

**STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
OFFICE OF PROFESSIONAL STANDARDS**

In the Matter of the License to Practice )	
Dentistry of: )	OPS No. 95-08-07-33 DD
)	Prog. No. DE 0379
GARY R. FELDMAN, D.D.S., )	
)	PREHEARING ORDER NO. 2:
)	ORDER ON MOTION FOR
Respondent. )	SUMMARY JUDGMENT
_____ )	

This matter came before Health Law Judge Brian D. Peyton, Presiding Officer for the Dental Quality Assurance Commission (the Commission) on Respondent's Motion for Summary Judgment. Having reviewed and considered the Respondent's Motion for Summary Judgment, the Memorandum in Opposition filed by the Department of Health (the Department), the Respondent's Reply Memorandum and Motion to Strike Declaration of Dr. Passmore, the Respondent's Supplemental Reply Memorandum, the oral arguments of the parties, and the record in this proceeding, the Presiding Officer now enters the following:

**I. CONTENTIONS OF THE PARTIES**

1.1 Dr. Feldman is a licensed dentist who practices as an oral surgeon. He has been charged with unprofessional conduct as defined by RCW 18.130.180(1) (moral turpitude, dishonesty or corruption); .180(7) (violation of WAC 246-816-090); and .180(13) (misrepresentation or fraud), in connection with the extraction of four third molars from Patient A in May 1993 and his subsequent characterization of those procedures in submitting an insurance claim to Aetna Insurance Company. The

Department of Health contends that Dr. Feldman billed Aetna for more extensive surgical procedures, and received a higher payment than justified by the condition of the molars and the ADA Code on Dental Procedure and Nomenclature CDT-2.

1.2 Dr. Feldman has moved for summary judgment on the grounds that (a) no competent evidence existed to substantiate what procedures were performed and whether those procedures were appropriate, and (b) a finding of unprofessional conduct under RCW 18.130.180(13) requires proof that any misrepresentation was made with knowledge or intent to defraud, which the Department can not establish.

1.3 In his declaration, Dr. Feldman asserts that the four molars were “erupted and decayed requiring extraction.” Dr. Feldman asserts that the lower third molars, Nos. 17 and 32, required elevation of full thickness mucoperiosteal flaps and distal bone removal, and the lower right third molar was sectioned. In submitting the insurance claim, Dr. Feldman coded those extractions as ADA code “07230 - removal of impacted tooth - partially bony.”

1.4 Dr. Feldman asserts that the upper third molars, Nos. 1 and 16, were removed via excision and elevation of a flap, elevation of the soft tissue from the distal occlusal aspects of the teeth, and removal of a small amount of distal bone. He asserts that tissue extraction was performed to avoid damage to restorations previously performed on the adjacent teeth. In submitting the insurance claim, Dr. Feldman coded those extractions as ADA code “07220 - removal of impacted tooth - soft tissue.”

Dr. Feldman states that the codes he used in the insurance claim correctly describe the the surgical procedures he performed in extracting Patient A’s four third molars.

1.5 In response to the summary judgment motion, the Department states that the condition of the four third molars, in Dr. Feldman's own description, indicate that the appropriate ADA code was 07210 - "Surgical removal of erupted tooth requiring elevation of mucoperiosteal flap and removal of bone and/or section of tooth." (emphasis added). The Department submitted the declaration of Norman Passmore, D.D.S., a licensed dentist and the reviewing Commission member, in support of its opposition to the motion for summary judgment.

1.6 Dr. Passmore asserts that, based on his review of Dr. Feldman's records and x-rays for the patient, and his knowledge of the procedures, the ADA codes and billing practices for extractions, Dr. Feldman should have billed all four extractions as surgical extractions. Dr. Passmore bases his opinion on the fact that the molars were fully erupted. He concluded that Dr. Feldman's billing was "excessive and misrepresented the services performed."

1.7 In reply, Dr. Feldman argued that Dr. Passmore should not be allowed to testify on the grounds that allowing the reviewing Commission member to testify violates the separation of functions required by the Administrative Procedures Act, RCW Chapter 34.05, and would create undue bias the Commission members hearing this matter in favor of his position and against Dr. Feldman. Dr. Feldman claims that Dr. Passmore is not qualified to testify regarding the standard of care for an oral surgeon, and improperly relied on a radiograph alone. Dr. Feldman asserts that the ADA Codes are "procedural codes" for billing purposes, and are not to be used for diagnostic purposes; the oral surgeon uses his best judgment when determining which code corresponds with the procedure performed.

## II. LEGAL ANALYSIS

2.1 The Presiding Officer shall rule on motions. WAC 246-11-380. An administrative agency may employ summary procedures, and may enter an order summarily disposing of a matter if there is no genuine issue of material fact. Asarco v. Air Quality Coalition, 92 Wn.2d 685, 697, 601 P.2d 501 (1979).

2.2 Under the civil rules, summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56 (c). In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. A defendant moving for summary judgment may meet the initial burden by demonstrating that the non-moving party lacks competent evidence to support an element of its case. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); Guile v. Ballard Community Hospital, 70 Wn. App. 18, 23, 851 P.2d 689, review denied 122 Wn.2d 1010 (1993). The purpose of Dr. Feldman's motion was to demonstrate just such a lack of evidence to support the charges against him.

2.3 If the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts showing the existence of a genuine issue of material fact. As the party that bears the burden of proof at hearing, the Department must demonstrate the existence of the essential elements of its claim. Young, 112 Wn.2d at 225-6. The evidence and all reasonable inferences therefrom must be considered in the light most favorable to the non-moving party. Id. at 226.

2.4 Dr. Feldman argues that Dr. Passmore can not testify on the grounds that, as the reviewing commission member, he may not testify in this proceeding. He contends that Dr. Passmore's testimony will impermissibly combine the prosecution of the charges and decision making authority, citing RCW 34.05.425 (disqualification of presiding officer for bias, prejudice, interest or other cause) and RCW 34.05.458 (investigator, prosecutor or advocate in an adjudicative proceeding may not serve as presiding officer in that proceeding).

Dr. Passmore's testimony is permissible. As reviewing commission member, he may testify and participate in settlement negotiations, so long as he does not also participate in the decision on the charges. He is not serving as judge, presiding officer, or finder of fact in this proceeding. His testimony will thus not violate the separation of functions required by RCW Chapter 34.05, or lead to a hearing that is not fair, impartial, or neutral.

2.5 Dr. Feldman also challenges the sufficiency of Dr. Passmore's declaration on the grounds that, as a licensed dentist, he does not have sufficient expertise to testify regarding the standard of care for an oral surgeon, who performs complicated surgeries dentists are not qualified to handle. Dr. Passmore is not, strictly speaking, rendering an opinion whether Dr. Feldman's performance of a particular surgical procedure fell below the standard of care for an oral surgeon. In this case, Dr. Passmore is offering an opinion regarding the interpretation of billing codes and the application of billing codes to the procedure that were performed.

A licensed practitioner will be qualified to offer an opinion on a question in an area in which he or she is not a specialist so long as he or she can demonstrate

familiarity with the issue in question. White v. Kent Medical Center, 61 Wn. App. 163, 173, 810 P.2d 4 (1989). Dr. Passmore states he is familiar with the extraction procedures and billing codes for those procedures, and thus demonstrates an adequate basis for his opinion. Dr. Feldman's objection to Dr. Passmore's qualifications goes to the relative weight that should be given his testimony and the testimony of Dr. Feldman.

2.6 Dr. Feldman asserts that a finding of misrepresentation or fraud under RCW 18.130.180(13) requires proof of an intentional act, as well as the eight other elements of fraud, and that the Department can not establish the requisite intent. Dr. Feldman in effect interprets the statute to read "intentional misrepresentation or fraud." The legislature is presumed to not use superfluous words. Auto Drivers v. Retirement Systems, 92 Wn.2d 415, 421, 598 P.2d 379 (1979). Wherever possible, each word of a statute should be given meaning. State v. Lundquist, 60 Wn.2d 397, 403, 374 P.2d 246 (1962). If "misrepresentation" was meant to be synonymous with "fraud", there would be no need for the legislature to use both words in RCW 18.130.180(13). The legislature's use of the terms "misrepresentation" and "fraud" was not inadvertent and was meant to distinguish the two words.

2.7 In In re Greene, No. 92-10-08-270 EMT (OPS July 7, 1993), a decision published on the Office of Professional Standards Index, the Presiding Officer concluded that, based on the rules of statutory construction, the existence of a cause of action for negligent misrepresentation under Washington law, and the purpose of disciplinary actions, the term "misrepresentation" as used in RCW 18.130.180 (13) includes negligent misrepresentation:

In Washington, the elements of a cause of action for negligent misrepresentation are taken from the Restatement (Second) of Torts SS 552 (1) (1977) and include:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Haberman v. WPSS, 109 Wn. 2d 107, 161-162, 750 P.2d 254 (1987). Liability for negligent misrepresentation is more limited than liability in an ordinary negligence case. With negligent misrepresentation, liability is limited to cases in which the defendant has knowledge of the injured party's reliance, or the injured party is a member of a group that the defendant seeks to influence, or the defendant has special reason to know that some member of a limited group will rely on the information. Haberman, supra at 162; Hines, supra at 150. . . .

The legislature did not intend that only intentional misrepresentations be prohibited. Interpreting Section 13 as prohibiting negligent misrepresentation effectuates the UDA's purpose of assuring the public of the adequacy of professional competence and conduct.

In re Greene, pp. 16-17, 19. Thus, the Department need not establish the nine elements of fraud to prove unprofessional conduct under RCW 18.130.180(13).

2.8 Based on the evidence submitted by the parties, viewed in a light most favorable to the Department, genuine issues of material of fact exist which preclude summary judgment. At issue in this proceeding is the interpretation of ADA code nos. 07210, 07220, and 07230, and the proper code applicable to the procedures performed by Dr. Feldman. The declarations of Drs. Feldman and Passmore raise questions regarding the condition of the molars, what procedures were performed and should have been performed, and the proper codes Dr. Feldman should have used, in the exercise of his professional judgment, to describe the extractions.

2.9 The purpose of summary judgment, and this order, is not to evaluate the merits of the parties' evidence or the relative credibility of their witnesses. The Commission, as the trier of fact, applying its professional expertise as authorized by RCW 34.05.461, will make the determination as to the merits of the charges. Regardless of how persuasive the Commission may ultimately find the evidence of a party, summary judgment is not appropriate on the record before the Presiding Officer.

### **III. ORDER**

Based on the foregoing, the Presiding Officer hereby ORDERS that Respondent's Motion for Summary Judgment is DENIED.

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DATED THIS 27TH DAY OF NOVEMBER, 1995.

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BRIAN D. PEYTON, Health Law Judge  
Presiding Officer