

# No. 03-15-00262-CV

---

---

*In the Court of Appeals  
Third District of Texas — Austin*

---

**TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE,**

*Appellant,*

**v.**

**TEXAS BOARD OF CHIROPRACTICE EXAMINERS AND PATRICIA  
GILBERT, EXECUTIVE DIRECTOR IN HER OFFICIAL CAPACITY,**

*Appellees.*

---

*On Appeal from 201st District Court, Travis County, Texas  
Cause No. D-1-GN-14-000355*

---

## **ACUPUNCTURE ASSOCIATION'S MOTION FOR REHEARING**

---

Craig T. Enoch  
Melissa A. Lorber  
Shelby O'Brien  
**ENOCH KEVER PLLC**  
5918 Courtyard Drive, Suite 500  
Austin, Texas 78730  
(512) 615-1200 / (512) 615-1198 fax

*Attorneys for Appellant*

## MOTION FOR REHEARING

### I.

**The Opinion erroneously remands only one of two Chiropractic Board rules that permit chiropractors to perform acupuncture. The Court should grant rehearing to remand both rules.**

Though the Court affirmed the trial court's judgment denying the Acupuncture Association's<sup>1</sup> motion for summary judgment, the Court reversed the judgment granting the Chiropractic Board's<sup>2</sup> competing motion on grounds that a fact issue exists concerning whether acupuncture needles are incisive. The Court remanded the case to the trial court for further proceedings regarding the Acupuncture Association's challenge to Chiropractic Board Rule 22 Texas Administrative Code § 78.14. But Section 78.14 is not the only challenged rule authorizing chiropractors to practice acupuncture.

Section 78.14 governs the practice of acupuncture by chiropractors, while Section 78.13(e)(2)(C) expressly authorizes chiropractors to practice acupuncture. Sections 78.14 and 78.13(e)(2)(C) go hand in hand in that they both authorize chiropractors to practice acupuncture. Thus, it makes no sense to remand one without the other. The Acupuncture Association challenged both rules. But the

---

<sup>1</sup> "Acupuncture Association" refers to Appellant Texas Association of Acupuncture and Oriental Medicine.

<sup>2</sup> "Chiropractic Board" collectively refers to the Appellees Texas Board of Chiropractic Examiners and Patricia Gilbert, Executive Director, in her Official Capacity.

Court only addressed and remanded Section 78.14. The Opinion instead incorrectly discusses the Chiropractic Board's laboratory examination rule that was not challenged and has no relevance to this proceeding.

The Court's failure to remand Section 78.13(e)(2)(C) appears to be premised on mistaken reading of the Chiropractic Board's rules. At two places in the Opinion, the Court refers to Section 78.13(e)(2) as authorizing chiropractors to evaluate and examine patients using laboratory examination. Opinion at 9, 14-15. But the Acupuncture Association did not challenge the Board's rule authorizing laboratory examination—which, in any event, is not found in Section 78.13(e)(2) but instead in Section 78.13(c)(2)(C).

For the reasons discussed below, the Acupuncture Association requests for the Court to grant rehearing and render judgment in its favor. But at a minimum, the Court should (1) grant rehearing, (2) reverse the trial court's grant of summary judgment in favor of the Chiropractic Board with respect to the Acupuncture Association's challenge to the validity of both Sections 78.14 *and* 78.13(e)(2)(C), (3) remand the case for consideration of both of these rules, and (4) remove mistaken references in the Opinion to the Chiropractic Board's laboratory examination rule.

## II.

**The Court should grant rehearing and render judgment for the Acupuncture Association because the Court’s rejection of the Chiropractic Board’s central argument—that the definition of acupuncture in the Acupuncture Chapter defines the scope of chiropractic in the Chiropractic Chapter—removes any basis for the assumption that the Legislature intends to distinguish between incisive and nonincisive needles.**

The Court concluded that Texas Occupations Code, Section 201.002—which prohibits chiropractors from performing any incisive procedures other than needles used for diagnostic blood draws—is ambiguous, requiring deference to the Chiropractic Board’s interpretation of “incisive.” Opinion at 14. The Court relied on its holding in *Texas Board of Chiropractic Examiners v. Texas Medical Association* (“*TMA I*”), accepting the argument that needles can be either nonincisive or incisive depending on whether the “technical” or “ordinary” meaning of “incisive” applied. 375 S.W.3d 464, 479-80 (Tex. App.—Austin 2012, pet. denied). The Court explained in *TMA I* that the “technical” meaning of incisive refers to needles that are capable of cutting and the “ordinary” meaning encompasses needles that are capable of piercing. *Id.*

But the Court should not continue down this path because it is improper to look to dictionaries to determine the meaning of “incisive” when the Legislature has supplied a definition. See *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). By including a lone exception to the prohibition on needle use (needles used for diagnostic blood draws), the Legislature has defined

“incisive” to encompass all other needles. TEX. OCC. CODE § 201.002(a)(3); *see Mid-Century Ins. Co. v. Kidd*, 997 S.W.2d 265, 273 (Tex. 1999).

The Court should also not continue down this path because, by rejecting the Chiropractic Board’s primary argument, the Court removed the Board’s premise for this argument. For years, the Chiropractic Board’s argument has been that the Legislature’s amendment to the Acupuncture Chapter,<sup>3</sup> which changed the definition of “acupuncture” to mean the “nonsurgical, nonincisive” insertion of an acupuncture needle, expanded the scope of the Chiropractic Chapter to authorize chiropractors to practice acupuncture. *TMA I*, 375 S.W.3d at 477. Indeed, the Chiropractic Board relied on that amendment in adopting its acupuncture rules.<sup>4</sup>

In *TMA I*, the Court noted that the inclusion of “nonincisive” in the Acupuncture Chapter could possibly explain how needles are capable of being inserted in the body in a nonincisive manner. *Id.* at 481. But the Court has now, correctly, rejected the Chiropractic Board’s argument that the definition of

---

<sup>3</sup> “Acupuncture Chapter” refers to Texas Occupations Code, Chapter 205. “Chiropractic Chapter” refers to Texas Occupations Code, Chapter 201.

<sup>4</sup> *See* Texas Register Preamble to the Chiropractic Board’s adoption of the scope of practice rule, including as related to the practice of acupuncture by chiropractors, available at [http://texreg.sos.state.tx.us/public/regviewer\\$ext.RegPage?sl=T&app=2&p\\_dir=N&p\\_rloc=147748&p\\_tloc=-1&p\\_ploc=&pg=1&p\\_reg=200602847&z\\_chk=52497&z\\_contains=](http://texreg.sos.state.tx.us/public/regviewer$ext.RegPage?sl=T&app=2&p_dir=N&p_rloc=147748&p_tloc=-1&p_ploc=&pg=1&p_reg=200602847&z_chk=52497&z_contains=), and Texas Register Preamble to the Chiropractic Board’s adoption of the acupuncture rule, available at [http://texreg.sos.state.tx.us/public/regviewer\\$ext.RegPage?sl=T&app=2&p\\_dir=N&p\\_rloc=201038&p\\_tloc=-1&p\\_ploc=&pg=1&p\\_reg=200902378&z\\_chk=50205&z\\_contains=](http://texreg.sos.state.tx.us/public/regviewer$ext.RegPage?sl=T&app=2&p_dir=N&p_rloc=201038&p_tloc=-1&p_ploc=&pg=1&p_reg=200902378&z_chk=50205&z_contains=).

“acupuncture” in the Acupuncture Chapter informs the scope of chiropractic in the Chiropractic Chapter. Opinion at 16-19. As such, with the rug now pulled out from under the foundation of the Chiropractic Board’s argument, it is improper to continue operating under the assumption that the Legislature intended for the Chiropractic Chapter to distinguish between so-called incisive and nonincisive needles. To the contrary, the Chiropractic Chapter expressly contemplates that needles are incisive and includes no indication of an intent to differentiate between needles with “beveled” versus “pointed” tips.<sup>5</sup>

This is the only reasonable way to read the Chiropractic Chapter. To continue down a path in which needles are broken into “incisive” or “nonincisive” categories would require courts, regulators, practitioners, and the public to examine needles under microscopes or consult with experts to determine if a particular needle is capable of cutting. The Court should not construe the Chiropractic Chapter in this absurd manner and should instead read it in accordance with its plain terms—that chiropractors may not use needles except for purposes of a diagnostic blood draw. TEX. OCC. CODE § 201.002(a)(3); *see also City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). And the Court should hold that

---

<sup>5</sup> Indeed, though it is unnecessary to consult legislative history given the lack of ambiguity in the statute, legislative history supports that the Legislature intended to prohibit all needle use when the Legislature amended the Chiropractic Chapter to prohibit incisive procedures. Representative Janek, in offering the amendment, stated the intent was to “take out any ability by chiropractors to put needles into people.” *TMA I*, 375 S.W.3d at 469 n.7.

because chiropractors cannot use needles, they also cannot practice acupuncture in the absence of a license issued by the Acupuncture Board.

### **III.**

#### **The Court failed to properly consider the unreasonableness of the Chiropractic Board's interpretation of the Chiropractic Chapter.**

Even if the Court continues to believe that the Chiropractic Chapter's definition of "incisive" is ambiguous, the Court failed to properly consider the unreasonableness of the Chiropractic Board's interpretation of its governing statute. A court only defers to an agency's interpretation of an ambiguous statute if the interpretation is reasonable and consistent with the statute. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011). As established above, the Chiropractic Board's interpretation of its scope of practice statute is inconsistent with the statute's plain terms. The Chiropractic Board's interpretation of the statute is also unreasonable.

The Court found the Chiropractic Board's interpretation of its scope of practice statute reasonable on the sole basis of the purported distinction between incisive and nonincisive needles. But the Court neglected to consider many of the Acupuncture Association's arguments regarding the unreasonableness of the Board's interpretation. For instance, the Court did not consider that a court should grant no deference to an agency's interpretation in regard to issues that do not lie

within the agency's expertise.<sup>6</sup> *Rogers v. Tex. Bd. of Architectural Exam'rs*, 390 S.W.3d 377, 384 (Tex. App.—Austin 2011, no pet.). The Board has no expertise in acupuncture—acupuncture is an entirely separate practice and profession regulated by a separate regulatory board.<sup>7</sup> The Court also did not examine the Chiropractic Board's lackluster education and training requirements that govern a chiropractor's practice of acupuncture.<sup>8</sup> It is unreasonable for a regulatory board to interpret its governing statute as enabling its licensees to practice an entirely separate profession that is regulated by a separate regulatory board while excusing its licensees from the extensive education and training requirements that the Legislature requires for that profession.<sup>9</sup>

### **PRAYER**

Appellant Texas Association of Acupuncture and Oriental Medicine respectfully prays that this Court grant the Acupuncture Association's Motion for Rehearing and render judgment for it. Alternatively, the Association prays that the Court grant rehearing and clarify that the trial court erred in granting summary judgment in favor of the Chiropractic Board with respect to the Association's

---

<sup>6</sup> See Acupuncture Association's Brief at 45.

<sup>7</sup> See *id.* at 26-27.

<sup>8</sup> See *id.* at 28-33.

<sup>9</sup> See *id.*



challenge to both 22 Texas Administrative Code §§ 78.14 and 78.13(e)(2)(C). The Association further requests any other relief the Court deems appropriate at law or equity.

Respectfully submitted,

By: /s/ Craig T. Enoch

Craig T. Enoch

Texas Bar No. 00000026

cenoch@enochkever.com

Melissa A. Lorber

Texas Bar No. 24032969

mlorber@enochkever.com

Shelby O'Brien

Texas Bar No. 24037203

sobrien@enochkever.com

**ENOCH KEVER PLLC**

5918 Courtyard Drive, Suite 500

Austin, Texas 78730

512.615.1200 / 512.615.1198 Fax

*Attorneys for Texas Association of  
Acupuncture and Oriental Medicine*

**CERTIFICATE OF COMPLIANCE**

Appellant certifies that this Motion for Rehearing (when excluding the caption, signature, certificate of compliance and certificate of service) contains 1,553 words.

*/s/ Craig T. Enoch*  
\_\_\_\_\_  
Craig T. Enoch

**CERTIFICATE OF SERVICE**

I hereby certify that, on October 4, 2016, the Acupuncture Association's Motion for Rehearing was served via electronic service on the following:

Joe H. Thrash  
Assistant Attorney General  
Administrative Law Division  
P.O. Box 12548  
Austin, Texas 78711  
Joe.Thrash@texasattorneygeneral.gov

*/s/ Craig T. Enoch*  
\_\_\_\_\_  
Craig T. Enoch