

STATE OF FLORIDA
BOARD OF MEDICINE

Final Order No. DOH-17-1990-**DS**-MQA

FILED DATE **NOV 08 2017**
Department of Health
By **Angela S. [Signature]**
Deputy Agency Clerk

IN RE: PETITION FOR DECLARATORY
STATEMENT OF RICHARD L. HENRY, M.D.

FINAL ORDER ON PETITION FOR DECLARATORY STATEMENT

This matter came before the Board of Medicine (hereinafter the "Board") on April 7, 2017, in Fort Lauderdale, Florida, for consideration of the *Petition for Declaratory Statement Before the Florida Board of Medicine Addressing § 458.3485, Florida Statutes, On Behalf of Richard L. Henry, M.D.* (attached hereto as exhibit A). The Notice of petition for declaratory Statement was published on February 22, 2017, in Vol. 43, No. 36, of the Florida Administrative Register.

The Petition, filed on behalf of Richard L. Henry, M.D. (hereinafter the "Petitioner"), inquires as to whether as a licensed Florida physician, may he allow an Anesthesiologist Assistant, licensed under Section 458.3475, Florida Statutes, to assist him by performing epidural anesthetic procedures and spinal anesthetic procedures under the circumstances set forth below.

FINDINGS OF FACT

1. The Petitioner routinely provides epidural and spinal anesthetic procedures to patients in facilities licensed pursuant to Chapter 395, Florida Statutes.
2. Petitioner would like to employ Anesthesiologist Assistants, licensed under 458.3475, to assist him in providing such services under the following conditions:
 - a. Petitioner would personally examine each and every patient and order the medication to be administered;

- b. Petitioner would directly supervise the administration of the medication by remaining in the same room as the Anesthesiologist Assistant performing the procedure.¹
- c. Petitioner would verify the training and capability of the Anesthesiologist Assistant to provide such services.
- d. Such precautions would be included in the protocol to be filed by the Petitioner in accordance with 458.3475(2), Florida Statutes.

CONCLUSIONS OF LAW

3. The Board of Medicine has authority to issue this Final Order pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.

4. The Petition filed in this cause is in substantial compliance with the provisions of §120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code.

5. For purposes of determining standing in this matter, the individual Petitioner, an allopathic physician licensed pursuant to Chapter 458, Florida Statutes, is a substantially affected person.

6. On March 13, 2017, the Florida Association of Nurse Anesthetists (hereinafter "FANA") and the Florida Academy of Anesthesiologist Assistants' (hereinafter "FAAA") each filed motions to intervene as parties in this proceeding. On March 8, 2017, the Florida Society of Anesthesiologists, Inc. (hereinafter "FSA"), filed a

¹ During the hearing in this matter before the Board on April 7, 2017, the Petitioner, Dr. Henry, clarified that it was his intent to be in the same room as the anesthesiologist assistant when the procedures at issue were to be performed.

motion to intervene as a party in this proceeding. The Petitioner did not object to any of the motions to intervene, and therefore, all three motions were granted.

7. Section 458.3475(3)(a)7., Florida Statutes (2016), reads as follows:

(3) An anesthesiologist assistant may assist an anesthesiologist in developing and implementing an anesthesia care plan for a patient. In providing assistance to an anesthesiologist, an anesthesiologist assistant may perform duties established by rule by the board in any of the following functions that are included in the anesthesiologist assistant's protocol while under the direct supervision of an anesthesiologist:

....

7. Assist the supervising anesthesiologist with the performance of epidural anesthetic procedures and spinal anesthetic procedures.

8. The ultimate issue at hand is whether the performance of epidural anesthetic procedures and spinal anesthetic procedures by an anesthesiologist assistant, under the circumstances set forth above, constitute "assisting" the anesthesiologist as contemplated in Section 458.3475(3)(a)7., Florida Statutes. The Board concludes that it does.

9. The Board is of the opinion that the term "assist," within the context of Section 458.3475(3)(a)7., Florida Statutes, would allow an anesthesiologist assistant to perform epidural anesthetic procedures and spinal anesthetic procedures him or herself as long as Dr. Henry is in the same room where the procedures are being performed and the rest of the conditions set forth in paragraphs 1. a-d of this order are met.

10. The Board's response to this Petition addresses solely the question propounded by the Petitioner and only addresses issues regarding the practice of medicine. The Board's conclusion is based solely on the Board's application of the factual circumstances outlined in the Petition and above, to the pertinent statutory and rule provisions set forth above.

This Final Order shall become effective upon filing with the Clerk of the Department of Health.

DONE AND ORDERED this 7th day of November, 2017.

BOARD OF MEDICINE



Claudia Kemp, J.D., Executive Director
For Magdalena Averhoff, M.D., Chair

NOTICE OF APPEAL RIGHTS

Pursuant to Section 120.569, Florida Statutes, Petitioner is hereby notified that he may appeal this Final Order by filing one copy of a notice of appeal with the Clerk of the Department of Health and the filing fee and one copy of a notice of appeal with the District Court of Appeal within 30 days of the date this Final Order is filed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email transmission to: Christopher L Nuland, Esquire, at nulandlaw@aol.com; to Glenn E. Thomas, Esquire at gthomas@llw-law.com; Steven Layer, M.D., at executiveoffice@fsahq.org; to Monica Rodriguez, Esquire, Rodriguez & Perry, P.A., at monica@rplawfirm.com; and to Edward A. Tellechea, Chief Assistant Attorney General, at Ed.Tellechea@myfloridalegal.com, on this 8th day of November 2017.

Brygel Sanders

Deputy Agency Clerk

STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF MEDICINE

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK

CLERK: *Angel Sanders*
DATE: **FEB 20 2017**

**PETITION FOR DECLARATORY STATEMENT
BEFORE THE FLORIDA BOARD OF MEDICINE
ADDRESSING THE 458.3475, FLORIDA
STATUTES, ON BEHALF OF RICHARD L. HENRY, M.D.**

**PETITION FOR DECLARATORY STATEMENT BEFORE THE FLORIDA BOARD OF
MEDICINE**

COMES NOW Petitioner, Richard L. Henry, M.D., a physician licensed under Chapter 458 of the Florida Statutes (License # ME46736), by and through the undersigned counsel and pursuant to 120.565, Florida Statutes, and hereby petitions the Florida Board of Medicine (hereinafter the "Board") for a Declaratory Statement stating that the petitioner may allow a Anesthesiologist Assistant licensed under 458.3475 to assist the Petitioner by performing epidural anesthetic procedures and spinal anesthetic procedures under the circumstances set forth below:

1. Petitioner is a Florida-licensed physician who is board-certified in Anesthesiology by the American Board of Anesthesiology. Petitioner's address, phone number and facsimile number are as follows:

Tallahassee Memorial Hospital

1300 Miccosukee Road

Tallahassee, FL 32308

Facsimile: (850) 385-0144

Telephone: (850) 385-0146

richhenry@msn.com

2. Petitioner's counsel's name, address, phone number, facsimile number, and email are as follows: Christopher L. Nuland, Esq., 1000 Riverside Avenue, Suite 240, Jacksonville, FL 32204. (904) 355-1555/(904) 355-1585. nulandlaw@aol.com.
3. Petitioner routinely provides epidural and spinal anesthetic procedures to patients in facilities licensed pursuant to Chapter 395, Florida Statutes.
4. Petitioner would like to employ Anesthesiologist Assistants, licensed under 458.3475, to assist him/her in providing such services under the following protocol:
 - a. Petitioner would personally examine each and every patient and order the medication to be administered;
 - b. Petitioner would directly supervise the administration of the medication by remaining in the operating or obstetrical suite when the epidural or spinal anesthetic procedure is performed by the Anesthesiologist Assistant.
 - c. Petitioner would verify the training and capability of the Anesthesiology Assistant to provides such services.
 - d. Such precautions would be included in the protocol to be filed by the Petitioner in accordance with 458.3475(2), Florida Statutes.
5. Section 458.3475(3)(a)7. allows the AA to "assist the supervising anesthesiologist with the performance of epidural anesthetic procedures and spinal epidural procedures,"

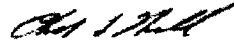
6. It should be noted that the Supreme Court of Ohio, in interpreting identical language in the Ohio Anesthesiologist Assistant Statute, held that the term "assist" means "to carry out procedures requested by the supervising anesthesiologist, including epidural anesthetic procedures and spinal epidural procedures." See Hoffman v. State Medical Board of Ohio, (Ohio, 2007)(Exhibit 1).
7. Florida State senator Mike Fasano was an original sponsor of the 2005 bill would become the 458.3475, Florida Statutes, which authorized AA practice in this State. Mike Fasano, notified the Board of Medicine that it was his legislative intention, and that of his colleagues in the Florida Legislature, that AAs to able to personally perform "epidural anesthetic procedures and spinal epidural procedures." (Exhibit 2).
8. Based upon the above, a reasonable interpretation of the statute, coupled with the precautions to be taken by the Petitioner, support a finding that the Anesthesiologist Assistant, operating under the direct supervision of the board-certified anesthesiologist Petitioner, should be allowed "to carry out procedures requested by the supervising anesthesiologist, including epidural anesthetic procedures and spinal epidural procedures

WHEREFORE, Petitioner, Richard L. Henry, M.D. respectfully requests that, pursuant to s. 120.565, Florida Statutes, the Board of Medicine issue a Declaratory Order finding that he/she may allow his/her Anesthesiology Assistants "to carry out procedures requested by the supervising anesthesiologist, including epidural

anesthetic procedures and spinal epidural procedures" pursuant to s. 458.3475,

Florida Statutes.

Respectfully submitted this 17th day of February, 2017.



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Anesthesiologist Assistants May Perform Spinal, Epidural Procedures Under Proper Supervision

2005-1754. Hoffman v. State Med. Bd. of Ohio, 2007-Ohio-2201.

Franklin App. No. 04AP-839, 2005-Ohio-3682. Judgment reversed.

Moyer, C.J., Pfeifer, Lundberg Stratton, O'Connor, O'Donnell, Lanzinger and Cupp, JJ., concur.

Opinion: <http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2007/2007-Ohio-2201.pdf>



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(May 23, 2007) In a 7-0 decision announced today, the Supreme Court of Ohio held that an administrative rule barring anesthesiologist assistants from performing epidural and spinal procedures is invalid because it conflicts with a state statute that allows assistants to perform such procedures under the supervision of an anesthesiologist. In arriving at its decision, which was authored by Justice Judith Ann Lanzinger, the Court concluded that, as used in R.C. 4760.09, the term "assist" means "to carry out procedures requested by the supervising anesthesiologist."

The case involved a suit filed by Joseph Hoffman of Cleveland, a licensed anesthesiologist assistant, who sought a declaratory judgment and injunction to bar the State Medical Board of Ohio from enforcing an administrative rule adopted by the board in May 2003. The rule in question, O.A.C. 4731-24-04(A), specifically prohibits anesthesiologist assistants from performing "epidural and spinal anesthetic procedures and invasive medically accepted monitoring techniques."

The Franklin County Court of Common Pleas held that the contested rule was unenforceable because it conflicted with provisions of R.C. 4760.09, a state law enacted in 2000 that sets licensing requirements for anesthesiologist assistants and specifically authorizes practitioners to engage in various types of procedures. On review, the 10th District Court of Appeals reversed the trial court's judgment, holding that the administrative rule and the statute were not in conflict, and ordered the lower court to enter a new declaratory judgment allowing the medical board to enforce its rule. Hoffman appealed the 10th District's decision, and the Supreme Court agreed to review the case.

Writing for the Court in today's decision, Justice Lanzinger cited specific language in R.C. 4760.09 that authorizes licensed anesthesiologist assistants to "(a)ssist the supervising anesthesiologist with the implementation of medically accepted monitoring techniques," and to "(a)ssist the supervising anesthesiologist with the performance of epidural anesthetic procedures and spinal anesthetic procedures."

"Because the administrative rule expressly prohibits anesthesiologist assistants from performing epidural or spinal anesthetic procedures—procedures that R.C. 4760.09(G) allows an anesthesiologist assistant to 'assist' in, the outcome of this case depends upon the meaning of the word 'assist,'" wrote Justice Lanzinger.

She noted that there is no definition of "assist" in R.C. Chapter 4760, but pointed to language in Section 4731-24-01(B) of the Ohio Administrative Code, the definitional section applicable to anesthesiologist assistants, which states that: "'Assist' means to carry out procedures as requested by the supervising anesthesiologist, provided that the requested procedure is within the anesthesiologist assistant's training and scope of practice, is authorized by the practice protocol adopted by the supervising anesthesiologist, and is not prohibited by Chapter 4731 or 4760 of the Revised Code, or by any provision of Chapter 4731. of the Administrative Code."

Applying the three tests set forth in that definition, Justice Lanzinger wrote that the administration of epidural and spinal anesthetics are procedures covered by the training regimen required for licensure as an anesthesiology assistant; that practice protocols allow assistants to administer anesthetics to patients in a hospital or ambulatory surgical facility "under the direct supervision and in the immediate presence" of an anesthesiologist "who is actively and directly engaged in the practice of medicine;" and that no statutory prohibitions are imposed by R.C. Chapter 4731 or 4760 regarding the practices banned by the challenged administrative rule.

In light of those findings, the Court rejected the medical board's argument that it should apply the general dictionary definition of "assist" to limit the role of anesthesiology assistants of "aiding" a physician in the performance of epidural and spinal procedures. "(B)ecause the word 'assist' has a technical meaning in the field of anesthesiology, as demonstrated by Hoffman through his expert's affidavit and by the definition set forth in the Ohio Administrative Code, we believe that the General Assembly intended that technical meaning to apply," wrote Justice Lanzinger. "It is established law in Ohio that [in construing statutes], where a word has a technical definition differing from its dictionary definition, it shall be construed according to the former."

" Therefore, the statute permits anesthesiologist assistants to perform epidural and spinal anesthetic procedures provided that, pursuant to R.C. 4760.08, the assistants are directly supervised by an anesthesiologist," she concluded. "The term 'assist' as used in R.C. 4760.09 means 'to carry out procedures as requested by the supervising anesthesiologist.'... We emphasize that R.C. 4760.08 permits an anesthesiologist assistant to carry out epidural and spinal anesthetic procedures as requested by and performed under the direction of a supervising anesthesiologist who is physically present in the room. Without such direct supervision, performance of these procedures by an anesthesiologist assistant would violate the statute."

Contacts

Stephen P. Carney, 614.466.8980, for the State Medical Board of Ohio.

Marc S. Blubaugh, 614.223.9300, for Joseph Hoffman.



Exhibit 2

MIKE FASANO

TAX COLLECTOR
 STATE OF FLORIDA

October 20, 2015

Department of Health
 Florida Board of Medicine
 4052 Bald Cypress Way
 Bin C-03
 Tallahassee, FL 32399-3253

Members of the Florida Board of Medicine and other interested parties:

Anesthesiology Assistants (AAs) have been licensed to practice in the state of Florida since July 1, 2004. Representative Bruce Kyle and I were the sponsors of the legislation (HB 579 and SB 626) which was signed into law by Governor Jeb Bush on June 17, 2004

AAs have become valuable members of the anesthesia care team, working under the direct supervision of physician anesthesiologists to provide procedure sedation and anesthesia for Floridians. Since their licensure was granted, they have been performing regional anesthesia including spinals and epidurals throughout the state. To my knowledge, there has never been a question before the Board of Medicine concerning their ability to do this, nor in the same 11 year span has an AA ever been disciplined before the Board

It has come to my attention that there has been some question as to whether or not AAs can personally perform regional anesthesia. As a sponsor of this legislation and subsequent law, I can assure you that we intended AAs to perform anesthesia according to their abilities, training, and per the protocol that they have submitted to the Board. As noted in this section of Florida Statute 458.375 Section (3)(a)(7):

(3) PERFORMANCE OF ANESTHESIOLOGIST ASSISTANTS.—

(a) An anesthesiologist assistant may assist an anesthesiologist in developing and implementing an anesthesia care plan for a patient. In providing assistance to an anesthesiologist, an anesthesiologist assistant may perform duties established by rule by the board in any of the following functions that are included in the anesthesiologist assistant's protocol while under the direct supervision of an anesthesiologist:

(7) Assist the supervising anesthesiologist with the performance of epidural anesthetic procedures and spinal anesthetic procedures.

Our intent with this language was to allow AAs to personally place the spinal and epidural anesthesia, and any interpretation otherwise is to prevent AAs from practicing to the full extent of their license and would be undermining the intent of the legislation.

Please do not hesitate to contact me regarding this matter.

Yours truly,



Mike Fasano
Tax Collector

MF/gg