underlying tissue. It is for these reasons that the Department seeks guidance as to whether the practice of intramuscular therapy may exceed the scope of practice as defined by the General Assembly.

## Law/Analysis

It is this Office's opinion that a court may well hold that filiform needles used in intramuscular trigger point therapy (IMT) or dry needling do not qualify as a "machine" subject to approval by the South Carolina Board of Chiropractic Examiners (the "Board"). S.C. Code

Ann. § 40-9-10(d). Further, it is this Office's opinion that a court may well hold that IMT does not fall within the scope of chiropractic practice as defined by South Carolina Code of Laws. S.C. Code Ann. § 40-9-10(a), (b). This opinion will review the text of Chapter 9, Title 40 of the South Carolina Code of Laws which governs chiropractors and chiropractic practice in this state according to the rules of statutory construction, relevant decisions of our state courts, and prior opinions issued by this Office.

The primary rule of statutory construction is to "ascertain and give effect to the intent of the legislature." Kerr v. Richland Mem'l Hosp., 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) (citations omitted). The South Carolina Supreme Court has held that when the meaning of a statute is clear on its face, "then the rules of statutory interpretation are not needed and the court has no right to impose another meaning. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 525–26, 642 S.E.2d 751, 754 (2007) (citations omitted) (internal quotations omitted); see also Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (holding that where a statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will."). "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), *reh'g denied* (Aug. 5, 2015).

While the Board is authorized to promulgate regulations concerning patient care and treatment, those regulations must not be inconsistent with the law. S.C. Code Ann. § 40-9-30(D)(3). It is this Office's long standing policy, like that of our state courts, to defer to an administrative agency's reasonable interpretation of the statutes and regulations that it administers. See Op. S.C. Att'y Gen., 2013 WL 3133636 (June 11, 2013). In Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014), the South Carolina Supreme Court explained, "[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." The Court stated that the determination of whether deference is afforded to an agency's interpretation of the statutes and regulations it administers involves two separate steps. Id.

> First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. See Brown v. Bi–Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's

> interpretation." (citations omitted)); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also Brown v. Bi–Lo, 354 S.C. at 440, 581 S.E.2d at 838.

Kiawah Dev. Partners, II, 411 S.C. at 32–33, 766 S.E.2d at 717. In Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003), the Court held that "where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." See also Richland Cty. Sch. Dist. Two v. S.C. Dep't of Educ., 335 S.C. 491, 498, 517 S.E.2d 444, 448 (Ct. App. 1999) ("[A]n administrative construction 'affords no basis for the perpetuation of a patently erroneous application of the statute.'"); Kiawah Dev. Partners, II, 411 S.C. at 34-35, 766 S.E.2d at 718 ("We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'").

As the request letter notes, the South Carolina Code of Laws previously defined "chiropractic" as "the science of palpating and adjusting articulations of the human spinal column by hand only." Bauer v. State, 267 S.C. 224, 230, 227 S.E.2d 195, 196 (1976). At issue in Bauer was whether chiropractors in South Carolina were permitted to use "equipment, machines, and devices" in their practice or were, instead, limited to the use of "hands only." Id. This Office and the Board took the position that the statute's plain language limited the practice of chiropractic to the use of hands only. The Court agreed stating, "The teachings of approved chiropractic schools and the customs, and practices of various chiropractors heretofore, are of little or no concern because the practice of chiropractic is subject to control of the legislature." 267 S.C. at 232, 227 S.E.2d at 197. The Court noted, "The legislature has the power to license chiropractors, to refuse to license them, and to license them limiting their activities." 267 S.C. at 231, 227 S.E.2d at 197. The Court suggested that the respondents briefing "set[] forth good reasons for the legislature to review the law as relates to chiropractors" and that they should seek a change in the law by legislative amendment. 267 S.C. at 234, 227 S.E.2d at 198. However, the Court found the matter was "purely one of statutory construction" and the statute did not "authorize the use of mechanical means in diagnosis, analysis, treatment, or in the practice of chiropractic." 267 S.C. at 235, 227 S.E.2d at 199.

Subsequent to Bauer, the General Assembly did, in fact, amend Chapter 9, Title 40 to expand the scope of chiropractic practice beyond the use of hands only. 1976 Act No. 745, § 2. This amendment was titled in part as "An Act ... to require approval by the Board of Chiropractic Examiners of certain equipment used by chiropractors." Id. The act provided a

broader definition for "chiropractic" which is "that science and art which utilizes the inherent recuperative powers of the body and deals with the relationship between the nervous system and the spinal column, including its immediate articulations and the role of this relationship in the restoration and maintenance of health." S.C. Code Ann. § 40-9-10(A). "Chiropractic practice" is further defined to include "the spinal analysis of any interference with normal nerve transmission and expression, and by adjustment to the articulations of the vertebral column and its immediate articulations for the restoration and maintenance of health and the normal regimen and rehabilitation of the patient without the use of drugs or surgery." S.C. Code Ann. § 40-9-10(B). Section 40-9-10(d) permits a machine to be used in "chiropractic practice" or "analysis" but only if the machine is first approved by the Board.

The first question posed in the request letter is whether IMT or dry needling is appropriately considered a "machine" that the Board can approve to be used in chiropractic practice. "Machine" is not defined statutorily in Chapter 9, Title 40. Because it is not defined, the rules of statutory construction dictate that it should be interpreted according to its "plain and ordinary meaning without resorting to subtle or forced construction." Catawba Indian Tribe, supra. The cited definitions below arguably support that there is a more common understanding and an understanding that is less common.[1] The more common understanding generally provides that a machine consists of multiple parts which work together to perform a desired function. American Heritage College Dictionary, supra. The less common understanding of machine is that it is a "device ... that alters the magnitude, or direction, or both, of an applied force." Id. This second dictionary definition may be thought to include the classic "simple machine;" this concept includes such basic mechanical devices as the wedge, pulley, inclined plane, and screw.

The request letter notes that IMT is not defined by statute and that the Board has not defined IMT by regulation. Instead, the letter suggests the definition adopted by the Illinois General Assembly as an example. The Illinois General Assembly defined IMT as "an advanced needling skill or technique limited to the treatment of myofascial pain, using a single use, single

[1] American Heritage College Dictionary 811 (3d. ed. 1993) ("Machine- n. 1.a. A device consisting of fixed and moving parts that modifies mechanical energy and transmits it in a more useful form. B. A simple device, such as a lever, that alters the magnitude, or direction, or both, of an applied force; a simple machine."); Machine, Black's Law Dictionary (11th ed. 2019) (machine (16c) Patents. A device or apparatus consisting of fixed and moving parts that work together to perform some function.); Merriam-Webster Online, https://www.merriam-webster.com/dictionary/ machine ("1a: a mechanically, electrically, or electronically operated device for performing a task; ... d(1): an assemblage (see ASSEMBLAGE sense 1) of parts that transmit forces, motion, and energy one to another in a predetermined manner; (2): an instrument (such as a lever) designed to transmit or modify the application of power, force, or motion"); dictionary.com, http://www.dictionary.com/browse/machine ("an apparatus consisting of interrelated parts with separate functions, used in the performance of some kind of work; a device that transmits or modifies force or motion.").

insertion, sterile filiform needle (without the use of heat, cold, or any other added modality or medication), that is inserted into the skin or underlying tissues to stimulate trigger points. 225 ILCS 90/1.5." (emphasis added). The letter suggests that this definition of IMT appears more consistent with "a skill or technique" rather than as a machine that "acts in a predetermined manner." This Office agrees that the given description of IMT does not appear to fit within either definition of machine discussed above. However, if instead of describing IMT as a machine, the filiform needle is looked at as a machine, a court may well find it fits within the second definition akin to a simple machine. It can be argued that a filiform needle magnifies pressure in the direction that a chiropractor guides it in order "to stimulate pressure points." A court may well resolve this question by reframing the question to whether IMT involves the use of a machine rather than whether IMT is a machine itself. In such a case, a court may find a filiform needle is a machine in the classical understanding of a simple machine, although it is questionable whether a court would find this understanding meets the plain and ordinary meaning of machine.

The second question presented in the request letter is whether IMT is consistent with the practice of chiropractic as established by the General Assembly. Initially, it should be understood that this Office has no particular expertise in the chiropractic field. The General Assembly granted the Board regulatory authority over patient care and treatment to the extent those regulations are consistent with the law. S.C. Code Ann. § 40-9-30(D)(3). Therefore, unless the Board's FAQ regarding IMT conflicts with the statutes governing chiropractic practice in Chapter 9, Title 40, and related regulations this Office will defer to the Board's guidance. See Kiawah Dev. Partners, II, supra ("We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'").

For the reasons discussed below, it is this Office's opinion that a court may well hold IMT does not fall within the scope of chiropractic practice as defined by South Carolina Code of Laws. S.C. Code Ann. § 40-9-10(a), (b). As discussed above, the General Assembly amended the definition of "chiropractic" and "chiropractic practice" to more broadly allow the Board to approve machines used in the practice of chiropractic. S.C. Code Ann. § 40-9-10(d). Chiropractic practice is now defined as "the spinal analysis of any interference with normal nerve transmission and expression, and by adjustment to the articulations of the vertebral column and its immediate articulations for the restoration and maintenance of health and the normal regimen and rehabilitation of the patient without the use of drugs or surgery." S.C. Code Ann. § 40-9-10(B) (emphasis added). The request letter notes that the Bauer Court construed the terms "articulation" and "adjust" as "articulation – 'a joint or juncture between bones or cartilages in the skeleton of a vertebrate' - and adjust – 'to bring the parts of (a thing) to a true or more effective relative position.'" The letter further articulates a concern that IMT may exceed the scope of the chiropractic practice, "The General Assembly, then, may have limited the physical aspects of the practice of chiropractic to adjustment to the articulations of the vertebral column and its immediate articulations. Intramuscular therapy does not appear to be so limited; its focus

is on the entire body - the skin and underlying tissue." The example definition of IMT adopted by the Illinois General Assembly does not expressly reference the spinal column, its articulations, or nerve transmission and expression; rather it is described as a skill or technique that involves the insertion of a filiform needle "into the skin or underlying tissues to stimulate trigger points." This description of IMT may well exceed the scope of the statutory definition of chiropractic practice.

This Office cannot opine, however, whether the example definition of IMT, or dry needling, is consistent with or even necessarily approximates the one that the Board considered for its guidance document. The resolution of such an issue is better suited for our state courts. See Op. S.C. Att'y Gen., 1989 WL 508567, at 6 (July 17, 1989) (Fact-finding is beyond the scope of an opinion and is more appropriately reserved to "the province of the courts."). Assuming that the definition of IMT considered included a description of piercing the skin with a filiform needle, this alone may exceed the statutory scope of chiropractic practice. This Office's March 24, 1989 opinion to Representative G. Ralph Davenport, Jr. concluded that phlebotomy was prohibited according to the Board's regulations. 1989 S.C. Op. Att'y Gen. 90 (1989). Phlebotomy was described as "the practice of using a needle and syringe to draw blood out of a patient's vein." Id. at 1. The opinion quoted S.C. Code. Ann. Regs. 25-8 (vol.23A 1976) as follows:

> None of these diagnostic or therapeutic procedures shall include the use of drugs, surgery, cauterization, desiccation or coagulation of tissues, rectal examinations, gynecological examinations, obstetrics, catherization [sic] with a needle, injection of dyes for radiological procedures, lumbar puncture to obtain spinal fluid, treatment of cancer or X–Ray therapy. [Emphasis added.]

1989 S.C. Op. Att'y Gen. 90, 5. The opinion reached its conclusion by comparing the description of phlebotomy to the procedures prohibited under the regulation. Id. at 6 ("The remaining language, which is emphasized above, prohibits "injection" or "puncture" by chiropractors in South Carolina. Thus, the intent of R 25–8 appears to be the prohibition of procedures such as phlebotomy."). Although Regulation 25-8 was subsequently amended, the emphasized prohibitions remain largely unchanged in Regulation 25-6 A.(4).[2] Because the

[2] (4) Diagnostic or therapeutic procedures shall not include the use of:
(a) drugs;
(b) surgery;
(c) cauterization;
(d) desiccation or coagulation of tissues;
(e) rectal examinations;
(f) gynecological examinations;
(g) obstetrics;
(h) catheterization with a needle;

example definition of IMT similarly involves the insertion of needles into the skin, it is reasonable to conclude that IMT would likewise be prohibited by S.C. Code Ann. Regs. 25-6.

Finally, the 1989 opinion noted that the Board previously found that chiropractic practice in South Carolina does not include acupuncture.

> The South Carolina Board of Chiropractic Examiners, interpreting S.C. Code Ann. R 25–8 (1976), has previously determined that the practice of acupuncture which involves the insertion of thin needles into the tissues at various points of the body, see, Schmidt's Attorneys' Dictionary of Medicine A–73 (vol. 1 1986) (definition of the word "acupuncture"), is not within the scope of chiropractic in South Carolina. (Minutes of South Carolina Board of Chiropractic Examiners, dated August 29, 1981.) That interpretation is consistent with a conclusion that R 25–8 prohibits procedures such as phlebotomy.

1989 S.C. Op. Att'y Gen. 90, 6 n.2 (1989). This Office has been unable to locate a copy of the Board's August 29, 1981 minutes nor have we been able to verify if this determination has since been rescinded. Assuming that the Board's determination that acupuncture is not within the scope of chiropractic practice is still valid, IMT or dry needling would likely not come within the scope of chiropractic practice for similar reasons. This Office understands that there has been discussion over the years regarding whether IMT or dry needling is a separate practice from acupuncture.[3] This Office declines to weigh in on that point, but does note that the common element to both terms, inserting filiform needles into the skin, appears to be what the Board determined was prohibited.

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> (i) injecting of dyes for radiological procedures;
> (j) lumbar puncture to obtain spinal fluid;
> (k) treatment of cancer or x-ray therapy.

S.C. Code Ann. Regs. 25-6 A.

[3] See TRIGGER POINT DRY NEEDLING: AN EVIDENCE AND CLINICAL-BASED APPROACH 60-61 (Jan Dommerholt and Cesar Fernandez-de-las-Penas eds., 2013).

> In a few older publications, I also stated erroneously that 'dry needling is no equivalent to acupuncture and should not be considered a form of acupuncture' (Dommerholt 2004, Dommerholt et al. 2006). ... In more recent publications, I have indicated that it is counterproductive and inaccurate to state that dry needling would not be in the scope of acupuncture, and that within the context of acupuncture, dry needling is a technique of acupuncture (Dommerholt 2011, Dommerholt & Gerwin 2010). But, as stated previously, dry needling is not in the exclusive scope of any discipline. It is physical therapy when performed by a physical therapist, chiropractic when performed by a chiropractor, and dentistry when performed by a dentist.

Again, this Office has no particular expertise in the chiropractic field and does not dispute what is taught in chiropractic schools or what techniques are generally accepted within the field. However, as the Court in Bauer explained the scope of practice is limited according to the parameters established by the General Assembly. Bauer, 267 S.C. at 232, 227 S.E.2d at 197 ("The teachings of approved chiropractic schools and the customs, and practices of various chiropractors heretofore, are of little or no concern because the practice of chiropractic is subject to control of the legislature."). Thus, it is this Office's opinion that a court may well hold IMT does not fall within the scope of chiropractic practice as defined by South Carolina Code of Laws.

## Conclusion

It is this Office's opinion that a court may well hold that filiform needles used in intramuscular trigger point therapy (IMT) or dry needling do not qualify as a "machine" subject to approval by the South Carolina Board of Chiropractic Examiners (the "Board"). S.C. Code Ann. § 40-9-10(d). The first question posed in the request letter is whether IMT or dry needling is appropriately considered a "machine" that the Board can approve to be used in chiropractic practice. "Machine" is not defined statutorily in Chapter 9, Title 40. Because it is not defined, the rules of statutory construction dictate that it should be interpreted according to its "plain and ordinary meaning without resorting to subtle or forced construction." Catawba Indian Tribe, supra. The definitions cited above arguably support that there is a more common understanding and an understanding that is less common. The more common understanding generally provides that a machine consists of multiple parts which work together to perform a desired function. American Heritage College Dictionary, supra. The less common understanding of machine is that it is a "device ... that alters the magnitude, or direction, or both, of an applied force." Id. This second dictionary definition may be thought to include the classic "simple machine;" this concept includes such basic mechanical devices as the wedge, pulley, inclined plane, and screw. A court may find a filiform needle is a machine in the classical understanding of a simple machine, although it is questionable whether a court would find this understanding meets the plain and ordinary meaning of machine.

Further, as discussed above, it is this Office's opinion that a court may well hold IMT does not fall within the scope of chiropractic practice as defined by South Carolina Code of Laws. S.C. Code Ann. § 40-9-10(a), (b). This Office understands that there has been discussion over the years regarding whether IMT or dry needling is a separate practice from acupuncture. We decline to weigh in on that point, but note that the common element to both terms, inserting filiform needles into the skin, appears to be what the Board determined was prohibited.in its August 29, 1981 minutes. This Office has no particular expertise in the chiropractic field and

does not dispute what is taught in chiropractic schools or what techniques are generally accepted within the field. However, the scope of practice is limited according to the parameters established by the General Assembly. Bauer, 267 S.C. at 232, 227 S.E.2d at 197 ("The teachings of approved chiropractic schools and the customs, and practices of various chiropractors heretofore, are of little or no concern because the practice of chiropractic is subject to control of the legislature."). As the Bauer Court suggested over forty years ago, there may be good reason for the Legislature to again "review the law as relates to chiropractors" and clarify its intent regarding the scope of chiropractic practice. Id.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General