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ATTORNEY GENERAL OPINION NO. 88- 169

Dr. Stanley C. Grant, Secretary
Department of Health and Environment
Forbes Field
Topeka, Kansas 66620-0001

Re: Public Health--Examination and Licensure of
Optometrists--Practice of Optometry; Opticians
Fitting Contact Lenses

Synopsis: Opticians may fit contact lenses pursuant to a
prescription when the fitting does not directly
relate to the aiding of any insufficiencies or
abnormal conditions of the eye after or by
examination or testing. Cited herein: K.S.A. 1987
Supp. 65-1501; 65-2887; 65-5001 et seq.

* * *

Dear Dr. Grant:

As Secretary of the Department of Health and Environment you
inquired whether opticians can lawfully fit contact lenses
pursuant to a prescription or whether this constitutes the
unlawful practice of optometry in violation of K.S.A. 1987
Supp. 65-1501 et seq., and amendments. We note for
purposes of simplifying your question that K.S.A. 65-1504b
prohibits any person from dispensing any ophthalmic lenses
without a prescription.

You indicate that a technical committee of the Department of
Health and Environment is reviewing an application from the
Opticians Association of Kansas requesting the committee to
recommend the credentialing of opticians pursuant to K.S.A.

1987 Supp. 65-5001 et seq., the Kansas act on credentialing. The committee is charged with making specific findings predicated on the need to protect the health, safety and welfare of the public. You would therefore like our office to clarify the current legal status of opticians fitting contact lenses for the purpose of making these findings.

The practice of optometry is defined in K.S.A. 1987 Supp. 65-1501 as:

"(1) The examination of the human eye and its adnexae and the employment of objective or subjective means or methods (including the administering, or dispensing, of topical pharmaceutical drugs) for the purpose of diagnosing the refractive, muscular, or pathological condition thereof;

"(2) the prescribing or adapting of lenses (including any ophthalmic lenses which are classified as drugs by any law of the United States or of this state), prisms, orthoptic exercises and visual training therapy for the relief of any insufficiencies or abnormal conditions of the human eye and its adnexae; and

"(3) except as otherwise limited by this section, the prescribing, administering or dispensing of topical pharmaceutical drugs for the treatment of any insufficiencies or abnormal conditions of the human eye and its adnexae." (Emphasis added.)

Though not dispositive of your inquiry, the Kansas Supreme Court has addressed the question of whether an optician fitting contact lenses in accordance with a prescription of a physician constitutes the unlawful practice of optometry. In State, ex rel., v. Doolin & Shaw, 209 Kan. 244 (1972) the Court found that dispensing opticians who fabricated, fitted, and inserted contact lenses in the eyes in accordance with a prescription of a physician, and who required the patient to return to the examining physician in order that the physician determine whether or not the prescription was properly filled and the lenses properly measured, fabricated, and fitted, were not engaged in the practice of optometry.

The Court affirming the lower court's denial of a permanent injunction concluded as a matter of law that the defendant's fitting process did not include examination of the eyes for pathological conditions or the measuring for refractive errors nor did it constitute adapting lenses within the meaning of the statute. In the absence of a statutory definition, the Court judicially construed "adapting" lenses to exclude the fitting process and to include the correction of refractive errors caused by defects or abnormal conditions of the eye. 209 Kan. at 262.

However in 1975, subsequent to this case the Kansas legislature provided a statutory definition of "adapt" that does include the fitting or use of lenses, as that term is used in establishing the practice of optometry (L. 1975, ch. 318, sec. 1). Currently in K.S.A. 1987 Supp. 65-1501a(d), the definition states:

"adapt means the determination, selection, fitting or use of lenses, prisms, orthoptic exercises or visual training therapy for the aid of any insufficiencies or abnormal conditions of the eyes after or by examination or testing." (Emphasis added.)

Thus the Doolin case is not dispositive because the legislature in effect overruled the court's decision by making the fitting of lenses part of the practice of optometry when the fitting is done for the aid of any insufficiencies or abnormal conditions of the eye after or by examination or testing. See Burch v. Kansas State Board of Examiners in Optometry, No. 82 CV 434 (unpublished decision, Shawnee County Dist. Ct., Twelfth Division April 7, 1982, making a similar conclusion in an appeal from a disciplinary action against an optometrist). See also Kansas Attorney General Opinion letter to Dr. James Kuhlmann, December 18, 1980 (the adaptation and fitting of contact lenses from an eyeglass prescription by an ophthalmic dispenser involves the practice of optometry); 77 A.L.R. 3d 817 (1977) "Fitting of Contact Lenses as Practice of Optometry".

Thus, it is clear that since the fitting of contact lenses in certain instances involves the practice of optometry that opticians cannot lawfully engage in such activity unless exempted from the optometry laws. Section (a) of K.S.A. 65-1508 exempts persons licensed to practice medicine and surgery from the optometry laws, and section (c) authorizes

optometrists' assistants to perform part of the practice of optometry but prohibits the delegation of the final fit of contact lenses to optometric assistants. Section (d) however is confusing because it provides that opticians are not to be considered optometrists' assistants within the meaning of the section. While it is arguable that this section may exempt opticians by allowing the delegation of optometric procedures to them, we are hard-pressed to conclude that the legislature intended to exempt opticians from the optometry law by implication rather than directly as in section (a) of K.S.A. 65-1508 that states:

"Nothing in this act shall be construed to prevent persons who are licensed to practice medicine and surgery in this state from performing the acts or services authorized for optometrists under the optometry law or from delegating the performance of screening procedures for visual acuities, color vision, visual fields and intraocular pressure to assistants."

While this opinion does not address what a physician or surgeon can do under the terms of the exemption cited above, K.S.A. 65-2887 prohibits doctors from assisting unlicensed persons from practicing optometry. We also note that we considered 1983 S.B. 245 that died in the Committee on Public Health and Welfare. The bill attempted to amend the optometry law to allow opticians to adapt contact lenses in all instances.

In conclusion, the fitting of contact lenses by opticians constitutes the practice of optometry in violation of the optometry law, K.S.A. 1987 Supp. 65-1501 et seq. and amendments, when the fitting is done for the aid of any insufficiencies or abnormal conditions of the eyes after or by examination or testing. Thus, it is our opinion that opticians may fit contact lenses pursuant to a prescription when the fitting does not involve the aiding of any insufficiencies or abnormal conditions of the eyes after or by examination or testing.

Very truly yours,


ROBERT T. STEPHAN

Attorney General of Kansas



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