

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
Appeal No. 2006-CA-001173

COMMONWEALTH OF KENTUCKY,
STATE BOARD OF PHYSICAL THERAPY

APPELLANT

v.

DUBIN ORTHOPAEDIC CENTRE, P.S.C.


APPELLEE

**AMICUS CURIAE BRIEF OF THE KENTUCKY MEDICAL
ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION**

Appeal from Franklin Circuit Court
Action No. 05-CI-00210

Certificate of Service

I hereby certify that a copy of this Amicus Curiae Brief of the Kentucky Medical Association and the American Medical Association has been served this 11 day of December, 2006 by mailing a copy to: Lisa English Hinkle, Esq., McBrayer, McGinnis, Leslie & Kirkland, 201 East Main Street, Suite 1000, Lexington, KY 40507-2003, Mark Brengelman, Assistant Attorney General, Office of Civil and Environmental Law, The Capitol Building, Suite 118, 700 Capitol Avenue, Frankfort, KY 40601-3449, Samuel McNamara, Judge, Franklin Circuit Court, Division 1, Post Office Box 678, Frankfort, KY 40602-0678, Roger L. Crittenden, Judge (retired), 518 Logan Street, Frankfort, KY 40601-3518, Jeffrey A. Darling, Esq., Darling and Reynolds, PSC, 429 North Broadway, Lexington, KY 40508, John J. Bennett, General Counsel American Physical Therapy Association, 1111 North Fairfax Street, Alexandria, VA 22314-1488. The undersigned did not remove the record on appeal.



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STATEMENT OF THE CASE

The practice of medicine in Kentucky is exclusively regulated, not by the Kentucky Board of Physical Therapy (“Appellant” or “Board”), but by the Kentucky Board of Medical Licensure (“KBML”), pursuant to the Medical Practice Act codified at KRS Chapter 311. In this case, the Board asserts that the Ronald S. Dubin, M.D. and his medical practice, Dubin Orthopaedic Centre, P.S.C. (“Dubin”), may not use certain codes developed and published by the American Medical Association in the Current Procedural Terminology (“CPT”) Coding Manual¹ as physical therapy evaluations and/or re-evaluations to bill patients for services rendered, even though the Board agrees that a licensed physician may perform physical therapy services within the scope of his or her medical license. The Board is taking the aggressive position that KRS Chapter 327 protects licensed physical therapists from competition from all other health care providers, even physicians, in so far as the ability to bill for physical therapy services is reserved solely to licensed physical therapists.²

The Franklin Circuit Court disagreed with the Board’s interpretation of KRS Chapter 327, and denied the Board’s request for a permanent injunction in its May 12, 2006 Opinion and Order. Commonwealth of Kentucky v. Dubin Orthopaedic Centre, P.S.C., No. 05-CI-00210 (Franklin Cir. Ct. May 12, 2006) (“Franklin Circuit Court Order”). The Board sought an injunction against Dubin which would have prevented him from billing for certain physical therapy evaluation services when provided by a licensed physician, rather than a licensed

¹ The CPT Coding Manual is a comprehensive listing of descriptive terms and identifying codes used by health care providers and health insurance plans for reporting medical services and procedures. Any physician billing a third party (e.g., private health insurance plan) for medical services must select the most appropriate CPT code to describe the services provided. Individual physicians do not have the luxury or burden of modifying the descriptive language of the CPT codes in claim submissions, because only CPT codes (e.g., 97001) are reported.

² The Board relies on the following language in KRS 327.020(3) to support its position: “It shall be unlawful for any person . . . to use . . . the words “physical therapy,” . . . or any other words, letters, abbreviations or insignia . . . to bill for physical therapy unless such physical therapy is provided by or under the supervision of a physical therapist. . . .”

physical therapist. Relying on language in KRS 327.020(3), the Board has taken the position that only a licensed physical therapist may bill for services described as “physical therapy” (whether directly or through the use of a medical billing code) even though it does not dispute that physicians licensed in the Commonwealth of Kentucky are authorized to provide physical therapy services.

In its May 12, 2006 Order and Opinion, the Franklin Circuit Court concluded that:

Dubin is duly authorized and legally allowed to provide these [physical therapy] services and as a result is entitled to compensation for the specific treatments provided. This Court will not undertake an exhaustive review of every CPT [billing] code that may be applicable to these services. The purpose of the Board’s statutory title protection in the term “physical therapy” as granted by KRS 327.020(3) is to prevent a person from holding themselves out to the public as a licensed physical therapist. Dubin’s use of CPT codes 97001 [physical therapy evaluation] and 97002 [physical therapy re-evaluation] presents no danger of this. These codes are merely used for billing purposes and the invoices contain no explanatory language detailing which specific services the codes stand for. It is up to the physician and third party payors to determine which billing codes accurately describe the medical services provided to patients.

Franklin Circuit Court Order, pp. 2-3. The Board now appeals the Franklin Circuit Court’s Order.

The Kentucky Medical Association (“KMA”) and the American Medical Association (“AMA”) submit this Amicus Curiae Brief in support of the Appellee’s request to uphold the decision of the Franklin Circuit Court.

ARGUMENT

I. KRS 327.020(1) EXEMPTS PHYSICIANS LICENSED IN KENTUCKY FROM THE RESTRICTIONS AGAINST BILLING FOR PHYSICAL THERAPY CONTAINED IN KRS 327.020(3)

A licensed physician’s scope of practice is the most broad and complex of all the healthcare-related professions, due in large part to the highly competitive and extensive medical

education and training required as a condition of licensure. Kentucky law vests the KBML with exclusive authority to regulate the “practice of medicine” in the Commonwealth of Kentucky and to establish the acceptable standards of medical practice. The practice of physical therapy is regulated by the Board in accordance with the Physical Therapy Practice Act codified at KRS Chapter 327. KRS 327.020(1) generally restricts the practice of physical therapy to licensed physical therapists, although it also includes the following significant exclusion:

Provided, however, that *nothing contained in this chapter* shall prohibit any person licensed in this state under any other law from engaging in the practice for which such person is duly licensed.

(emphasis added). This language could not be more clear. Nothing in KRS Chapter 327 applies to licensed physicians engaging in the practice of medicine.

The Board’s reliance on the restrictions against billing for physical therapy services found in KRS 327.020(3) is misplaced, and ignores the specific language in KRS 327.020(1) which excludes physicians from the restrictions and limitations found in all of KRS Chapter 327, including KRS 327.020(3)’s billing restrictions. The Franklin Circuit Court properly interpreted this statutory framework when it found that “Dubin is duly licensed and legally allowed to provide these [physical therapy] services and as a result is entitled to compensation for the specific treatments provided.” Franklin Circuit Court Order, p. 2.

The Court’s decision is based on a proper interpretation of KRS Chapter 327’s statutory framework, as well as the proper scope of the practice of medicine. The KBML recently issued an advisory opinion which specifically addressed whether a licensed physician may properly perform and bill for physical therapy treatments provided to a patient. See Kentucky Board of Medical Licensure Advisory Opinion, issued July 5, 2006, at p. 3 (“KBML Opinion”). As the

sole administrative body in the Commonwealth of Kentucky charged with regulation of the

practice of medicine, the KBML Opinion is significant:

To the extent that a licensed physician provides medical treatment(s) to a patient, including treatment(s) commonly referred to as physical therapy, the physician may lawfully demand reasonable payment for such treatment(s). The Board believes that obtaining reimbursement for professional services plainly falls within the lawful practice of medicine as authorized by KRS Chapter 311.

If the patient is paying directly for the physician's services, KRS 327.020(1) would permit a licensed physician to use the term "physical therapy" in billing for treatment if such treatment(s) was actually provided as part of the physician's practice.

To the extent that the licensed physician is seeking payment from a third party payor, such reimbursement would be governed by the terms of the contract between the parties and the law(s) applicable to such contract. . . .

The Board must assume that any body reviewing the ability of licensed physicians to be reimbursed for providing treatment(s) commonly referred to as physical therapy would apply that section of KRS 327.020(1), which provides, ". . . nothing contained in this chapter shall prohibit any person licensed in this state under any other law from engaging in the practice for which such person is duly licensed."

As noted above, it is the Board's position that a licensed physician may provide treatment(s) commonly known as physical therapy, as part of their lawful practice, where medically appropriate. In similar manner, it is the Board's position that, where a licensed physician provides such treatment, the physician may lawfully advise the patient that the patient is being treated or referred for physical therapy. It would follow that, when a licensed physician provides the treatment(s) commonly referred to as physical therapy, the physician may properly obtain reasonable payment for such treatment and may refer to the treatment as physical therapy when seeking payment.

KBML Opinion, at p. 3 (emphasis added).

II. INTERPRETATION OF KRS 327.020 ENDORSED BY APPELLANT IS INCORRECT AS A MATTER OF LAW AND WOULD LEAD TO AN ABSURD RESULT

In this appeal, the Board virtually ignores the significance of the exclusionary language contained in KRS 327.020(1), and urges this Court to accept its tortured reading of KRS 327.020(3) to overturn the opinion and order of the Franklin Circuit Court. The Board distinguishes between so-called “practice act” protections and “title act” protections and argues that KRS 327.020(1) only protects physicians from KRS 327.020(3)’s restriction against practicing physical therapy, but does not permit physicians to bill for “physical therapy” services actually performed. The interpretation of KRS 327.020 suggested by the Board is contrary to the plain language of the statute and the statutory framework and, if accepted, would lead to an absurd result. See Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co., 983 S.W.2d 493, 500 (Ky. 1998)(“ A statute should not be interpreted so as to bring about an absurd or unreasonable result.”).

It is illogical to suggest that the General Assembly would pass a bill permitting a licensed physician to practice medicine (which includes the practice of physical therapy), but prohibiting him or her from billing for any physical therapy services actually performed. The broad, exclusionary language of KRS 327.020(1) protects physicians against precisely that unreasonable result. The Board encourages this Court to interpret the billing restrictions in KRS 327.020(3) in such a way as to render the broad exclusionary language of KRS 327.020(1) virtually meaningless, and contrary to well-settled law that “in expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, and to its object and policy.” Cabinet for Families and Children v. Cummings, 163 S.W.3d 425 (Ky 2005).

III. EXISTENCE OF ALTERNATIVE CPT BILLING CODES IS IMMATERIAL

The Board argues that Dubin could bill patients and health insurance companies for physical therapy services certain “evaluation and management” CPT codes, rather than codes 97001 (physical therapy evaluation) or 97002 (physical therapy re-evaluation). The Franklin Circuit Court considered and rejected the Board’s argument in its May 12, 2006 Opinion and Order:

The Board also claims that the CPT contains several alternative codes that could be used to bill for these services.

However, Dubin is duly licensed and legally allowed to provide these services and as a result is entitled to compensation for the specific treatments provided. This Court will not undertake an exhaustive review of every CPT code that may be applicable to these services. . . . It is up to the physician and third party payors to determine which billing codes accurately describe the medical services provided to patients.

Franklin Circuit Court Opinion, at pp. 2-3. The existence of possible alternative billing codes is immaterial as a matter of law. As explained more thoroughly above, the Franklin Circuit Court properly concluded that licensed physicians may perform and bill for physical therapy services, notwithstanding the billing prohibition in KRS 327.020(3), because KRS 327.020(1) exempts physicians from the restrictions in KRS Chapter 327.


Even if other CPT billing codes were relevant, the Board categorically and incorrectly asserts that Dubin could properly bill patients and third party payors for physical therapy evaluations using alternative “evaluation and management” billing codes. See Brief for the Appellant, filed October 12, 2006, at pp. 18-19. As the KMA noted in its *amicus curiae* brief filed with the Franklin Circuit Court, CPT codes 97001 and 97002 are separate and distinct from various “evaluation and management” codes. See Kentucky Medical Association’s *Amicus*

(also published by the American Medical Association), explained:

The physical medicine codes 97001, physical therapy evaluation, and 97002, physical therapy reevaluation, are different from the evaluation and management (E/M) codes. They do not include management services and are strictly for the purposes of a comprehensive evaluation and reevaluation needed to support medical necessity for further care.

American Medical Association, *Coding Communication: Physical Medicine and Rehabilitation Services, Part 1*, in *CPT Assistant* (Dec. 2003) (emphasis added) (cited in Kentucky Medical Association's *Amicus Curiae* Brief, filed Dec. 22, 2005, at p. 7). This explanation and clarification in the *CPT Assistant* regarding the proper use of the codes 97001 and 97002 clearly contradicts the Board's assertion that physicians should or could simply use separate evaluation and management billing codes, rather than codes 97001 and 97002 to bill for physical therapy evaluations.

Respectfully submitted,


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