

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT**

In the Matter of:

JASON SWANSON,
TYLER ARNOLD,

Respondents.

Master Case Nos. M2009-736
M2009-737

CORRECTED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER

APPEARANCES:

Respondent, Jason Swanson, by
Richard D. Will, P.S., per
Richard D. Wall, Attorney at Law

Respondent, Tyler Arnold, by
Richard D. Will, P.S., per
Richard D. Wall, Attorney at Law

Department of Health Unlicensed Practice Program (Program), by
Office of the Attorney General, per
Heather Carter, Assistant Attorney General

PRESIDING OFFICER: Jerry D. Mitchell, Health Law Judge

A hearing was held in this matter on November 13, 2012, regarding allegations of the unlicensed practice of medicine. The Respondents are ordered to permanently cease and desist the unlicensed practice of medicine by engaging in the removal of tattoos using a laser device and are ordered to pay a fine.

ISSUES

- A. Did the Respondents engage in unlicensed practice alleged under RCW 18.71.011, RCW 18.71.021, RCW 18.130.050 and WAC 246-919-605?

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- B. If the Program proves unprofessional conduct, what are the appropriate sanctions under RCW 18.130.190?

SUMMARY OF PROCEEDINGS

At the hearing, the Program presented the testimony of Tyler Arnold, the Respondent; Jason Swanson, the Respondent; and Dwight Correll, Department of Health (DOH) Investigator. The Respondents presented the testimony of Jason Swanson, the Respondent; Tyler Arnold, the Respondent; and Patrick J. Clark.

The Presiding Officer admitted the following Program exhibits:

- P-1: Department of Licensing, License Query System, License Detail on Bullet Proof Tattoo Valley, printed May 12, 2009;
- P-2: U.S. Food and Drug Administration, Center for Devices and Radiological Health 510(l) Premarket Notification Database for Palomar Q-Yag-5 Nd: YAG Laser System, dated May 20, 2009;
- P-3: Summary of Safety and Effectiveness for K 061436, Palomar Q-Yag-5 laser, filed December 6, 2006;
- P-4: DOH and Human Services Letter to Palomar Med Tech, dated December 6, 2006; and
- P-5: Indications for Use Statement K 061436 Q-Yag-5 laser system.

The Presiding Officer admitted the following Respondent exhibits:

- R-1: Laser Tattoo Session – Post Laser Skin Care Instructions;
- R-2: Releaser from Palomar A-YAG-5;
- R-3: Laser Tattoo Session – Information and Consent;
- R-4: Laser Tattoo Session Applications for Skin Conditions Gen. Information;
- R-5: Consent form;

- R-6: Treatment Chart;
- R-7: Patient Invoice Record;
- R-9: Chapter 6, Clinical Application; and
- R-10: Palomar Q-YAG-5 Clinical Update Number One.

I. FINDINGS OF FACT

1.1 The Respondents, Jason Swanson and Tyler Arnold, do not currently hold credentials to practice as physicians and surgeons in the state of Washington, and have never held such credentials.

1.2 "Tattooing" is the indelible marking of the skin produced by introducing minute amounts of pigments into the skin. The Respondents are owners of a tattooing business in Spokane, Washington, and work as licensed tattoo artists in that business. The business has a website that advertises "tattoo removal". While an individual can provide tattooing services without a health care license, it requires a health care license or a physician's license to remove a tattoo using a laser.

1.3 On or about May 12, 2009, DOH Investigator **Tony Pizzillo** conducted a site visit to the business and spoke with Tyler Arnold (Arnold). Arnold identified himself as an owner of the business and also as a tattoo artist. Arnold informed the Investigator that the business used a laser device to remove tattoos. Arnold admitted that he used the device to remove tattoos from customers.

1.4 On or about May 20, 2009, the DOH Investigator visited the business again. The DOH Investigator handed Jason Swanson (Swanson) a letter notifying him that the use of the laser device to remove tattoos constituted the unlicensed practice of

medicine. Swanson received the letter and signed the document as evidence of receipt.

1.5 Swanson called the DOH Investigator on or about May 21, 2009. Swanson told the Investigator that he would continue to use the laser.

1.6 On or about February 24, 2012, DOH Investigator **Pizzillo** visited Arnold at his tattoo business. **Pizzillo** did not identify himself as a DOH investigator. **Pizzillo** showed Arnold a tattoo on his arm and asked if they could remove it using their laser device. Arnold affirmed that he would use the laser to remove the tattoo. Arnold said he is trained to use the device and that he or another technician at the business would use the laser. Arnold gave the Investigator a business card and **Pizzillo** left the premises.

1.7 On or about February 27, 2012, DOH Investigator Correll visited the Respondents' tattoo business. The DOH Investigator identified himself to Swanson as a DOH Investigator. The DOH Investigator asked to see the laser that was used to remove tattoos. Swanson showed the Investigator a laser device that said it was used to remove tattoos.

1.8 The device used by both the Respondents to remove tattoos is the Palomar Q-Yag 5 (Palomar). On the back of the device is a caution that federal law restricts the use of this device by anyone other than a physician.

1.9 Swanson and Arnold (jointly the Respondents) each received eight hours of hands-on training for use of the laser from Laurie Haney, a registered nurse in California. Ms. Haney has no Washington credentials. The Palomar operator guidelines (Exhibit P-6, p. 4) provide that all use of the laser equipment is based on the

physician's knowledge and experience, and a physician is responsible for correct diagnosis and for all treatment results. The physician should carefully screen all potential candidates for laser treatment. The screening should include the physician's assessment of the patient's skin type.

1.10 Mr. Arnold and Mr. **Swanson** did not refer their customers/patients for screening by a physician prior to the use of the laser on the customers/patients. Neither of the Respondents held any health care credentials in the state of Washington during the relevant period and was not qualified to perform diagnoses or assess the customer's/patient's skin type.

1.11 Tattoo ink lies beneath the skin. Mr. Swanson testified that a safety device only allows the laser to go a certain distance, but he admitted that the laser does penetrate the skin. The use of lasers penetrates the skin, alters tissues, and for that reason the laser is considered a prescriptive device. See WAC 246-919-605.

1.12 Mr. Arnold and Mr. Swanson have no medical training and hold no health certifications. The unlicensed use of the laser by the Respondents creates a risk of harm to the Respondents' patients/clients. The use of a laser device to remove tattoos can result in complications such as visual impairment, blindness, inflammation, burns, scarring, hypopigmentation (diminished pigment in a tissue) and/or hyperpigmentation (increased pigmentation, especially of the skin).

II. CONCLUSIONS OF LAW

2.1 The Secretary of Health (and by designated authority, the Presiding Officer) has jurisdiction over the Respondents and the subject of this proceeding. Chapter 18.130 RCW.

2.2 Except as otherwise required by law, the Program bears the burden of proving the allegations set forth in the Notice of Intent to Issue Cease and Desist Order by a preponderance of the evidence. WAC 246-10-606.

2.3 It is the purpose of the Medical Quality Assurance Commission to regulate the competency and quality of professional health care providers under its jurisdiction by establishing, monitoring, and enforcing qualifications for licensing, consistent standards of practice, continuing competency mechanisms, and discipline. Rules, policies, and procedures developed by the Commission must promote the delivery of quality health care to the residents of the state of Washington. RCW 18.71.002. Anyone practicing medicine in the state of Washington must possess a valid current license. RCW 18.71.021.

2.4 In the Jason Swanson matter, assigned Master Case No. M2009-736, the Program proved by a preponderance of the evidence that the Respondent committed the unlicensed practice of medicine in violation of RCW 18.71.011, RCW 18.71.021, and WAC 246-919-605.

2.5 In the Tyler Arnold matter, assigned Master Case No. M2009-737, the Program proved by a preponderance of the evidence that the Respondent committed

the unlicensed practice of medicine in violation of RCW 18.71.011, RCW 18.71.021, and WAC 246-919-605¹, which state:

RCW 18.71.011 Definition of practice of medicine-Engaging in practice of chiropractic prohibited, when. A person is practicing medicine if he or she does one or more of the following:

- (1) Offers or undertakes to diagnose, cure, advise, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain, or other condition, physical or mental, real or imaginary, by any means or instrumentality;
- (2) Administers or prescribes drugs or medical preparations to be used by any other person;
- (3) Severs or penetrates the tissues of human beings;
- (4) Uses on cards, books, papers, signs, or other written or printed means of giving information to the public, in the conduct of any occupation or profession pertaining to the diagnosis or treatment of human disease or conditions the designation : doctor of medicine," "physician", "surgeon", "m.d.", or any combination thereof unless such designation additionally contains the description of another branch of the healing arts for which a person has a license: PROVIDED HOWEVER, That a person licensed under this chapter shall not engage in the practice of chiropractic as defined in RCW 18.25.005.

RCW 18.71.021 License required. No person may practice or represent himself or herself as practicing medicine without first having a valid license to do so.

WAC 246-919-605 Use of laser, light, radiofrequency, and plasma devises as applied to the skin.

- (1) For the purposes of this rule, laser, light, radiofrequency, and plasma devices (hereafter LLRP devices) are medical devices that:
 - (a) Use a laser, noncoherent light, intense pulsed light, radiofrequency, or plasma to topically penetrate skin and alter human tissue; and

¹ See RCW 18.130.050 Authority of disciplining authority and RCW 18.130.190 Practice without license-Investigation of complaints-Cease and desist orders-Injunctions-Penalties.

- (b) Are classified by the federal Food and Drug Administration as prescription devices.
- (2) Because an LLRP device penetrates and alters human tissue, the use of an LLRP device is the practice of medicine under RCW 18.71.011. The use of an LLRP device can result in complications such as visual impairment, blindness, inflammation, burns, scarring, hypopigmentation and hyper pigmentation.
- (3) Use of medical devices using any form of energy to penetrate or alter human tissue for a purpose other than the purpose set forth in subsection (1) of this section constitutes surgery and is outside the scope of this section.

2.6 Pursuant to RCW 18.130.190 of the Uniform Disciplinary Act, after due and proper notice, the Secretary of Health is authorized to issue a cease and desist order against a person upon a determination that such person has engaged in or is engaging in unlicensed practice of medicine and may impose a fine of up to \$1,000 for each day of unlicensed practice.

2.7 The Program requested a cease and desist order and \$1,000 fine be entered against the Respondent Swanson and a cease and desist order and \$1,000 fine be entered against the Respondent Arnold. The Respondents each request that the Statement of Charges be dismissed.

2.8 Safeguarding the public's safety is the paramount responsibility of every disciplining authority. In considering the sanction, the Presiding Officer notes the following aggravating factors: medical risk to patients. The Presiding Officer notes the following mitigating factor: there is no evidence to indicate that any patient suffered physical harm.

III. ORDER

3.1 The Respondent, Jason Swanson, Master Case No. M2009-736, is ORDERED TO PERMANENTLY CEASE AND DESIST the unlicensed practice of medicine by engaging in the removal of tattoos using a laser device. The Respondent, Jason Swanson is further ORDERED TO PAY a fine of \$1,000 to the Unlicensed Practice Program in the state of Washington.

3.2 The Respondent, Tyler Arnold, Master Case No. M2009-737, is ORDERED TO PERMANENTLY CEASE AND DESIST the unlicensed practice of medicine by engaging in the removal of tattoos using a laser device. Respondent, Tyler Arnold is further ORDERED TO PAY a fine of \$1,000 to the Unlicensed Practice Program in the state of Washington.

3.3 The fines shall be made payable to the Washington State Department of Health and sent to the following address:

Unlicensed Practice Program
PO Box 1099
Olympia, WA 98507

Dated this 24 day of January, 2013.



JERRY D. MITCHELL, Health Law Judge
Presiding Officer

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CLERK'S SUMMARY

| <u>Charge</u> | <u>Action</u> |
|-----------------|---------------|
| RCW 18.71.011 | VIOLATED |
| RCW 18.71.021 | VIOLATED |
| WAC 246-919-605 | VIOLATED |

NOTICE TO PARTIES

This Order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within ten days of service of this Order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Unlicensed Practice Program
PO Box 47874
Olympia, WA 98504-7874

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-10-704. The petition is denied if the Presiding Officer does not respond in writing within 20 days of the filing of the petition.

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in Chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

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The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

For more information, visit our website at:

<http://www.doh.wa.gov/PublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/Hearings.aspx>

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