

Effective 05-17-10



May 7, 2010 *Protecting, maintaining and improving the health of all Minnesotans*

Ms. Kelly Jean Johnson
[REDACTED]

RE: MDH File Number: OTA10007

Dear Ms. Johnson:

Based on the facts and law in this matter as described in the enclosed Staff Determination, the Minnesota Department of Health (MDH) has determined that you used physical agent modalities without prior approval, in violation of Minnesota Statutes, section 148.6440, subdivision 2. Therefore, the Department is assessing you a civil penalty in the amount of \$360. This action is authorized pursuant to Minnesota Statutes, sections 214.131, subdivision 2; and 148.6448, subdivision 3.

This decision will be made final and effective 30 days from the date it is received by you. During that 30-day period, you have the right to challenge this decision in a contested-case hearing, as provided under Minnesota Statutes, Chapter 14. Requests for a hearing should be made in writing and include specific grounds for challenging the Department's decision. If you wish to request a hearing, please send a written hearing request, within 30 days of your receipt of this letter, to:

Tom Hiendlmayr, Director of the Health Occupations Program
Minnesota Department of Health
PO Box 64882
Saint Paul, MN 55164-0882

You may also deliver your request to 85 East Seventh Place, Suite 220, Saint Paul, MN; or fax it to Mr. Hiendlmayr at (651)201-3839. If you have any questions about this matter, please contact Kyle Renell at (651)201-3727.

Sincerely,

A handwritten signature in black ink, appearing to read "Darcy Miner", is written over the typed name.

Darcy Miner, Director
Compliance Monitoring Division

Enclosure

cc: Tom Hiendlmayr, Director of the Health Occupations Program

**HEALTH OCCUPATIONS PROGRAM
MINNESOTA DEPARTMENT OF HEALTH**

**A Determination In the Matter of
Kelly Jean Johnson
Occupational Therapy Practitioner**

AUTHORITY

1. The Minnesota Department of Health (MDH) has authority to discipline occupational therapists and occupational therapy assistants for violations of law under Minnesota Statutes, section 214.131, subdivision 2, and Minnesota Statutes, section 148.6448, subdivision 3. The types of discipline MDH may impose include public reprimands and the assessment of civil penalties.
2. Pursuant to Minnesota Statutes, section 148.6440, subdivision 2, a practitioner must provide documentation of having met the educational and clinical requirements for the use of physical agent modalities (PAMs) and wait until approval is granted, before the use thereof.
3. Effective June 17, 1996, persons not credentialed by the State of Minnesota are prohibited from using the protected titles, "occupational therapy," "occupational therapist," or "OT" alone or in combination with other words or initials to form an occupational title or to indicate or imply that they are credentialed by the MDH as an occupational therapist (OT) or occupational therapy assistant (OTA). An MDH-issued Registration was required for practitioners to use protected titles until May 12, 2000, when it also became illegal to practice as an OT or OTA in Minnesota without first being licensed.
4. On January 8, 2003, MDH staff consulted the OT Practitioner Advisory Council about an appropriate penalty for unlicensed practice. MDH determined the penalty as follows: OT practitioners who practice without a license will be assessed a penalty of ten percent of the practitioner's net income during the violation period. MDH shall also assess the costs of investigation.
5. On April 27, 2006, the MDH brought the issue of illegal use of PAMs to the Competency Review Committee (CRC) of the Occupational Therapy Practitioner Advisory Council. The CRC concluded that using PAMs illegally was illegal practice and recommended PAMs violations be issued a disciplinary penalty based on the same calculation as that used for illegal practice, plus costs of the investigation.

FINDINGS OF FACT

1. Kelly Jean Johnston (hereinafter "Practitioner") has been continually licensed as an occupational therapist since February 12, 2008. Practitioner was initially granted a temporary license, effective from February 12, 2008, through August 11, 2008. Her permanent license was issued on April 23, 2008, and her license is currently due to expire on February 29, 2012.
2. Page five of Practitioner's application for permanent licensure, dated April 3, 2008, contained the following language regarding PAMs:

"The Commissioner is required by Minnesota Statutes §148.6440, subdivision 1(c), to maintain a roster of licensees using physical agent modalities. You must indicate whether you will be using any physical agent modality and, if so, the type of physical agent modality (superficial, electrical stimulation, ultrasound). Prior to use of physical agent modalities, you must submit to the Commissioner documentation verifying that you have met the educational requirements described in Minnesota Statutes §148.6440, Subds. 3 to 5 and have been granted approval as provided in subdivision 7. Minnesota Statutes §148.6440, subdivision 1(b), requires that physical agent modalities be provided only under a physician's order." [Emphasis in original]
3. Page six of Practitioner's application for permanent licensure, dated April 3, 2008, contained the "Physical Agent Modalities Statement" with the direction "ALL APPLICANTS MUST COMPLETE." [Caps in original] Practitioner did not check statement one, which stated, "if you do not use physical agent modalities, please check here". However, Practitioner did place an "x" beside both "superficial physical agent modality" and "electrotherapeutic devices" under statement two, which states: "please check the type of modality used in practice and whether the modality will be used in practice as an occupational therapy assistant or an occupational therapist..." Below the PAMs statement, the following note appeared in bold type: "PLEASE NOTE: You are responsible for submitting required documentation and gaining approval from the Commissioner prior to independent practice of each type of physical agent modality." Immediately below that statement, Practitioner attested to the following: "The information I have provided in this application is true and accurate to the best of my knowledge and belief. I have read and will comply with the requirements of Minnesota Statutes §§148.6401 to 148.6450."
4. By letter dated April 10, 2008, Credentialing staff notified Practitioner that her application could not be processed because she failed to complete the PAMs statement. On April 21, 2008, Credentialing staff received a re-executed page six, re-dated April 17, 2008, by which Practitioner checked statement one, which read: "If you do not use physical agent modalities, please check here." Practitioner did not modify her response to

statement two by which she indicated she used both "superficial physical agent modality" and "electrotherapeutic devices" in her occupational therapy practice. Also received on April 21, 2008, was a revised page six by which Practitioner attested that she: (1) understood that she was required to apply and receive approval from the Commissioner before using PAMs in her practice; (2) that she understood the PAMs approval process was a separate application process she could begin after receiving her license; and (3) that she wanted the PAMs forms and instructions sent to her.

5. On January 14, 2010, Credentialing staff received Practitioner's PAMs application, dated May 10, 2007. Enclosed with the application was Practitioner's certificate of attendance for the 2007 course conducted by the College of Saint Scholastica. Practitioner also included an undated statement in which she stated she "honestly" believed she had mailed in her "certification and course information". Practitioner stated that she did "not know how", but she had "overlooked" that she was "supposed to receive a letter of approval" and "honestly thought" that since she had her course certification that she was PAMs certified. By letter dated February 24, 2010, Credentialing staff notified Practitioner that her request for approval to use PAMs was denied since she did not meet the PAMs requirement because PAMs documentation must be submitted within two years of course completion.
6. By letter dated March 2, 2010, Investigations and Enforcement Unit (I&E) staff notified Practitioner that an investigation regarding her illegal PAMs use was being conducted. Practitioner was asked several questions about her PAMs use and instructed to respond in writing by April 1, 2010.
7. In an undated letter received on March 30, 2010, Practitioner admitted to using PAMs a total of nine times on five different patients during the period from July 26, 2008, and December 30, 2009. Practitioner further stated that she had only used PAMs during her employment at Saint Cloud Hospital.
8. By letter dated April 12, 2010, Saint Cloud Hospital advised that Practitioner has been employed as an occupational therapist since February 18, 2008, during which time she has earned net wages in the amount of \$115,334.99 and has used PAMs in her practice. The hospital included the following statement regarding Practitioner's use of PAMs:

"Ms. Johnson recalls in her original application she checked the PAMs certificate box and was contacted by the state via phone that she was not PAMs certified and that she needed to send in further information. She recalls sending in the certificate and thought that was all that needed to occur. No other follow-up occurred because Ms. Johnson thought that her certificate of course completion was all that was needed. Ms. Johnson did not understand that an additional application was required by the state to obtain her official PAMs."

CONCLUSION

1. Practitioner did not comply with the requirements under Minnesota Statutes, section 148.6440, subdivision 2, because she used PAMs without first being approved by the MDH as required by state law.

DETERMINATION

1. Practitioner should pay a civil penalty of \$360.00, representing the economic advantage gained by the violation and to reimburse MDH for costs of investigations and proceedings to date.