

**STATE OF FLORIDA  
BOARD OF MEDICINE**

By: Vicki R. Kenon  
Deputy Agency Clerk

IN RE: PETITION FOR DECLARATORY STATEMENT  
OF KARL HEMPEL, M.D. AND TALLAHASSEE  
PRIMARY CARE ASSOCIATES, P.A.,

Petitioners,

and

DONALD W. DEWEY, M.D. AND TALLAHASSEE  
ORTHOPEDIC CLINIC, III, P.L.,

Intervenors.

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**FINAL ORDER**

THIS CAUSE came before the Board of Medicine (hereinafter Board) on April 8, 2000, in Orlando, Florida, pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code, for the purpose of considering the Petition for Declaratory Statement filed on behalf of Karl Hempel, M.D., and Tallahassee Primary Care Associates, P.A. (hereinafter TPCA). Petitioner Karl Hempel, M.D., was present, and Petitioners were represented by Allen R. Grossman, Attorney at Law. Donald W. Dewey, M.D., a licensed physician in Tallahassee, Florida moved to intervene in this matter on behalf of himself and his group practice, Tallahassee Orthopedic Clinic III, P.L. The Intervenors specifically adopted the facts as set forth by the Petitioners. The Board granted the Motion To Intervene and Intervenors participated in the discussion of this matter through their legal counsel, Thomas W. Lager, Attorney at Law. Having considered the Petition, the arguments submitted by counsel for the parties, and being

otherwise fully advised in the premises, the Board makes the following findings and conclusions.

### FINDINGS OF FACT

1. Petitioner Karl Hempel, M.D., is a physician licensed pursuant to Chapter 458, Florida Statutes.
2. Petitioners Tallahassee Primary Care Associates, P.A., is a group practice of primary care physicians as defined in Section 455.654(3)(h), Florida Statutes.
3. Petitioners seek an interpretation by the Board of Medicine of Section 455.654, Florida Statutes, as applied to their proposed practice activities.
4. Petitioners proposed practice activities are as set forth in the Petition:
  - a. TPCA owns and operates a diagnostic imaging center (center) that has the ability to perform regular x-ray, mammography, nuclear medicine, ultra sound, computed tomography (CT scans), and dexa scans. TPCA utilizes its center to perform tests on and for its own patients and provides the full range of offered services to its patients. In addition, TPCA intends to accept outside referrals for diagnostic imaging services subject to the limitations of Section 455.654(4)(a), Florida Statutes[.]
  - b. All diagnostic imaging services are provided by a TPCA physician or by a full or part-time employee of TPCA;
  - c. All equity in TPCA is held by physicians comprising the group practice and each physician provides at least 75% of his/her professional services to the group;
  - d. TPCA does not have any contract with a practice management company that provides any financial incentives, directly or indirectly, based on an increase in outside referrals for diagnostic imaging services from any group or sole provider managed by the same practice management company;
  - e. TPCA will bill for both the technical and professional

component related to diagnostic imaging services for or on behalf of the referred patient<sup>1</sup> and no portion of the payment, or any type of consideration, either directly or indirectly, will be shared with the referring physician;

f. Outside referrals will only be accepted from physicians who are not members of TPCA and are not investors and do not hold any investment interest in TPCA;

g. If TPCA has a Medicaid provider agreement with the Agency for Health Care Administration (AHCA), it will furnish diagnostic imaging services to its Medicaid patients and will not refer a Medicaid recipient to a hospital for outpatient diagnostic imaging services unless the referring TPCA physician furnishes the hospital with documentation the medical necessity of such referral;

h. TPCA will make all reports required by AHCA; and

i. TPCA will accept outside referrals of no more than 15% of its patients receiving one of the statutorily defined diagnostic imaging services.

j. TPCA currently has a contractual agreement with a local radiology group for radiologist members of the radiology group to provide reads and interpretations of tests conducted at TPCA's center. Together, TPCA and the radiology group have the ability to have such reads and interpretations completed either on site at TPCA's center in Tallahassee or at the radiology group's offices or at other locations as required by the radiology group, via telecommunications or courier service to and from each such location.

5. This Petition was noticed by the Board in Volume 26, No. 13, page 1586, of the March 31, 2000, Florida Administrative Weekly.

#### CONCLUSIONS OF LAW

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<sup>1</sup>TPCA may or may not bill for both the professional and technical components of services which are performed at the center for its own-patients.

6. The Board has jurisdiction of this matter pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code, and Chapters 458 and 455, Florida Statutes.

7. The Petition filed in this cause is in substantial compliance with the provisions of Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.

8. The first issue addressed in the Petition is the Board's interpretation of the "15 percent" limitation on the acceptance of outside referrals by a group practice. On this issue, the Board accepts and adopts the legal explication and analysis set forth in the Petition and expressly approves the calculation method proposed. In this regard the Board adopts the following as its conclusions of law:

a. Section 455.654, Florida Statutes is known as the Patient Self-Referral Act of 1992. In general terms, this law prohibits health care providers from referring patients for the provision of designated health services and other health care items or services by an entity in which the health care provider is an investor, unless certain specified provisions of this law are satisfied. Among other potential sanctions, violations of this law by health care providers subject to the jurisdiction of this Board can result in disciplinary action by the Board. Section 455.654(5)(g), Florida Statutes.

b. In 1998, following the First District Court of Appeal's reversal of the Board's Declaratory Statement issued to Charles H. Wingo, M.D. and Tallahassee Orthopedic Clinic,<sup>2</sup> the Florida Legislature significantly amended Section 455.654, Florida Statutes.

c. Subsection 455.654(3), Florida Statutes was amended to create a definition of the term "diagnostic imaging services"

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<sup>2</sup>Agency for Health Care Administration v. Wingo, 697 So. 2d 1231(Fla. 1<sup>st</sup> DCA 1997).

as that term is used in Section 455.654, Florida Statutes:

(d) "Diagnostic imaging services" means magnetic resonance imaging, nuclear medicine, angiography, arteriography, computed tomography, positron emission tomography, digital vascular imaging, bronchography, lymphangiography, splenography, ultrasound, EEG, EKG, nerve conduction studies, and evoked potentials.

and to create a definition for the term "outside referral for diagnostic imaging services" as that term is used in Section 455.654, Florida Statutes:

(m) "Outside referral for diagnostic imaging services" means a referral of a patient to a group practice or sole provider for diagnostic imaging services by a physician who is not a member of the group practice or of the sole provider's practice and who does not have an investment interest in the group practice or sole provider's practice, for which the group practice or sole provider billed for both the technical and the professional fee for the patient, and the patient did not become a patient of the group practice or sole provider's practice.

d. The definition of the word "referral" was renumbered to be 455.654(3)(o), Florida Statutes, and the "group practice exception" to that definition<sup>3</sup> was amended to address accepting outside referrals for diagnostic imaging services. The new language provides that effective July 1, 1999:

... a physician licensed pursuant to chapter 458 ... may refer a patient to a sole provider or group practice for diagnostic imaging services, excluding radiation therapy services, for which the sole provider or group practice billed both the technical and the professional

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<sup>3</sup>Set forth in subparagraph 455.654(3)(o)3.f., Florida Statutes.

fee for or on behalf of the patient, if the referring physician has no investment interest in the practice. The diagnostic imaging service referred to a group practice or sole provider must be a diagnostic imaging service normally provided within the scope of practice of the patients of the group practice or sole provider. The group practice or sole provider may accept no more than [sic] 15 percent of their patients receiving diagnostic imaging services from outside referrals, excluding radiation therapy services.

e. The Legislature also created statutory requirements for accepting outside referrals for diagnostic imaging services. These requirements were set forth in Section 455.654(4), Florida Statutes. [Reference omitted]

f. As indicated above, TPCA intends to comply with the 15% limitation set forth in Section 455.654(3)(o)3.f., Florida Statutes. It is clear that as defined in Section 455.654(3)(d), Florida Statutes, neither regular x-ray procedures nor mammography examinations are considered to be diagnostic imaging services as contemplated in this statute. In order to comply with the 15% limitation TPCA, must make an appropriate calculation regarding the amounts and types of services being provided through TPCA's center. To accomplish this necessary calculation, TPCA intends to identify every patient undergoing any of those procedures listed in the definition of diagnostic imaging services, in Section 455.654(3)(d), Florida Statutes, and include them in the total from which the limitation of 15% will be calculated.

9. The second issue set forth in the Petition relates to TPCA's relationship with a local radiology group and the question of whether the term "diagnostic imaging services," as used in Section 455.564, Florida Statutes, includes only the technical aspects of the procedures and does not include the reading and interpretation of the results of the procedures.

part: 10. Petitioners' analysis of the legal requirements as to this issue is, in pertinent

a. As indicated above, TPCA currently has a contractual agreement with a local radiology group to provide reads and interpretations of the results of diagnostic imaging services performed at TPCA's center. TPCA would like to continue its professional relationship with the local radiology group and expand their contractual agreement to include reads and interpretations of outside referrals for diagnostic imaging services accepted by TPCA and conducted in TPCA's center.

b. Petitioners understand the term diagnostic imaging services to encompass only the technical aspects of the procedures described without reference to the reading or interpretation of the results of those tests and procedures. Petitioners believe that a careful and reasonable reading of Section 455.654, Florida Statutes, supports this understanding.

c. Diagnostic imaging services are subject to unique requirements separate from other "designated health services" under the Patient Self-Referral Act. However, the Legislature did not specifically define whether diagnostic imaging services refers to the technical component of these services or whether it includes the professional component as well.

d. The services that are listed all include two distinctly separate components. There is the technical service that is the actual performance of the particular test on the patient, the actual "imaging" service. Then, there is the separate professional aspect that is the reading or interpretation of the results of the particular test. This usually involves a physician that never actually sees the patient and is usually (but not always) performed by a radiologist.

e. While the law does not directly state whether diagnostic imaging services refers to just the imaging or both the imaging and reading or interpretation, there are a number of strong indicators that it only refers to the imaging portion of the service.

f. First, the Board should examine the intent and purpose of the law. The Patient Self-Referral Act is clearly intended to prohibit referral of patients by health care providers to entities the referring provider owns. Section 455.654(2), Florida Statutes specifically sets forth the intent of the law to eliminate potential conflicts of interest that can adversely affect competition, result in overutilization, increase cost or affect quality. However, there are numerous deliberate limitations and exceptions in the law so the law does not unduly hinder the appropriate delivery of proper health care services. For example, the term "referral" does not include services by a radiologist for diagnostic imaging services.<sup>4</sup> Clearly, the Legislature did not want to limit radiologists in their provision of professional services involving reads and interpretations of diagnostic imaging services.

g. The reading and interpretation of results from diagnostic imaging services is almost always performed by a radiologist. The exception provided in subparagraph 455.654(3)(o)3.a., Florida Statutes, was clearly intended to avoid impacting the performance of the professional services related to diagnostic imaging services.

Radiologists do not usually provide referrals, but rather they accept them for the purpose of providing qualified reads and interpretations of various diagnostic tests.<sup>5</sup> Although it is highly unlikely that a radiologist would simultaneously be a primary care physician in position to make initial referrals, there are likely situations in which a radiologist might wish to "refer" a patient for additional tests or possibly re-testing. Certainly, the Legislature understands the characteristics of the practice of radiology. It is obvious that in the exception, in Section 455.654(3)(o)3.a., Florida Statutes, which specifically excludes from the definition of the word "referral" any direction by a radiologist to send a patient to receive diagnostic imaging services, the term diagnostic imaging services can only logically be describing the technical aspects of conducting such tests.

h. In those instances where a physician that is not a

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<sup>4</sup>Section 455.654(3)(o)3.a., Florida Statutes (1999).

<sup>5</sup>The usual scope of a radiologist's practice far exceeds the limited definition of diagnostic imaging services set forth in this statute.



radiologist may have an investment interest in an entity providing a diagnostic imaging service and would attempt to provide the related professional services, there is a protection in the law to prevent any abuse. If that physician is not a member of the group and is providing an "outside referral" for the technical service, the law requires the group to bill for both the technical and professional component and prohibits any sharing of a fee with the referring doctor. Section 455.654(4)(a)4., Florida Statutes.

i. Consequently, the intent and purpose of the Patient Self-Referral Act are protected by interpreting the term diagnostic imaging service, as used in this statute, to include only the technical aspects of the enumerated tests.

j. Another strong clue that only the technical component is referred to is found in the new provisions of the law governing outside referrals for diagnostic imaging services. One of the requirements for accepting outside referrals is that the group practice or sole provider accepting outside referrals must bill for both the technical and professional components of the service. Logically, if the definition of "diagnostic imaging service" already included both the technical and professional components, there would be no need to have a specific provision requiring billing for both components by the entity accepting the outside referral.

k. As an example of the recognized distinction between the administration of diagnostic imaging services and the reading and interpretation of the test results related to the diagnostic imaging services, the Board can examine the manner in which these activities have been treated by Medicare. Under Medicare law, a radiologist's services are paid for under a physician fee schedule separate from the technical component. 42 CFR §415.120; CCH Medicare and Medicaid Guide ¶13453, 3453.50. Medicare has traditionally separated these two distinct aspects of the diagnostic process. Had the Florida Legislature meant to combine them together, it would have said so. Because it did not, it is logical and legally correct to conclude that diagnostic imaging services refers only to the technical component. There is no basis for concluding otherwise and there is no public policy reason for combining and confusing

those two distinct services.

11. The Board agrees with and adopts the legal analysis set forth above and expressly finds that the term "diagnostic imaging services," as defined and used in Section 455.654, Florida Statutes, refers only to the technical aspects of the tests set forth in Section 455.654(3)(d), Florida Statutes.

12. In light of the Board's rulings on the first two issues, the Board need not and does not address the third issue raised as to the definition of the term "employee," as used in Section 455.654(4)(a)4., Florida Statutes.

13. This Final Order responds only to the specific facts set forth and specific questions set forth by Petitioners in the Petition for Declaratory Statement. The conclusions of the Board are with regard to the specific statutory provisions addressed and should not be interpreted as commenting on whether the proposed facts may or may not violate other provisions of Chapter 458, Florida Statutes, or other related obligations placed on physicians in Florida.

WHEREFORE, the Board hereby finds that under the specific facts of the Petition, as set forth above, the contractual arrangement described by Petitioners is permitted pursuant to Section 455.654(3) and (4), Florida Statutes

DONE AND ORDERED this 23<sup>RD</sup> day of June, 2000.

*Janyaf Williams*  
FOR GEORGES A. EL-BAHRI  
CHAIRMAN

**NOTICE OF RIGHT TO JUDICIAL REVIEW**

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE AGENCY FOR HEALTH CARE ADMINISTRATION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to Karl Hempel, M.D., and Tallahassee Primary Care Associates, P.A., c/o Allen R. Grossman, Esquire, Gray, Harris & Robinson, P.A., Suite 250, 225 South Adams Street, Tallahassee, Florida 32301; and to Donald W. Dewey, M.D. and Tallahassee Orthopedic Clinic, III, P.L. c/o Thomas W. Lager, Esquire, 354 Office Plaza, Tallahassee, Florida 32301; and to M. Catherine Lannon, Assistant Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, on or before 5:00 p.m., this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been provided by certified mail to Karl F. Hempel, M.D., 1511 Surgeons Dr., #A, Tallahassee, Florida 32308-4649, Allen R. Grossman, Esquire, Gray, Harris & Robinson, P.A., 225 South Adams Street, Suite 250, Tallahassee, Florida 32301, Donald Dewey, M.D., 3334 Capital Medical Blvd., Suite 400, Tallahassee, Florida 32308, Thomas W. Lager, Esquire, 354 Office Plaza, Tallahassee, Florida 32301 and interoffice delivery to M. Catherine Lannon, Assistant Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050 at or before 5:00 p.m., this 13<sup>th</sup> day of July, 2000.



STATE OF FLORIDA  
BOARD OF MEDICINE

IN RE: Petition for Declaratory Statement of  
Karl Hempel, M.D. and Tallahassee  
Primary Care Associates, P.A.,

Case No. \_\_\_\_\_

Petitioners

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PETITION FOR DECLARATORY STATEMENT

Pursuant to Sections 120.565, and 455.654(5), Florida Statutes, and Rule Chapter 28-105, Florida Administrative Code, Karl Hempel, M.D., as a member and representative of Tallahassee Primary Care Associates, P.A. (TPCA), petition the Board of Medicine for a Final Order setting forth a Declaratory Statement on the facts and law presented herein.

1. Petitioner Karl Hempel, M.D. is a physician licensed pursuant to Chapter 458, Florida Statutes, and is a member and the president of TPCA. Dr. Hempel practices at 1511 Surgeons Drive, Suite A, Tallahassee, FL 32308. The office telephone number is (850)878-6134 and the fax number is (850)877-6727.

2. Petitioner TPCA is a group practice of primary care physicians as defined in Section 455.654(3)(h), Florida Statutes, with executive offices located at 1690 Raymond Diehl Road, Unit C-1, Tallahassee, FL 32308. The office telephone number is (850)297-0114 and the fax number is (850)297-0314. Neither TPCA or any of its physicians are investors or have an investment interest in any radiology group practice.

3. The agency affected by this Petition is the Board of Medicine of the State

of Florida (hereafter the Board). The statutory provisions upon which this Declaratory Statement is sought are contained in Section 455.654, Florida Statutes. A copy of this law is attached hereto for easy reference as Exhibit A.

4. TPCA owns and operates a diagnostic imaging center (center) that has the ability to perform regular x-ray, mammography, nuclear medicine, ultra sound, computed tomography (CT scans), and dexa scans. TPCA utilizes its center to perform tests on and for its own patients and provides the full range of offered services to its patients. In addition, TPCA intends to accept outside referrals for diagnostic imaging services subject to the limitations of Section 455.654(4)(a), Florida Statutes:

- a. All diagnostic imaging services are provided by a TPCA physician or by a full or part-time employee of TPCA;
- b. All equity in TPCA is held by physicians comprising the group practice and each physician provides at least 75% of his/her professional services to the group;
- c. TPCA does not have any contract with a practice management company that provides any financial incentives, directly or indirectly, based on an increase in outside referrals for diagnostic imaging services from any group or sole provider managed by the same practice management company;
- d. TPCA will bill for both the technical and professional component related to diagnostic imaging services for or on behalf of the

referred patient<sup>1</sup> and no portion of the payment, or any type of consideration, either directly or indirectly, will be shared with the referring physician;

- e. Outside referrals will only be accepted from physicians who are not members of TPCA and are not investors and do not hold any investment interest in TPCA;
- f. If TPCA has a Medicaid provider agreement with the Agency for Health Care Administration (AHCA), it will furnish diagnostic imaging services to its Medicaid patients and will not refer a Medicaid recipient to a hospital for outpatient diagnostic imaging services unless the referring TPCA physician furnishes the hospital with documentation the medical necessity of such referral;
- g. TPCA will make all reports required by AHCA; and
- h. TPCA will accept outside referrals of no more than 15% of its patients receiving one of the statutorily defined diagnostic imaging services.

5. TPCA currently has a contractual agreement with a local radiology group for radiologist members of the radiology group to provide reads and interpretations of tests conducted at TPCA's center. Together, TPCA and the radiology group have the ability to have such reads and interpretations completed either on site at TPCA's center

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<sup>1</sup>TPCA may or may not bill for both the professional and technical components of services which are performed at the center for its own patients.

in Tallahassee or at the radiology group's offices or at other locations as required by the radiology group, via telecommunications or courier service to and from each such location.

6. Section 455.654, Florida Statutes is known as the Patient Self-Referral Act of 1992. In general terms, this law prohibits health care providers from referring patients for the provision of designated health services and other health care items or services by an entity in which the health care provider is an investor, unless certain specified provisions of this law are satisfied. Among other potential sanctions, violations of this law by health care providers subject to the jurisdiction of this Board can result in disciplinary action by the Board. Section 455.654(5)(g), Florida Statutes.

7. In 1998, following the First District Court of Appeal's reversal of the Board's Declaratory Statement issued to Charles H. Wingo, M.D. and Tallahassee Orthopedic Clinic,<sup>2</sup> the Florida Legislature significantly amended Section 455.654, Florida Statutes.

8. Subsection 455.654(3), Florida Statutes was amended to create a definition of the term "diagnostic imaging services" as that term is used in Section 455.654, Florida Statutes:

(d) "Diagnostic imaging services" means magnetic resonance imaging, nuclear medicine, angiography, arteriography, computed tomography, positron emission tomography, digital vascular imaging, bronchography, lymphangiography, splenography, ultrasound, EEG, EKG, nerve conduction studies, and evoked potentials.

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<sup>2</sup>Agency for Health Care Administration v. Wingo, 697 So. 2d 1231(Fla. 1<sup>st</sup> DCA 1997).



and to create a definition for the term "outside referral for diagnostic imaging services" as that term is used in Section 455.654, Florida Statutes:

(m) "Outside referral for diagnostic imaging services" means a referral of a patient to a group practice or sole provider for diagnostic imaging services by a physician who is not a member of the group practice or of the sole provider's practice and who does not have an investment interest in the group practice or sole provider's practice, for which the group practice or sole provider billed for both the technical and the professional fee for the patient, and the patient did not become a patient of the group practice or sole provider's practice.

9. The definition of the word "referral" was renumbered to be 455.654(3)(o), Florida Statutes, and the "group practice exception" to that definition<sup>3</sup> was amended to address accepting outside referrals for diagnostic imaging services. The new language provides that effective July 1, 1999:

... a physician licensed pursuant to chapter 458 ... may refer a patient to a sole provider or group practice for diagnostic imaging services, excluding radiation therapy services, for which the sole provider or group practice billed both the technical and the professional fee for or on behalf of the patient, if the referring physician has no investment interest in the practice. The diagnostic imaging service referred to a group practice or sole provider must be a diagnostic imaging service normally provided within the scope of practice of the patients of the group practice or sole provider. The group practice or sole provider may accept no more than [sic] 15 percent of their patients receiving diagnostic imaging services from outside referrals, excluding radiation therapy services.

10. The Legislature also created statutory requirements for accepting outside referrals for diagnostic imaging services. These requirements were set forth in Section 455.654(4), Florida Statutes. (See Exhibit A)

11. As indicated above, TPCA intends to comply with the 15% limitation set

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<sup>3</sup>Set forth in subparagraph 455.654(3)(o)3.f., Florida Statutes.

forth in Section 455.654(3)(o)3.f., Florida Statutes. It is clear that as defined in Section 455.654(3)(d), Florida Statutes, neither regular x-ray procedures nor mammography examinations are considered to be diagnostic imaging services as contemplated in this statute. In order to comply with the 15% limitation TPCA, must make an appropriate calculation regarding the amounts and types of services being provided through TPCA's center. To accomplish this necessary calculation, TPCA intends to identify every patient undergoing any of those procedures listed in the definition of diagnostic imaging services, in Section 455.654(3)(d), Florida Statutes, and include them in the total from which the limitation of 15% will be calculated.

12. Petitioners respectfully request that the Board of Medicine set forth in its Final Order whether this calculation is correct pursuant to the definitions and limitations set forth in Section 455.654(3), Florida Statutes.

13. The next issue of concern to TPCA is its current relationship with a local radiology group. As indicated above, TPCA currently has a contractual agreement with a local radiology group to provide reads and interpretations of the results of diagnostic imaging services performed at TPCA's center. TPCA would like to continue its professional relationship with the local radiology group and expand their contractual agreement to include reads and interpretations of outside referrals for diagnostic imaging services accepted by TPCA and conducted in TPCA's center.

14. Petitioners understand the term diagnostic imaging services to encompass only the technical aspects of the procedures described without reference to the reading or interpretation of the results of those tests and procedures. Petitioners

believe that a careful and reasonable reading of Section 455.654, Florida Statutes, supports this understanding.

15. Diagnostic imaging services are subject to unique requirements separate from other "designated health services" under the Patient Self-Referral Act. However, the Legislature did not specifically define whether diagnostic imaging services refers to the technical component of these services or whether it includes the professional component as well.

16. The services that are listed all include two distinctly separate components. There is the technical service that is the actual performance of the particular test on the patient, the actual "imaging" service. Then, there is the separate professional aspect that is the reading or interpretation of the results of the particular test. This usually involves a physician that never actually sees the patient and is usually (but not always) performed by a radiologist.

17. While the law does not directly state whether diagnostic imaging services refers to just the imaging or both the imaging and reading or interpretation, there are a number of strong indicators that it only refers to the imaging portion of the service.

18. First, the Board should examine the intent and purpose of the law. The Patient Self-Referral Act is clearly intended to prohibit referral of patients by health care providers to entities the referring provider owns. Section 455.654(2), Florida Statutes specifically sets forth the intent of the law to eliminate potential conflicts of interest that can adversely affect competition, result in overutilization, increase cost or affect quality. However, there are numerous deliberate limitations and exceptions in

the law so the law does not unduly hinder the appropriate delivery of proper health care services. For example, the term "referral" does not include services by a radiologist for diagnostic imaging services.<sup>4</sup> Clearly, the Legislature did not want to limit radiologists in their provision of professional services involving reads and interpretations of diagnostic imaging services.

19. The reading and interpretation of results from diagnostic imaging services is almost always performed by a radiologist. The exception provided in subparagraph 455.654(3)(o)3.a., Florida Statutes, was clearly intended to avoid impacting the performance of the professional services related to diagnostic imaging services. Radiologists do not usually provide referrals, but rather they accept them for the purpose of providing qualified reads and interpretations of various diagnostic tests.<sup>5</sup> Although it is highly unlikely that a radiologist would simultaneously be a primary care physician in position to make initial referrals, there are likely situations in which a radiologist might wish to "refer" a patient for additional tests or possibly re-testing. Certainly, the Legislature understands the characteristics of the practice of radiology. It is obvious that in the exception, in Section 455.654(3)(o)3.a., Florida Statutes, which specifically excludes from the definition of the word "referral" any direction by a radiologist to send a patient to receive diagnostic imaging services, the term diagnostic imaging services can only logically be describing the technical aspects of conducting

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<sup>4</sup>Section 455.654(3)(o)3.a., Florida Statutes (1999).

<sup>5</sup>The usual scope of a radiologist's practice far exceeds the limited definition of diagnostic imaging services set forth in this statute.

such tests.

20. In those instances where a physician that is not a radiologist may have an investment interest in an entity providing a diagnostic imaging service and would attempt to provide the related professional services, there is a protection in the law to prevent any abuse. If that physician is not a member of the group and is providing an "outside referral" for the technical service, the law requires the group to bill for both the technical and professional component and prohibits any sharing of a fee with the referring doctor. Section 455.654(4)(a)4., Florida Statutes.

21. Consequently, the intent and purpose of the Patient Self-Referral Act are protected by interpreting the term diagnostic imaging service, as used in this statute, to include only the technical aspects of the enumerated tests.

22. Another strong clue that only the technical component is referred to is found in the new provisions of the law governing outside referrals for diagnostic imaging services. One of the requirements for accepting outside referrals is that the group practice or sole provider accepting outside referrals must bill for both the technical and professional components of the service. Logically, if the definition of "diagnostic imaging service" already included both the technical and professional components, there would be no need to have a specific provision requiring billing for both components by the entity accepting the outside referral.

23. As an example of the recognized distinction between the administration of diagnostic imaging services and the reading and interpretation of the test results related to the diagnostic imaging services, the Board can examine the manner in which

these activities have been treated by Medicare. Under Medicare law, a radiologist's services are paid for under a physician fee schedule separate from the technical component. 42 CFR §415.120; CCH Medicare and Medicaid Guide ¶3453, 3453.50. Medicare has traditionally separated these two distinct aspects of the diagnostic process. Had the Florida Legislature meant to combine them together, it would have said so. Because it did not, it is logical and legally correct to conclude that diagnostic imaging services refers only to the technical component. There is no basis for concluding otherwise and there is no public policy reason for combining and confusing those two distinct services.

24. Petitioners respectfully request that the Board of Medicine set forth in its Final Order that the term "diagnostic imaging services," as defined and used in Section 455.654, Florida Statutes, refers only to the technical aspects of the tests set forth in Section 455.654(3)(d), Florida Statutes.

25. If the Board of Medicine, does not agree with the interpretation suggested in paragraph 24 above, Petitioners are concerned about the correct meaning of the term "employee," in Section 455.654(4)(a)4., Florida Statutes. As set forth above, TPCA currently has a contractual arrangement with the radiology group to have members of the radiology group provide reads and interpretations of diagnostic tests conducted at TPCA's center.

26. If the definition of diagnostic imaging services refers only to the technical portion of the service, then there is no need to be concerned about the definition of the word employee for purposes of the facts presented in this Petition because, by

definition the reading radiologist is not performing diagnostic imaging services for purposes of this law. For all of the reasons set forth above, that is the correct conclusion, consistent with both the letter and the spirit of the law.

27. If diagnostic imaging services includes both the technical and professional components, then Petitioners believe that their contractual relationship is still acceptable under the law. The ability to contract for reads and interpretations by qualified radiologists depends upon the reasonable meaning given to the word employee as used in Section 455.654(4)(a)4., Florida Statutes.

28. The term "full or part-time employee of the group" as set forth in Section 455.654(4)(a)1., Florida Statutes, is not engendered with a definition anywhere in Chapter 455, Florida Statutes. It is a pole star of statutory interpretation that if a term is not defined in a statute or rule its common ordinary meaning applies. *State, Department of Administration, Division of Retirement v. Moore*, 524 So. 2d 704 (Fla. 1<sup>st</sup> DCA 1988). Florida's courts have repeatedly observed that the plain and ordinary meaning of an undefined statutory term can properly be determined by using such term's ordinary dictionary definition. *L.B. v. State*, 700 So. 2d 370 (Fla. 1997); *Green v. State*, 604 So. 2d 471 (Fla. 1992); and *St. Johns River Water Management District v. Consolidated-Tomoka Land Company*, 717 So. 2d 72 (Fla. 1<sup>st</sup> DCA 1998).

29. The new Lexicon Webster's Encyclopedic Dictionary of the English Language, Deluxe Edition, Lexicon Publications, Inc., New York 1991 Edition defines

employee as "someone paid to work on a regular rather than a casual basis."<sup>6</sup> Use of this common definition of the term employee would clearly allow for the type of contractual relationship currently existing between TPCA and the radiology group to fall within the requirements of Section 455.654(4)(a)1., Florida Statutes. Allowing the contractual relationship between TPCA and the radiology group will do no harm to the clear intent and purpose of Section 455.654, Florida Statutes, which are to ensure that the original referring physician does not receive financial incentive for the referral of diagnostic imaging services to TPCA and to ensure that TPCA is only accepting referrals for diagnostic imaging services it usually provides for its own patients.<sup>7</sup>

30. It should be noted that the Florida Legislature has in other statutes provided various specific definitions of full-time and part-time employees depending upon the context within which the term is being used. See, Chapter 443, Florida Statutes (Unemployment Compensation); Chapter 441, Florida Statutes (Workers' Compensation); and Chapter 61 (Dissolution of Marriage).<sup>8</sup> In each of these statutes, when the Legislature intended that the term employee have a meaning other than the common dictionary definition and usage, the statute contains a specific definition to be

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<sup>6</sup>The term "employee" is defined similarly in various other dictionaries as a person who works for another in return for payment (American Heritage Dictionary); as someone who works for a person or business in return for wages or other compensation (Wordsmyth); as someone who works for a person, business or government (Newbury House Dictionary); as a person who works for another in return for financial or other compensation and as a worker who is hired to perform a job (Dictionary.com); and as a person hired for an indefinite time period (Law.com Dictionary).

<sup>7</sup>There is no provision anywhere in Florida law that generally prohibits TPCA from contracting with the radiology group to perform reads and interpretations of tests performed by TPCA for patients of TPCA as the usual method for providing such services.

<sup>8</sup>In addition the federal government has special definitions used in specific contexts such as for I.R.S. purposes.



applied in the implementation of the statute. The Legislature could have done so in Section 455.654, Florida Statutes, but did not choose to do so. It is therefore left to the Board of Medicine to apply the common and usual meaning of the word employee when interpreting this statute.

31. It is an age old axiom of statutory construction that where a statute is restrictive or penal in nature,<sup>9</sup> any doubt about the meaning of statutory terms must be resolved in favor of the restricted group. *Forsythe v. Longboat Key Beach Environmental Control District*, 604 So. 2d 452 (Fla. 1992). Simply put, the Legislature could have referenced any number of specific definitions for the purpose of determining what is an employee when applying Section 455.654, Florida Statutes. Since it did not, the Board of Medicine is required to use the usual and common dictionary meaning to resolve any doubts in favor of the licensees impacted by the statute, so long as it is not contrary to the intent of the statute.

32. In this case, the usual and common meaning of the word employee as someone paid to work for another on a regular rather than casual basis does not do any harm to the stated intent of the statute and indeed fits well within Florida's regulatory scheme. Use of some of the more restrictive definitions provided in other state and federal laws would likely create problems never intended and even contradictory to the intent of Section 455.654, Florida Statutes.

33. If the Board of Medicine has already found that the term diagnostic

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<sup>9</sup>Section 455.654(5), Florida Statutes contains severe civil penalties and significant administrative penalties for any licensee involved in prohibited referrals.

imaging services includes the performance of the specific test as well as the reading or interpretation of the results of the specific test, then to apply a restrictive definition of the term employee as well would result in a significant negative impact on the practice of radiologists, the use of telemedicine, and the availability of such services to patients.

34. As an example, if TPCA is required to have an employee as defined in I.R.S. regulations, to read and interpret test results from diagnostic imaging procedures, TPCA would have to hire an in-house radiologist with the incumbent costs and liabilities related to such employees,<sup>10</sup> the cost of such services will thereby increase. Radiologists would be forced into such employment rather than maintaining their independent professional status. In those areas where sufficient radiologists may not be available to become I.R.S. type employees, necessary services may not even be made available to needy patients. Requiring the relationship between TPCA and its reading radiologists to meet all the requirements of I.R.S. employee status will discourage and inhibit the use of available and less costly telemedicine services and will curtail the current common practice of contracting for such services to be provided efficiently through the use of appropriate technology.<sup>11</sup>

35. Applying a restrictive definition of the word employee, together with a determination that diagnostic imaging services includes the reading and interpretation

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<sup>10</sup>In addition to providing salaries, a group such as TPCA would have to withhold taxes, provide benefits, assume liability and therefore provide liability coverage and cover any number of other costs inherent in such employer/employee relationships under the I.R.S. model.

<sup>11</sup>Such technology currently allows for the efficient and competent reading and interpretation of diagnostic imaging results via telecommunications either around the corner, as with TPCA and the radiology group, or around the country as in the case of a rural clinic or a narrow specialty.

of the test results, does nothing to aid the stated intention of Section 455.654, Florida Statutes. Applying the common meaning of the term employee as signifying an ongoing relationship where one is paid a determined amount for providing specific services on a regular rather than casual basis, comports with the legal imperatives of statutory construction without running afoul of the clear intent of the statute.

36. The Board of Medicine should state in its Final Order that the provisions of Section 455.654(4)(a)1., Florida Statutes, do not prohibit TPCA from contracting with radiologists, to provide the reads and interpretations of the test results from diagnostic imaging services provided by TPCA to patients accepted from outside referrals pursuant to Section 455.654, Florida Statutes.

WHEREFORE, Petitioners respectfully request that the Board of Medicine issue a Final Order stating that under the circumstances set forth in this Petition, it is appropriate for TPCA to calculate the allowable 15% of outside referrals, pursuant to Section 455.654(3), Florida Statutes, based upon the total number of patients receiving diagnostic imaging services, as defined therein; and that the term diagnostic imaging services as defined in Section 455.654, Florida Statutes, includes only the actual administration of the specific diagnostic imaging procedure and does not include the reading or interpretation of the test results by a radiologist. If the Board of Medicine determines that the reads and interpretations are included in the term diagnostic imaging services, then Petitioners request that the Board of Medicine's Final Order clarify that the term employee as used in Section 455.654(4)(a)1., does not preclude the use of a contract for services between TPCA and a radiology group, wherein the

radiology group will provide reads and interpretations for diagnostic imaging procedures conducted by TPCA both for patients of TPCA and for patients referred from outside of TPCA, but within the limitations of Section 455.654(3), Florida Statutes.

Respectfully submitted this 21<sup>st</sup> day of March, 2000.



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