

CONNECTICUT BOARD OF EXAMINERS FOR OPTOMETRISTS

IN RE: PETITION OF LAWRENCE LEFLAND, O.D., ON BEHALF OF OF THE
CONNECTICUT ASSOCIATION OF OPTOMETRISTS

HEARING DATES: June 28, 2000 and September 12, 2001

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DECLARATORY RULING

FACTS AND NATURE OF THE PROCEEDINGS

On November 17, 1999, the Connecticut Board of Examiners for Optometrists (“the Board”) received a request dated November 2, 1999, from Lawrence Lefland, O.D., to determine the circumstances under which an optometrist would be considered to be practicing his profession “as an employee of any unlicensed person, firm or organization.”

On February 9, 2000, the Board agreed to conduct a declaratory ruling proceeding in accordance with Connecticut General Statutes §4-176.

As part of this question, the Board determined that it would consider the definition of the term, “independent contractor.” The Board also considered whether any of the following characteristics, *inter alia*, would determine employee status if the optometrist is practicing in a situation where the unlicensed person, firm or organization:

- a. has ownership of the patient records;

- b. does not allow the optometrist access to patient records after hours and/or does not allow the optometrist to render after-hour care;
- c. receives payment for the optometrist's services and then pays the optometrist;
- d. determines the optometrist's hours of practice and professional fees;
- e. offers money or other remuneration to the optometrist in exchange for charging the patient a reduced fee for a professional service;
- f. offers a lease arrangement (or an arrangement for other fee services) for less than fair market value,
- g. offers the optometrist a "percentage" lease agreement; or,
- h. advertises that a free optometric service is going to be offered in exchange for purchasing other goods or services, and the optometrist is unable to prevent the offer.

A notice of hearing was published in the March 7, 2000, in the Connecticut Law Journal, scheduling a hearing for June 28, 2000.

Dr. Lefland agreed to waive the time frame of 180 days set forth in Conn. Gen. Stat. §4-176 (i) directing the issuance of a declaratory ruling.

Prior to the June 28, 2000 hearing, intervenor status with expanded rights of cross-examination and the right to inspect and copy all documents was given to the National Association of Optometrist and Opticians ("NAOO"), the Connecticut Association of Optometrists ("CAO"), and the Connecticut Opticians Association.

Intervenor status was given to the following individuals and organizations: the Board of Examiners for Opticians for the State of Connecticut; Cole Vision, the Harvey & Lewis Co., Joshua Orland, O.D., Kennedy and Perkins Guild Opticians, Connecticut Society of Eye Physicians, Eye and Eye Vision Center, Maria Diaz O.D., Dana L. Shepard, O.D., and Dennis Iadorola, O.D. These intervenors provided pre-filed testimony, which they adopted under oath during the hearing, and the witnesses were available for questioning and cross-examination. Additionally, the Board considered letters from Robert L. Ross, O. D. and Jeanette Jezick, O. D. as interested parties.

Robert F. Frankel, Esq., and Dr. Lefland, immediate past president of the CAO, appeared on behalf of the CAO; Edward Spinella, Esq., appeared on behalf of the NAOO; Rene "Skip"

Rivard, L.O., executive Director of the Connecticut Opticians Association, appeared on behalf of the Connecticut Opticians Association; and, Raymond Dennis, L.O., appeared on behalf of the Board of Examiners for Opticians for the State of Connecticut.

On June 28, 2000, the NAOO filed a Motion to Recuse Board Members and a Motion to Terminate Proceedings on the grounds that the Board failed to properly authorize the declaratory ruling proceeding. During the hearing on June 28, 2000, the Board formally voted to proceed with the declaratory ruling, rendering the Motion to Terminate the Proceedings moot. Tr., 6/28/00, p. 41. The Board hearing was continued September 12, 2000. On August 26, 2000, the Board denied the Motion to Recuse.

DISCUSSION AND LAW

By law, a declaratory ruling constitutes a statement of agency law which is binding upon those who participate in the hearing and may also be utilized by the Board, on a case by case basis, in future proceedings before it concerning licensed optometrists. This ruling is intended to provide guidance to individual licensed optometrists and others regarding (1) the circumstances in which an optometrist would be considered to be in violation of the applicable statutes for practicing his profession “as an employee of any unlicensed person, firm or organization” as the phrase is used in Connecticut General Statutes §20-133a, and (2) the definition of an independent contractor. If a licensed optometrist follows the guidance provided by this ruling, the Board will presume the optometrist acted appropriately and in accordance with professional standards in any contested case concerning an issue addressed in this declaratory ruling. In situations where an optometrist has departed from the guidance provided by this ruling, the Board will consider the facts of the specific case and determine whether there has been a violation of Connecticut General Statute §20-133a.

During the hearing, the Board received the following exhibits: a two page document entitled “Proposed Declaratory Ruling Proceeding” (Exhibit 1); a four page document entitled “Statement of the Connecticut State Board of Examiners for Opticians Before the Connecticut State Board of Examiners for Optometry” (Exhibit 2); an eight page document entitled “Declaratory Ruling Proceeding Position Statement of Intervenor Cole Vision Corporation”

(Exhibit 3); a three page letter from Dr. Dana L. Shepard dated June 20, 2000 (Exhibit 4); a three page document entitled “Testimony for Declaratory Ruling Proceeding Pursuant to C.G.S. §20-133a,” signed by Maria Diaz, O.D. (Exhibit 5); a twenty five page document entitled “Testimony of Lawrence Lefland before the Connecticut Board of Examiners for Optometrists” with attachments (Exhibit 6); a two page letter from Rene R. Rivard, L.O., (Exhibit 8); four pages of testimony from Raymond P. Dennis, L.O., (Exhibit 9); a one page letter from Robert L. Ross, O.D. (Exhibit 10); a five page letter from Jeanette Jezick, O.D. (Exhibit 11); and, a one page letter from Mark D. Yorgensen, O.D. (Exhibit 12).

On September 12, 2001, Lawrence Lefland, O.D. testified as past president of the COA in support of adopting a Proposed Declaratory Ruling (“Proposed Ruling”) submitted by the COA and NAOO (Exh. 1).

The COA, through its counsel Attorney Robert Frankel, also supported the adoption of the Proposed Ruling and further argued that it is within the Board’s purview to address the issues. The COA’s position is that the Board, in issuing the Proposed Ruling would not be dictating the business practice of optometrists and establishments where such optometrists practice. To the contrary, the Proposed Ruling grants the freedom typical of an independent contractor and at the same time affords the protection that the public needs.

Maria Diaz, O.D., Robert L. Ross, O.D., Jeanette Jezick, O.D., Dana L. Shepard, O.D., and Dennis P. Iadarola, O.D., also testified and adopted under oath their pre-filed statements in support of the Board’s adoption of the Proposed Ruling which would clarify the difference between an independent contractor and an employee while at the same time, protect the public and practicing optometrists.

The NAOO objected to Dr. Iadarola’s testimony and pre-filed documents on the basis that the NAOO did not received such documents before the day of the hearing on September 12, 2001. As a consequence, they were unprepared to defend their position, cross examine Dr. Iadarola, and were therefore prejudiced. Dr. Iadarola’s testimony and pre-filed documents were stricken by the Board. Tr. 9/12/01, pp. 139-140.

Rene "Skip" Rivard, L.O., Executive Director of the Connecticut Opticians Association, adopted the Association’s pre-filed statement opposing the promulgation of any Declaratory

Ruling on these issues. The Connecticut Opticians Association argued that the Board, pursuant to Conn. Gen. Stat. § 19a-19, cannot issue a Declaratory Ruling since to do so would constitute the regulation of business practices.

Raymond Dennis, L.O., the Chairman of the Board of Examiners for Opticians, adopted its pre-filed statement opposing the promulgation of any ruling by the Board on these issues.

Alan Winek, L.O., a member of the Board of Examiners for Opticians, testified that the Board should protect the safety and well-being of the public.

Cole Vision, through its counsel Edward J. Heath, adopted its pre-filed statement opposing the promulgation of any ruling from the Board on these issues.

Conn.Gen. Stat. § 20-133a mentions but does not define the word, “employee.” The statute requires that practicing optometrists and unlicensed establishments (“establishments”) leasing to optometrists, make their own determination of whether someone is practicing as an independent contractor or whether they are practicing as employees of establishments. As demonstrated by the testimony, these distinctions are often difficult to define. Conn. Gen. Stat. § 20-133a provides, in pertinent part, that:

No licensed optometrist shall practice his profession as an employee of any unlicensed person, firm or corporation, provided that said prohibition shall not apply to health services organizations, hospitals, other optometrists or ophthalmologists. Nothing herein contained shall prohibit any registered optometrist or optometrists from continuing his employment in the mercantile establishment in which he or they were employed on June 28, 1963. No rule of the board shall prohibit the practice of optometry on a lessee or sublessee basis in or on the premises of a retail, commercial or mercantile establishment.

Although the term "employee" is not defined for purposes of Conn. Gen. Stat. § 20-133(a), under Connecticut common law, the primary determinant in establishing whether an employer-employee relationship exists, is whether the employer has the right of general control of the work. Hunte v. Blumenthal, 238 Conn. 146, 153-54 (1996).

It is also instructive to look at the definition of "employee" for purposes of the Unemployment Compensation Act at Conn. Gen. Stat. § 31-222(a)(1)(B)(ii) which defines "employee", in pertinent part that as follows:

(I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

The Board agrees that it is characteristic of independent contractors to exert control over their work, schedule, tools, collecting of fees, and advertisement. While practicing as independent contractors, either as solo practitioners or in group practices, optometrists must maintain such control. Most importantly, optometrists are responsible and shall be in control of their patients' records. This conclusion is supported elsewhere in Connecticut law. Conn. Gen. Stat. § 20-7c provides, in pertinent part, that:

- (a) (1) A provider . . . shall supply to a patient upon request complete and current information possessed by that provider concerning any diagnosis, treatment and prognosis of the patient . . .
- (b) Upon a written request of a patient, his attorney or authorized representative, or pursuant to a written authorization, a provider . . . shall furnish to the person making such request a copy of the patient's health record

Additionally, section 19a-14-41 of the Regulations of Connecticut State Agencies ("the Regulations") provides, in pertinent part, that:

Each person licensed or certified pursuant to the following chapters and Acts shall maintain appropriate medical records of the assessment, diagnosis, and course of treatment provided each patient, and such medical records shall be kept for the period prescribed

Section 19a-14-42 of the Regulations provides, in pertinent part, that:

Unless specified otherwise herein, all parts of a medical record shall be retained for a period of seven (7) years from the date of treatment, or, upon the death of the patient, for three (3) years

Medical records belong and shall be under the control of the optometrists who create them. When an optometrist leaves an establishment, the optometrist has an obligation to retain possession of patients' records. A third party who leases the establishment to the optometrist cannot control such records unless they possess a separate, duplicate record that they created in the process of selling durable medical equipment to patients, such as eye glasses. As independent contractors, optometrists must have access to their patients' medical records at all times.

Optometrists should also maintain control of the fees that they charge to patients for their services, including the setting of the amount of the fees and the collection thereof. As testified by Dana L. Shepard, O.D., under her contract with Vision Corner, from 1993 to 1996, her professional fees were set at \$29.00 per exam. The Vision Corner staff collected the payments and then issued her weekly checks. In November and December of each year, a holiday promotion was imposed on the optometrists. For example, in 1993, the exam fee was reduced to \$19.00, and in 1994, the fee was reduced to \$14.00. Vision Corner subsidized the professional fee, but only if the patient had purchased a new pair of glasses. Exh. 4. Additionally, under Dr. Shepard's contract, third party payors paid directly to Vision Corner, and Dr. Shepard occasionally would not receive payment. When Dr. Shepard tried to hire her own clerk and collect her own fees, Vision Corner refused such arrangements. Tr., 9/12/01, pp. 91-92. These types of practices in which optometrists are not in control of setting of fees and of collection of fees, by either delegating or contracting with another entity, are indicative of an employer-employee relationship. Moreover, the Board regards any guaranteed minimum fee as an unacceptable employment situation, since optometrists lack control over patient care.

Dr. Shepard also testified that during her contract with Vision Corner, the establishment dictated her schedule of three exams per hour, and she was pressured to adhere to this schedule, regardless of the individual needs of her patients. Exh. 4; Tr., 9/12/01, pp. 89, 93-94.

Maria Diaz, O.D. also testified in support of the Proposed Ruling and gave a personal account of her experiences when she was working as an independent contractor for an unlicensed entity. Dr. Diaz testified that her relationship with the establishment was similar to that of employee-employer in that she was obligated to work with support staff who discouraged her patients from having their eyes dilated so that they could purchase glasses during the same visit. She also had no discretion in the hiring or supervision of such staff and was obligated to work with individuals who were not qualified to provide ophthalmic care to her patients. Exh. 5; Tr., 9/12/00, pp. 73-80.

Also under Dr. Diaz' lease agreement, her fees for eye examinations were contingent upon whether she persuaded the patient to buy the company's merchandise. If the patient bought a pair of glasses, she received \$29.00 for the eye exam as opposed to \$15.00 if the patient bought nothing. Exh. 5. The Board finds that such agreements are indicative of an employer-employee relationship and jeopardize patients' health and safety.

Several intervenors argued that the Board should not issue a declaratory ruling in which the Board reaches a general legal conclusion as to which relationships under §20-133a are employer-employee relationships and which are independent contractor relationships, and that any such conclusion shall be reached on a case-by-case basis. The Board's position is that this declaratory ruling will provide guidance to practitioners and the public, and when determining specific cases before it, the Board will consider the facts of the specific case, and determine whether there has been a violation of Connecticut General Statute §20-133a.

Accordingly, the Board has sufficient evidence to issue a Declaratory Ruling that clarifies the difference between independent contractors and employees.

CONCLUSION AND RULING

The Board adopts the Proposed Ruling submitted by the CAO and the NAOO with modifications, as follows:

In every landlord-tenant or independent contractor relationship, the leasing or contracting optometrist shall:

- a. Retain ownership and control of optometric patient records and have 24-hour access to such records.
- b. Be afforded access to the premises, after business hours, for medical emergencies. Any contract or lease shall contain a reasonable protocol for the optometrist to gain access to the premises for such medical emergencies.
- c. Set his or her own fees for optometric services and products sold in the optometrist's office, provided that optometrists may refrain from the sale of ophthalmic products in the leased premises.
- d. Not be constrained in scheduling patients, the amount of time spent with a patient, or the number of patients to be seen in a particular time period. The optometrist may, however, contract to perform optometric services for a minimum number of hours per day.
- e. Not be limited in the treatments, products or services recommended for patient, nor shall the commercial establishment compensate optometrists based on goods purchased by patients.
- f. Not enter into a lease for less than fair market value, except that the optometrist may pay rent based on a percentage of gross income.
- g. Not be limited in the managed care or insurance plans in which the optometrist chooses to participate.
- h. Be free to practice to the full scope of licensure permitted under law, as well as control the hiring, staffing, training, office and employment policies of the individuals employed to assist the optometrist in the management and administrative aspects of his practice and in patient care. The optometrist, however, may contract for the provision of clerical services.
- i. Be allowed to have a separate phone line and listing for his or her optometric office. The optometrist may own and control the telephone line and listing.
- j. Be free to advertise within the bounds of the law as the optometrist deems to be in the best interest of the practice.
- k. Control and determine to whom all patients are referred for medical, ophthalmologic and/or additional optometric services.

1. Not permit signage or advertising that states, implies or suggests to a reasonable person that the optometrist is employed as an employee of an optical establishment. The burden rests with the optometrist to ensure that the optometry advertising is accurate and does not violate statutes and regulations.

5/1/2002
Date

Edward F. Pinn, O.D., Chairperson,
Connecticut Board of Examiners for
Optometrists