

## 49 Op. Att'y Gen. No. 1

ADMINISTRATIVE LAW AND PROCEDURE - Deference given to agency interpretation unless incorrect;  
HEALTH - Use of physical agent modalities by occupational therapists;  
LICENSES, PROFESSIONAL AND OCCUPATIONAL - Scope of occupational therapy practice;  
STATUTORY CONSTRUCTION - Construing intent of legislature;  
STATUTORY CONSTRUCTION - Construing plain meaning of words of statute;  
MONTANA CODE ANNOTATED - Title 37, chapter 24, Sections 1-2-101, 37-11-101(11), -102(7), -104(2),  
-106, -106(1), -106(1)(b), 37-24-103, -103(5), -103(5)(k), -103(7), -103(8);  
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 3 (1991). HELD: Occupational therapists  
are not authorized by Montana law to perform iontophoresis.

March 12, 2001

Mr. Lon Mitchell  
Board Counsel  
Board of Occupational Therapists  
Montana Department of Commerce  
P.O. Box 200513

Helena, MT 59620-0513 Dear Mr. Mitchell: You have requested my opinion on the following question, which I have rephrased as follows:

Are occupational therapists authorized by Montana law to employ iontophoresis?

It is my opinion that they are not. I write this opinion under the assumption that the parties agree to the following definition: Iontophoresis means a process whereby topical medications are applied through the use of electricity. See Mont. Code Ann. § 37-11-106(1)(b). I. BACKGROUND This request for an Attorney General's Opinion arises out of a declaratory ruling by the Montana Board of Occupational Therapists (Board). The Board concluded that "iontophoresis as a physical agent modality is within the scope of practice for appropriately licensed occupational therapists within the state of Montana." The Montana Chapter of the American Physical Therapy Association (PT Association), objected to the conclusion of the Board. The Board and the PT Association have agreed to defer to an Opinion of the Attorney General. As a general rule, an administrative agency's interpretation of a statute under its domain should receive deference unless there are compelling indications that the Board's interpretation is incorrect. See Christenot v. Department of Commerce, 272 Mont. 396, 400, 901 P.2d 545, 548 (1991). My conclusion in this case is that the Board's interpretation is incorrect. I reach this conclusion relying primarily on the following: (1) the statutes governing physical therapy define topical medication and authorize its application and administration, whereas the occupational therapy statutes are silent on the subject; and (2) the statutes governing physical therapy define iontophoresis and expressly authorize its use, whereas the occupational therapy statutes contain no similar definition and authorization. II. STATUTORY SCHEME GOVERNING PHYSICAL AND OCCUPATIONAL THERAPISTS Analysis of the statutes governing physical therapists and occupational therapists is instructive. A. Applicable physical therapy statutes The Montana legislature first sought to regulate the profession of physical therapy in 1961. The governing statutes are now codified in Mont. Code Ann. title 37, chapter 11. The definition of physical therapy is found at Mont. Code Ann. § 37-11-101(7):

"Physical therapy" means the evaluation, treatment, and instruction of human beings to detect, assess, prevent, correct, alleviate, and limit physical disability, bodily malfunction and pain, injury, and any bodily or mental conditions by the use of therapeutic exercise, *prescribed topical medications*, and rehabilitative procedures for the purpose of preventing, correcting, or alleviating a physical or mental disability.

(Emphasis added.) Mont. Code Ann. § 37-11-101(11) defines topical medications and states in relevant part, "'Topical medications' means medications applied locally to the skin." Section 37-11-104(2) establishes the boundaries of physical therapy treatment. It states:

Treatment employs, for therapeutic effects, physical measures, activities and devices, for preventive and therapeutic purposes, exercises, rehabilitative procedures, massage, mobilization, and physical agents including but not limited to mechanical devices, heat, cold, air, light, water, electricity, and sound.

Section 37-11-106 governs application and administration of topical medications; § 37-11-106(1)(b) provides that "[a] licensed physical therapist may apply or administer topical medications by: . . . *iontophoresis, a process whereby topical medications are applied through the use of electricity.*" (Emphasis added.) B. Applicable occupational therapy statutes The Montana legislature sought to regulate the practice of occupational therapy some 24 years after it enacted legislation governing the practice of physical therapy. The regulations governing the practice of occupational therapy are codified in title 37, chapter 24. The definition of occupational therapy is found at Mont. Code Ann. § 37-24-103(5):

"Occupational therapy" means the use of purposeful activity and interventions to achieve functional outcomes to maximize the independence and the maintenance of health of an individual who is limited by physical injury or illness, psychosocial dysfunction, mental illness, developmental or learning disability, the aging process, cognitive impairment, or an adverse environmental condition. The practice encompasses assessment, treatment, and consultation. Occupational therapy services may be provided individually, in groups, or through social systems. Occupational therapy interventions include but are not limited to:  
. . . .

The section then goes on to list authorized occupational therapy interventions, including employment of "physical agent modalities." Mont. Code Ann. § 37-24-103(5)(k). Section 37-24-103(7) defines physical agent modalities:

"Physical agent modalities" means *those modalities that produce a response in soft tissue through the use of light, water, temperature, sound, or electricity.* Physical agent modalities are characterized as adjunctive methods used in conjunction with or in immediate preparation for patient involvement in purposeful activity. Superficial physical agent modalities include hot packs, cold packs, ice, fluidotherapy, paraffin, water, and other commercially available superficial heating and cooling devices. Use of superficial physical agent modalities is limited to the shoulder, arm, elbow, forearm, wrist, and hand and is subject to the provisions of 37-24-105. Use of sound and electrical physical agent modality devices is limited to the elbow, forearm, wrist, and hand and is subject to the provisions of 37-24-106.

(Emphasis added.) III. LEGAL ANALYSIS In 1991, the legislature amended the statutes governing physical therapy specifically to authorize licensed physical therapists to apply and administer topical medications. The definition of topical medications is found at Mont. Code Ann. § 37-11-101(11); they are defined as "medications applied locally to the skin" and include "only medications listed in 37-11-106(2) for which a prescription is required under state or federal law." Mont. Code Ann. § 37-11-106 specifically authorizes the methods and standards with which physical therapists must comply when applying or administering topical medications. It provides:

*37-11-106. Application and administration of topical medications -- prescription, purchasing, and recordkeeping requirements.* (1) A licensed physical therapist may apply or administer topical medications by:

- (a) direct application;
- (b) iontophoresis, a process whereby topical medications are applied through the use of electricity; or
- (c) phonophoresis, a process whereby topical medications are applied through the use of ultrasound.

(2) A licensed physical therapist may apply or administer the following topical medications:

- (a) bactericidal agents;

- (b) debriding agents;
- (c) anesthetic agents;
- (d) anti-inflammatory agents;
- (e) antispasmodic agents; and
- (f) adrenocortico-steroids.

(3) Topical medications applied or administered by a physical therapist must be prescribed on a specific or standing basis by a licensed medical practitioner authorized to order or prescribe topical medications and must be purchased from a pharmacy certified under 37-7-321. Topical medications dispensed under this section must comply with packaging and labeling guidelines developed by the board of pharmacists under Title 37, chapter 7.

(4) Appropriate recordkeeping is required of a physical therapist who applies or administers topical medications as authorized in this section.

Section 37-11-106 defines the methods of application a physical therapist may use and lists the topical medications a physical therapist may administer. Subsection (1) sets forth the three ways a licensed physical therapist may apply or administer topical medications: direct application, iontophoresis or phonophoresis. Subsection (1)(b) defines iontophoresis as "a process whereby topical medications are applied through the use of electricity." Section 37-11-106 clarifies that topical medications applied or administered by a physical therapist must be prescribed by a licensed medical practitioner authorized to prescribe such medication. Finally, the section requires that any physical therapist who applies or administers topical medications must comply with appropriate record-keeping requirements. The statutes governing the practice of occupational therapy are silent on the subject of application and administration of topical medications. Mont. Code Ann. § 37-24-103 provides the relevant definitions governing occupational therapy. Unlike § 37-11-106, § 37-24-103 does not provide a definition of topical medications, nor does it list application or administration of topical medications as an authorized occupational therapy intervention. The distinction between the scope of practice for occupational therapists and physical therapists is significant. When interpreting the statutes governing occupational and physical therapists, I must do so in accordance with the intent of the legislature. State v. Christensen, 265 Mont. 374, 376, 877 P.2d 468, 469 (1994). The legislature amended the physical therapy statutes in 1991 to define topical medications and authorize their application and administration. The occupational therapy statutes were also amended in 1991 to allow the use of superficial heat and cold, and again in 1993 to specifically authorize use of physical agent modalities. The legislature did not, in either of these instances, grant occupational therapists the authorization to apply or administer topical medications. Therefore, it is my opinion that the legislature did not intend to grant occupational therapists such authorization. The legislature is presumed to have full knowledge of existing laws. Theil v. Taurus Drilling Ltd. 1980-II, 218 Mont. 201, 207, 710 P.2d 33, 36 (1985). Had the legislature intended to extend occupational therapists' scope of practice to include iontophoresis it would have made a corollary authorization allowing occupational therapists to apply and administer topical medications. It has been suggested that, while there is no express authorization for occupational therapists to use iontophoresis, it falls under Mont. Code Ann. § 37-24-103(7)'s definition of physical agent modalities. That section provides in relevant part:

"Physical agent modalities" means those modalities that produce a response in soft tissue through the use of light, water, temperature, sound, or electricity. Physical agent modalities are characterized as adjunctive methods used in conjunction with or in immediate preparation for patient involvement in purposeful activity.

Mont. Code Ann. § 37-24-103(7). I do not agree with the argument that iontophoresis falls under § 37-24-103(7)'s definition of physical agent modalities. While the definition of physical agent modalities does include the use of electricity, there is no reference to the application or administration of topical medications. The definition of iontophoresis found at § 37-11-106, which the PT Association urges is proper, as well as the definition used by the Board in its declaratory ruling and the definitions found in the professional literature submitted by Montana Occupational Therapy Association contemplate the delivery

of topical medication through the use of electricity. When interpreting the language of a statute, deference should be granted to the plain meaning of the words used. Sherner v. Conoco, Inc., 2000 MT 50, ¶ 35, 298 Mont. 401, 995 P.2d 990. It is my opinion, based on a reading of the plain language of the statutes governing occupational therapists, that the authorization of occupational therapists to use electricity in their practice does not encompass the procedure of iontophoresis which, by both parties' proposed definitions, involves the application and administration of topical medications. THEREFORE, IT IS MY OPINION:

Occupational therapists are not authorized by Montana law to perform iontophoresis.

Sincerely, MIKE McGRATH

Attorney General mm/ans/jym