

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE STATE MEDICAL BOARD**

In the Matter of the Application of)
)
 SCOTT EMERY, M.D.)
)
)
)
_____)

OAH No. 07-0169-MED
Board Case No. 2801-05-003

DECISION AND ORDER

I. Introduction

Dr. Scott Emery (“Respondent”) is a neurologist licensed to practice medicine in the states of Colorado and Oregon. Dr. Emery submitted an application for licensure in Alaska on June 24, 2005; he was issued a temporary license on August 9, 2005. The temporary license expired on February 9, 2006.

The Alaska State Medical Board (“Board”) notified Dr. Emery by letter dated March 5, 2007 that his application for a license was denied by the Board because he practiced medicine while unlicensed by the State of Alaska when he performed an independent medical evaluation (“IME”) on February 7, 2005 in Alaska.¹

Dr. Emery filed his appeal of the Board’s decision on March 27, 2007 and requested an administrative hearing. The formal hearing convened on July 23, 2007 before Administrative Law Judge (“ALJ”) James T. Stanley. The Division of Corporations, Business, and Professional Licensing (“Division”) called two witnesses to testify: Leslie A. Gallant, Executive Administrator, Alaska State Medical Board; and, Brian Howes, investigator for the Division. Dr. Emery testified and called two witnesses to testify: Nelson Page, attorney; and Roger Holmes, attorney. Division exhibits A, B, C, D and E were admitted into evidence.² Respondent exhibits 1-5, 9, 15, 17, 21-25, 28, and 30-32 were admitted into evidence. The hearing was recorded.

Hearings conducted on behalf of the State Medical Board are governed by Alaska’s Administrative Procedure Act (“APA”).³ Like most administrative hearings, APA hearings are conducted less formally than court proceedings. The Alaska Rules of Evidence generally do not

¹ Exhibit A, p. 103.

² Exhibits B (portions of Dr. Emery’s 2005 license application file) and D (a single page from Dr. Emery’s 1994 license file) are marked **confidential**.

³ AS 44.62.330(a)(5).

apply, and much evidence that would not be admitted in a court proceeding, or that would not be admitted without laying an elaborate foundation, is readily admitted in an APA hearing.⁴

II. Facts

Dr. Emery received his medical degree from the University of Washington in 1975.⁵ He completed his medical internship in 1976.⁶ He completed his residency in neurology in 1979.⁷ Dr. Emery is a board-certified neurologist⁸ licensed to practice medicine in Colorado⁹ and Oregon.¹⁰ From 1979 until 1994, Dr. Emery was licensed to practice medicine in Alaska; Dr. Emery left Alaska in 1993 and allowed his Alaska license to lapse, effective December 31, 1994.

On February 7, 2005, Dr. Emery performed a Rule 35¹¹ independent medical examination of Dominador Villasin, plaintiff in a civil action for damages flowing from alleged personal injuries, in the conference room of an Anchorage law firm.¹² The IME was commissioned by counsel for the third party defendant in the civil action.¹³ Mr. Villasin was evaluated by Dr. Emery for symptoms occurring after an accident wherein ceiling materials fell on Mr. Villasin's head on August 5, 2001. Prior to the evaluation on February 7, 2005, Dr. Emery reviewed the medical records compiled by Mr. Villasin's treating physicians.¹⁴ Subsequent to February 7, 2005 and before June 16, 2005, Dr. Emery prepared a nine-page report of his evaluation of Mr. Villasin.¹⁵

Counsel for Mr. Villasin contacted Leslie Gallant, Executive Administrator for the Alaska State Medical Board, on June 16, 2005 and inquired whether or not Dr. Emery was

⁴ *In the Matter of Mark Beirne, M.D.* (October 25, 2007) (denying an application for a medical license because the applicant had previously surrendered his medical license, but practiced medicine after the surrender).

⁵ Exhibit A, p. 101.

⁶ Exhibit A, p. 104.

⁷ Exhibit A, p. 103.

⁸ Exhibit C, p. 29.

⁹ Exhibit A, p. 87 (Colorado).

¹⁰ Division's Post Hearing Brief Re: Practice of Medicine, p. 1, line 19.

¹¹ Rule 35(a) of the Alaska Rules of Civil Procedure provides that "(W)hen the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

¹² Exhibit 28, Notice of Independent Medical Examination of Dominador O. Villasin by Scott Emery, M.D.

¹³ Exhibit 28.

¹⁴ Exhibit 23, p. 1, pp. 5-6.

¹⁵ Exhibit 23.

licensed to practice medicine in the State of Alaska.¹⁶ Ms. Gallant advised the inquiring counsel that Dr. Emery was licensed in Alaska through December 31, 1994, but did not hold an Alaska license after that date. To verify that Dr. Emery performed the IME on Mr. Villasin on February 7, 2005, counsel for Mr. Villasin provided notes from the examination to Ms. Gallant.¹⁷

Division Investigator Luker opened an investigative file on June 22, 2005.¹⁸ The purpose of the investigation was to determine whether Dr. Emery has practiced medicine in Alaska while not licensed in Alaska. Investigator Luker wrote to Dr. Emery on December 22, 2005,¹⁹ and posed a variety of questions, to which Dr. Emery replied on January 2, 2006.²⁰ Some of Dr. Emery's responses in his letter of January 2, 2006 bear directly on the IME issues:

3) I currently hold an active medical license in Colorado (32889) and since the time I was informed that performing medicolegal consultation in the State of Alaska required a state medical license, have applied for and obtained a license in Alaska (T3572) again as well.

* * *

5) I do not believe by the definition provided in Sec. 08.64.380(6)(A) or (B), or by customary usage that I have practiced medicine in the State of Alaska since July 1, 1993. I have provided telephone consultations regarding cases for which records or imaging studies regarding Alaskan citizens were presented to me for evaluation of medicolegal issue by attorneys or insurers. On one occasion, in January 2003, I was asked by representatives of NORCAL to examine a patient in Anchorage for the purpose of establishing causation of injury and consequent liability. On another occasion, on February 7th, 2005 I was asked to evaluate an individual involved in personal injury litigation. His records and imaging studies were reviewed in Colorado. The patient was interviewed and examined on the above date in an attorney's office in Anchorage. In no case was a diagnosis or treatment offered to an individual for the purpose of medical management nor was a physician-patient relationship expressed or implied.

* * *

I should add in the end that I was unaware that state medical licensure may be required for the performance of medicolegal consultation in Alaska. I do not believe this was true at the time that I practiced neurology in

¹⁶ Exhibit 6.

¹⁷ Exhibit 6.

¹⁸ Exhibit 21.

¹⁹ Exhibit 3, pp. 1-3.

²⁰ Exhibit 21.

Anchorage and then in Fairbanks prior to July, 1993. It is not required in other jurisdictions of which I am aware. When it was brought to my attention that the plaintiff's attorney for the individual whom I saw last February intended to file a complaint, I immediately applied for, and have received licensure again in Alaska.

On June 24, 2005, Dr. Emery submitted an application for medical licensure in Alaska. On August 9, 2005, Dr. Emery was given a temporary license to practice medicine in Alaska; this temporary license expired on February 9, 2006.²¹

The issue of whether conducting an IME constitutes the practice of medicine was brought to the attention of a physician Board member who opined that performing an IME was the practice of medicine.²² The Board member suggested that Dr. Emery be approached with a Memorandum of Agreement ("MOA"),²³ to include a fine and reprimand. Investigator Howes wrote to Dr. Emery on August 30, 2006.²⁴ Dr. Emery rejected the proposed MOA. On September 21, 2006, counsel for Dr. Emery wrote to Investigator Howes and stated that Dr. Emery did not violate any Alaska statute or regulation.²⁵ Counsel for Dr. Emery asserted that:

Medical reviews are not the practice of medicine. Dr. Emery did not diagnose, treat, operate on or prescribe for, or administer to a patient. He formed no physician patient privilege. His review was done entirely for a legal proceeding and, as such, his conduct is entirely regulated by the Court system.²⁶

On January 17, 2007, Investigator Howes drafted a memorandum for the Board regarding his investigation of Dr. Emery.²⁷ The memorandum incorrectly advised the Board that the IME conducted by Dr. Emery was performed in conjunction with a workmen's compensation matter. The IME in question was in fact convened pursuant to a defendant's Rule 35 request filed in a 2002 civil action for personal injury then pending in the Superior Court for the State of Alaska.²⁸

²¹ Exhibit 9.

²² Exhibit 5.

²³ Exhibit A, pp. 38-43.

²⁴ Investigator Howes' letter is not part of the record in this case. Investigator Howe's' letter is mentioned in a responsive letter from Dr. Emery's Alaska counsel dated September 21, 2006 (Exhibit A, pp. 73-74).

²⁵ Exhibit A, p. 74.

²⁶ Exhibit A, p. 73.

²⁷ Exhibit 5.

²⁸ *Villasin v. Janssen Contracting, et al, Janssen Contracting (third party plaintiff) v. BEK of Alaska Inc. (third party defendant)*, Case No. 3AN-02-11255CI.

Through his attorney, Dr. Emery had been in letter contact with the Senior Investigator for the Board since (at least) September 21, 2006.²⁹ The Senior Investigator was trading email correspondence with Dr. Emery's attorney on December 27, 2006.³⁰ The Senior Investigator for the Board submitted a memorandum to the Board on January 17, 2007 disclosing that Dr. Emery was represented by counsel in the matter.³¹ The Executive Administrator placed Dr. Emery's application on the Board agenda.

The Board met on January 25, 2007 to consider, *inter alia*, Dr. Emery's pending application for relicensure in Alaska. Dr. Emery and/or his counsel were not given written or oral notice that Dr. Emery's application for relicensure, or any other possible action involving Dr. Emery, was before the Board.³² Ms. Gallant informed the Board that Dr. Emery performed an IME on a patient in Alaska at a time when Dr. Emery was not licensed to practice medicine in Alaska. Ms. Gallant advised the board "...that reviewing medical records and rendering an opinion is considered a forensic review of records and not the practice of medicine; however, conducting a physician examination does fall under the practice of medicine."³³ Ms. Gallant further advised the Board that in September of 1996, the Board sent a letter to workers' compensation underwriters (doing business in Alaska) stating that performing independent medical evaluations was considered to be the practice of medicine.³⁴ Following a discussion of Dr. Emery's application for licensure, the Board voted unanimously to deny "...Dr. Emery's application based on his violation of the law in practicing medicine without a license."³⁵

Notwithstanding the interactions of Dr. Emery and his attorney with Board personnel described above, and the Board staff's position that Dr. Emery practiced medicine without a license for which serious, adverse action may result³⁶ neither Dr. Emery nor his counsel was given specific notice that action on Dr. Emery's application would be taken on January 25,

²⁹ Exhibit 17.

³⁰ Exhibit 25.

³¹ Exhibit 5.

³² Hearing testimony of Ms. Gallant and Dr. Emery.

³³ Exhibit 3, p. 10; the exhibit is minutes of the January 25, 2007 Board meeting. The minutes are presumed not to be a verbatim transcript of the Board meeting; rather, the minutes record "high points" of matters discussed, action taken, the motion and the votes for or against the motion.

³⁴ Exhibit 15. The letter is signed by the Chair of the Board, but makes no reference to when or how the matter of Alaska-sited IME's by physicians not licensed in Alaska was addressed by the Board. The opinion expressed in the letter (that a license was required) did not become a regulation until July 25, 2008 (twelve years after the 1996 letter).

³⁵ Exhibit 3, p. 10.

³⁶ Exhibit 5.

2007.³⁷ No document evidencing public notice of the Board meeting was offered; the Division takes the position that public notice was given pursuant to the Open Meetings Act,³⁸ and if Dr. Emery wished to attend, he could have done so.³⁹

Ms. Gallant notified the Federation of State Medical Boards of the adverse decision by the Alaska Board soon after the Board's decision on January 25, 2007.⁴⁰ On March 5, 2007, Ms. Gallant notified the Colorado Board of Medical Examiners, and the Oregon State Board of Medical Examiners, that Dr. Emery had been denied licensure in Alaska to practice medicine.⁴¹

On March 5, 2007, the Board, through Ms. Gallant, sent a letter by certified mail to Dr. Emery advising him that his license application had been denied, that grounds for disciplinary action existed because he practiced medicine in Alaska without a license, and that his conduct was deemed unprofessional under state regulation.⁴² On March 12, 2007, the Division notified The Healthcare Integrity and Protection Data Bank ("HIPDB")⁴³ that the Board had taken adverse action against Dr. Emery, namely denying his license application because he practiced medicine in Alaska without a medical license, which in turn made Dr. Emery sanctionable for unprofessional conduct.⁴⁴ Dr. Emery received the Board's adverse action letter on March 14, 2007, forty-eight days after Board action on his application for licensure and two days after the filing of an adverse action report with HIPDB. He requested an administrative hearing seven days later.⁴⁵

³⁷ The executive administrator was asked on cross-examination why Dr. Emery was not given any direct notice that his application and related investigative reports were on the agenda. She responded that: she believed that there was no legal requirement to give Dr. Emery (or his counsel) notice that he was on the agenda; she had no staff, save one assistant; and, she just "didn't have time". It is noted that seven individuals are listed on the agenda as appearing before the board, but the record is silent as to how these seven individuals received notice of the meeting and their place on the agenda.

³⁸ AS 44.62.310.

³⁹ Division's Post Hearing Brief Re: Practice of Medicine, p. 15, line 17.

⁴⁰ Hearing testimony of Ms. Gallant. The exact date of notice to the Federation of State Medical Boards is not in the record, but Ms. Gallant's testimony establishes that the report was issued before Dr. Emery was apprised of the Board's decision to deny licensure.

⁴¹ Exhibits 1 and 2, respectively.

⁴² Exhibit 3.

⁴³ HIPDB is a national data bank established to receive and disclose certain final adverse actions against health care practitioners, providers, and suppliers. *HIDPB Guide Book* (February 2000). The subject of an Adverse Action Report may dispute the accuracy of the report, or add a statement to a report at any time. www.npdb-hipdb.hrsa.gov/dispute.

⁴⁴ Exhibit 32.

⁴⁵ Dr. Emery's request for an administrative hearing was dated March 21, 2007 and received by the Division on March 27, 2007.

III. Discussion

The core issue presented in this case is whether, on February 7, 2005, Dr. Emery's performance of an IME in Alaska constituted the practice of medicine.⁴⁶ If an IME was the practice of medicine in Alaska in 2005, then the Board's refusal to license Dr. Emery may stand, although the Board retains the discretion to alter the decision. If the IME in question did not constitute the practice of medicine, then Dr. Emery's appeal should be granted and the Board's denial should be reversed. The parties agree that medical record reviews and report writing are not the practice of medicine.⁴⁷ Thus, the sole issue presented is whether Dr. Emery's in-person examination of Mr. Villain in Alaska turned what would otherwise be an allowable forensic review into "the practice of medicine."

The Division contends that the Board has the discretion to refuse to grant Dr. Emery a medical license under the following statutes and regulation:

AS 08.64.360. Penalty for practicing without a license or in violation of chapter. Except for a physician assistant, a mobile intensive care paramedic, or a person licensed or authorized under another chapter of this title who engages in practices for which that person is licensed or authorized under that chapter, a person practicing medicine or osteopathy in the state without a valid license or permit is guilty of a class A misdemeanor. Each day of illegal practice is a separate offense.

AS 08.64.240. License refused. ... (b) The board may refuse to grant a license to any applicant for the same reasons that it may impose disciplinary sanctions under

AS 08.64.326. Grounds for imposition of disciplinary sanctions. (a) The board may impose a sanction if the board finds after a hearing that a licensee ... (7) failed to comply with this chapter, a regulation adopted under this chapter, or an order of the board;

12 AAC 40.967. UNPROFESSIONAL CONDUCT. For purposes of AS 08.64.240(b) and AS 08.64.326, "unprofessional conduct" means an act or omission by an applicant or licensee that does not conform to the generally accepted standards of practice for the profession for which the applicant seeks licensure or a permit under AS 08.64 or which the licensee is authorized to practice under AS 08.64. "Unprofessional conduct" includes the following: ...(6)

⁴⁶ 12 AAC 40.945 (performance of independent medical evaluation) was adopted July 25, 2008, more than three years after Dr. Emery examined Mr. Villain. This regulation provides that "a physician who comes into this state for the purpose of performing an independent medical evaluation that involves a face-to-face physical examination, regardless of the purpose of the evaluation, is practicing medicine and is required to be licensed in this state."

⁴⁷ The Division's Post hearing Brief Re: Practice of Medicine, p. 10, lines 9-11.

practicing a profession licensed under AS 08.64 without a required license or permit or with a lapsed, expired, retired, or inactive license or permit;...

A. *Conducting a Civil Rule 35 IME Was Not the Practice of Medicine in Alaska When Dr. Emery Examined Mr. Villasin*

A person may not practice medicine in the state of Alaska unless the person is licensed under AS 08.64.⁴⁸ Practicing medicine in Alaska without a license exposes the unlicensed practitioner to a class A misdemeanor charge.⁴⁹ The practice of medicine in Alaska is defined by statute, in pertinent part, as “(F) or a fee, donation, or other consideration, to diagnose, treat, operate on, prescribe for, or administer to, any human ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition.”⁵⁰ The statutory Alaska definition of the practice of medicine does not include the words “examine, examination, evaluate, or evaluation.”

No regulatory interpretation of the “practice of medicine” existed when Dr. Emery examined Mr. Villasin on February 7, 2005. Given that the Board did not determine until January 25, 2007 that conducting an IME of Mr. Villasin would be defined as the practice of medicine, how would Dr. Emery know in 2005 that conducting a Rule 35 IME would later be considered by the Board as the practice of medicine for which a license was required? The short answer is that Dr. Emery could not have known how expansively the Board would define the practice of medicine in 2007. Stated differently, in 2005 Dr Emery simply had no reason to believe that an IME performed in Alaska required a license. Alaska counsel retaining Dr. Emery did not know that a license was required for an IME.⁵¹ At the time of the IME of Mr. Villasin, Dr. Emery had practiced medicine for more than twenty-five years and he was unaware of other

⁴⁸ AS 08.64.170(a). The statute contains limited exceptions to the licensure requirement; none of the exceptions apply to Dr. Emery or his circumstances.

⁴⁹ AS 08.64.360. Dr. Emery was not charged with a class A misdemeanor. Accordingly, no decision is required herein whether the Rule of Lenity applies. If a crime had been charged, the Rule of Lenity might apply. “It is well established that ambiguities in criminal statutes should be read narrowly and strictly construed against the State.” *McDole v. State*, 121 P.3d 166 (Alaska App. 2005).

⁵⁰ AS 08.64.380(6)(A).

⁵¹ Attorneys Page and Holmes testified that the conduct of IME’s is not the practice of medicine and should not be for a variety of reasons. Regardless of whether the IME is characterized as an examination, evaluation or diagnosis, attorney Page and Holmes assert that an IME is not the practice of medicine because the IME is not done for treatment or healing purposes. Given that attorneys Page and Holmes have 65 years of combined legal experience with medical and insurance matters, it is reasonable to believe that they would know if “suitably licensed”, as used in Rule 35, means licensed in Alaska.

jurisdictions that required licensure (in that jurisdiction) in order to conduct an IME.⁵² Even though Dr. Emery was unaware that the Alaska Board believed that conduct of an IME required a license, once he was placed on notice by the investigator, he immediately applied for licensure. Stated differently, Dr. Emery was not resistant to the idea of obtaining a license to conduct IME's in Alaska, he simply had not previously been aware of the unpublished requirement.

That Dr. Emery received a fee for conducting the IME is clear from the evidence and not disputed by the parties. However, the definition of “diagnose”, as used in the statute, is open to interpretation. The standard definition of “diagnose” is: to recognize (as a disease) by signs and symptoms; to analyze the cause or nature of <diagnose the problem>;⁵³ identify the medical condition of (someone).⁵⁴ Does the definition of “diagnose” as used in the statute fall within the standard definition of “diagnose”? Or, does “diagnose” mean something different, something more?

The definition of diagnose, standing alone, does not include any implication of treatment or healing efforts; rather, a diagnosis simply identifies conditions or symptoms that the examinee may possess. When the word diagnose is read in conjunction with the other words in the statute, it becomes evident that diagnose means for the purpose of treatment, for the purpose of determining the need for an operation or a particular drug prescription.⁵⁵ The essence of the practice of medicine is treatment of a patient.⁵⁶ Accordingly, simply diagnosing Mr. Villasin in the course of a Rule 35 IME, without treatment designed to heal the patient, does not constitute the practice of medicine by Dr. Emery.⁵⁷

The Division argues that in 2005 an IME was the practice of medicine and the fact that the IME was conducted pursuant to Rule 35 makes no difference. Because Rule 35 requires that the examiner be *suitably licensed*, the Division argues that *suitably licensed* must mean licensed in the State of Alaska. In partial support of its argument, the Division refers to AS 23.30.095, a

⁵² Exhibit 21, p. 2 and Dr. Emery's testimony.

⁵³ www.merriam-webster.com/dictionary/diagnose.

⁵⁴ *The Concise Oxford Dictionary*, 10th ed. (1999).

⁵⁵ Whenever possible, a court interprets each part or section of a statute with every other part or section, so as to create a harmonious whole. *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 530-31 (Alaska 1993).

⁵⁶ “The practice of medicine is the learned profession that is mastered by graduate training in a medical school and that is devoted to preventing or alleviating or curing diseases and injuries. wordnet.princeton.edu/perl/webn?s.”

⁵⁷ “The practice of medicine is...the performance of any act...whether with or without the use of drugs or medicine...by a person holding himself or herself out as able to cure disease, with a view to relieve, heal, or cure, and having for its object the prevention, healing, remedying, cure, or alleviation of disease.” From a decision of City Court Judge Joseph L. Green in a case involving a County Medical Society, as reported in the New York Times on February 6, 1906.

statute addressing medical treatments, services, and examinations conducted pursuant to the Alaska Workers' Compensation Act. In pertinent part, the statute provides that:

The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice *authorized to practice medicine under the laws of the jurisdiction in which the examination occurs*, furnished and paid for by the employer.⁵⁸ (emphasis added)

Dr. Emery was not conducting a worker's compensation examination of Mr. Villasin on February 7, 2005 and therefore the licensing requirement of AS 23.30.095 does not apply.⁵⁹

The *suitably licensed* requirement of Rule 35 does apply because Dr. Emery was conducting a Rule 35 examination of Mr. Villasin in 2005. Alaska Civil Rule 35 and federal Civil Rule 35 are worded the same. In December 1991, Federal Civil Rule 35 was revised to authorize the court to require that physical or mental examinations be conducted by a person who is *suitably licensed* or certified; in a similar fashion, Alaska Civil Rule was amended in 1993.⁶⁰ Nothing in Rule 35, whether it be Alaska or Federal Rule 35, states or has been judicially construed to mean that *suitably licensed* requires licensure in the jurisdiction where the Rule 35 examination is conducted. Existing authority is to the contrary:

The court's responsibility to determine the suitability of the examiner's qualifications applies even to a proposed examination by a physician. If the proposed examination and testimony call for an expertise that the proposed examiner does not have, it should not be ordered, even if the proposed examiner is a physician. *The rule does not, however, require that the license or certificate be conferred by the jurisdiction in which the examination is conducted.*⁶¹ (emphasis added)

The crux of Rule 35's *suitably licensed* language is that the court has the authority to insure that an examiner, physician or other professional, has the requisite skills to perform the examination requested by a party to litigation. The revision to the rule adding *suitably licensed*

⁵⁸ AS 23.30.095(e).

⁵⁹ The Division agrees that Dr. Emery did not perform a workers' compensation impairment IME on Mr. Villasin. Lines 5-6, p. 9, Division's *Post Hearing Brief Re: Practice of Medicine*.

⁶⁰ Alaska Supreme Court Order, 1122, effective July 15, 1993.

⁶¹ *Notes of Advisory Committee on December 1991 Amendment of (federal) Rule (35)*. At all times pertinent, the Federal and Alaska wording of Civil Rule 35 are the same.

language encourages the court to exercise discretion when ordering an independent medical examination.⁶²

Dr. Emery's conduct of an IME in Alaska on February 7, 2005 was an "isolated assessment of an individual's health or disability for an employer, business, or insurer"⁶³ and did not constitute a traditional definition of the practice of medicine⁶⁴ or a statutory definition. An independent medical examiner is responsible for administering an objective medical evaluation but not for monitoring patient's health over time, treating patients, or fulfilling many other duties traditionally held by physicians.⁶⁵ The evidence in this case does not show that Dr. Emery diagnosed Mr. Villasin for the purpose of healing him, treated him, operated on him, prescribed for him, or administered to any ailment, disease, disorder, injury, or other mental or physical condition that Mr. Villasin may have had on February 7, 2005. In simple terms, the evidence coalesces to show that Dr. Emery examined Mr. Villasin for a fee and then wrote a report for potential use in pending litigation.

B. The Division's Reliance on the 1996 Board Letter is Misplaced

The Chair of the Alaska State Medical Board distributed a letter dated September 16, 1996 advising that the performance of "diagnostic tests and treatment" by physicians traveling to the State of Alaska will be considered the practice of medicine for which a medical license is required:⁶⁶

As of October 15, 1996, the Alaska State Medical Board will consider any physician who travels to Alaska and engages in the practice of medicine without first obtaining licensure in this state to be in violation of the above-referenced statutes.⁶⁷ The Alaska State Medical Board will recommend to the Attorney General that appropriate criminal and civil actions be prosecuted against those physicians the Board finds in violation of Alaska law.

⁶² "The revision is intended to encourage the exercise of this discretion, especially with respect to examinations by persons having narrow qualifications." *Notes of Advisory Committee on December 1991 Amendment of Rule (Federal Civil Rule 35)*.

⁶³ American Medical Association Policy statement E-10.03, *Patient –Physician Relationship in the Context of Work-Related and Independent Medical Examinations, adopted June 1999*.

⁶⁴ The practice of medicine is "according to philology, logic, and common sense, it is simply the art of healing...", *Journal of the American Medical Association* ("JAMA"), February 1, 1908, republished in JAMA on January 30, 2008(vol.299, No.4).

⁶⁵ *Id.*, footnote 64.

⁶⁶ Exhibit 15.

⁶⁷ AS 08.64.380(6)(A), defining the practice of medicine, and AS 08.64.170(a) states in pertinent part "A person may not practice medicine, podiatry, or osteopathy in the state unless the person is licensed under this chapter..."

The exact distribution of the 1996 letter is unclear from the record. Testimony was received indicating that the letter was sent to at least three workers' compensation insurance carriers then active in the State of Alaska.⁶⁸ The record contains no evidence that Dr. Emery had any knowledge of the letter prior to contact with a Division investigator in 2005.⁶⁹

The Division offers the 1996 letter from the Board to buttress its argument that physicians traveling to Alaska to perform diagnostic tests and treatments must be licensed in Alaska. Setting aside for the moment the question of whether performing diagnostic tests constitute the practice of medicine, can the 1996 letter be used against Dr. Emery in this proceeding? The answer is no.

The 1996 letter from the Board is a regulation under the Administrative Procedures Act ("APA") because it purports to "affect the public" and it "interprets or makes specific the law enforced or administered by the..." Board.⁷⁰ The 1996 letter asserts that it is an interpretation of AS 08.64.170(a) (license required to practice medicine) and AS 08.64.380(6)(A) (defining the practice of medicine) and will be applied broadly to all physicians performing test in Alaska. To be a valid and enforceable regulation, the 1996 letter-regulation must have been promulgated under the APA requirements. It was not.

The Board prepared the regulation (letter) and cited to authority for the regulation, but did not complete the numerous other requirements imposed by the APA. The Board did not submit the regulation to the Lt. Governor.⁷¹ The Board did not submit the regulation to the Department of Law, and the Department of Law was thus prevented from issuing the required written statement of approval or disapproval.⁷² The regulation was not published for public comment as required by law.⁷³ A public hearing on the regulation was not held.⁷⁴ As applied to Dr. Emery, the 1996 regulation (letter) was not valid or effective because it did not comply with

⁶⁸ Hearing testimony of Ms. Gallant.

⁶⁹ Exhibit 21, Dr. Emery's January 2, 2006 letter to the investigator, and Dr. Emery's testimony.

⁷⁰ *Jerrel v. State, Department of Natural Resources*, 999 P.2d 138, 143 (Alaska 2000). In *Jerrel*, the Department of Natural Resources ("DNR") issued a letter requiring a minimum size visibility mark for livestock. Because the letter implemented, interpreted, or made specific the law enforced or administered by the state agency, the letter was held to be a regulation.

⁷¹ AS 44.62.040.

⁷² AS 44.62.060.

⁷³ AS 42.62.190.

⁷⁴ AS 44.62.210(a).

the statutes.⁷⁵ Therefore, the 1996 regulation (letter) cannot form the basis to find that Dr. Emery practiced medicine in Alaska without a license in 2005.

IV. Conclusion

Dr. Emery did not engage in the “practice of medicine” on February 7, 2005 when he performed an IME on Mr. Villasin because a Rule 35 IME is not, as defined in AS 08.64.380(6)(A), “diagnosing” within the meaning of the statute. A license to practice medicine in Alaska was not required for a suitably licensed physician to perform a Rule 35 IME. Dr. Emery did not practice a profession licensed under AS 08.64 for which a license is required and he did not engage in unprofessional conduct as described in 12 AAC 40.967.

Dr. Emery has met his burden of proof to prove by a preponderance of the evidence that he did not practice medicine in Alaska without a license on February 7, 2005. The Board directs that Dr. Emery’s application for licensure be granted.

DATED this 17th day of November, 2008.

By: Signed _____
James T. Stanley
Administrative Law Judge

⁷⁵ As 44.62.030 provides, in pertinent part, that “...a regulation adopted is not valid or effective unless consistent with the statute....”

Villasin actually does—i.e., diagnoses conditions as a result of face-to-face examination of the patient. This is not materially different from what a consulting physician does when asked by the primary physician to examine the patient for a consult. That the express purpose for conducting an IME is to gain information for litigation does not change the nature of the examination or diminish the need for the state entity regulating the practice of medicine to ensure that persons conducting such examinations are competent and adhere to applicable standards of practice and professional ethics.

The second interpretation—the one the board, in its discretion as the entity charged with regulating the practice of medicine in Alaska, concludes is more appropriate to the statute’s intended purpose—looks at “diagnose” as a term of art, and from a medical perspective. As the proposed decision shows, for more than a decade, the board has interpreted the statutory definition of the “practice of medicine” to include conducting a face-to-face IME, even though that interpretation has only recently been memorialized in a formally adopted regulation.

2. **Findings.** The board rejects the finding that “Dr. Emery did not engage in the ‘practice of medicine’ on February 7, 2005 when he performed an IME on Mr. Villasin ...”² and finds instead that he was practicing medicine when he performed the IME. Dr. Emery performed a face-to-face neurological examination of Mr. Villasin. His very thoroughly documented results show that he diagnosed several conditions, recommended against a particular treatment (surgery), and recommended further medical attention and follow up for elevated blood pressure and cardiac rhythm disturbance.³ Unlike a records-only based evaluation, this examination was the practice of medicine as the board interprets AS 08.64.380(6)(A).

The board’s interpretation may not have been widely known until it was embodied in a recently adopted regulation.⁴ That interpretation may not have been known to the attorney who hired Dr. Emery for the Villasin IME, or to Dr. Emery himself, who had left Alaska in 1993 and allowed his Alaska license to lapse in 1994. The board considers Dr. Emery to be obviously well-qualified and capable, as shown by the thorough IME report. It seems implausible that such a physician would not realize that the face-to-face IME he performed is the practice of medicine.

Recognizing, however, that in a case heard on the board’s behalf by an administrative law judge, the board must rely on the judge’s assessment of credibility, Dr. Emery’s assertion that he

² November 17, 2008 [Proposed] Decision and Order at 13.

³ See February 7, 2005 Independent Medical Examination by Scott Emery, M.D., at 6-7.

⁴ 12 AAC 40.945 (effective July 25, 2008).

was “unaware that state medical licensure may be required for the performance of medicolegal consultation in Alaska”⁵ will be taken as credible. The board, therefore, accepts that at the time of and under the specific circumstances of Dr. Emery’s IME of Mr. Villasin, Dr. Emery had no actual knowledge of the board’s long-standing interpretation.

3. **Disposition.** The disposition of the case is changed to strike the direction at page 13 of the November 17, 2008 proposed decision that licensure be granted to Dr. Emery and uphold the prior denial decision, but without prejudice to Dr. Emery’s ability to file an up-to-date application, which the board will consider without treating this single instance of unprofessional conduct as a disqualification for licensure. The application presently pending is more than three years old. For the reasons stated above, the board’s denial of that application was proper at the time the decision was made. Practicing medicine without a license constitutes unprofessional conduct for which the board had the discretion to deny an application.⁶

However, having become more fully informed of the circumstances as a result of the record developed through the hearing process, and having accepted that Dr. Emery had no actual knowledge of the board’s long-standing interpretation of AS 08.64.380(6)(A), in its discretion under AS 08.64.240(b), the board concludes that the single instance of unprofessional conduct reflected in Dr. Emery’s performance of the Villasin IME without a current Alaska license should not be a permanent bar to his obtaining licensure in Alaska. Accordingly, if Dr. Emery files an up-to-date application for licensure, the board will consider that application on its merits and without treating this denial decision, or the unlicensed practice of medicine incident that gave rise to it, as a bar to approval.

This Decision of the Board and the November 17, 2008 decision document, as modified above, shall constitute the final decision of the State Medical Board in this matter, as adopted by a vote of the board this 30th day of January, 2009.

By: Signed _____
Jean M. Tsigonis, M.D., Chair
On Behalf of the State Medical Board

[This document has been modified to conform to technical standards for publication.]

⁵ November 17, 2008 [Proposed] Decision and Order at 3 (quoting Dr. Emery’s January 2, 2006 letter).

⁶ AS 08.64.240(b); AS 08.64.326(a)(7)&(9); 12 AAC 40.967.