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"I swear, I only had one drink":

Detection and Regulation of Impaired Practitioners

This article is based on a presentation by Troy E. Costales, Board Member, Oregon Physical Therapist Licensing Board; Jason Kaiser, Executive Officer, Physical Therapy Board of California; Sherri Paru, PT, Clinical Advisor/Investigator, Oregon Physical Therapist Licensing Board; and Donald Woodbury, Drug Recognition Expert, Polk County, Florida, Sheriff's Office, at the 2015 FSBPT Annual Meeting.

This session began with a Drug Recognition Expert describing the effects drugs and alcohol may have on professional judgment. Discussion revolved around how long alcohol stays in your system, how alcohol interacts with other drugs, and what board members need to know about cannabis. Then a board member, investigator, and administrator from border states with very different statutes, policies, and case law (Oregon and California) discussed investigative strategies, potential case outcomes, monitoring programs, and disciplinary actions for impaired practitioners.

A discussion of Standardized Field Sobriety Tests (SFSTs) set the stage for the presentation. SFSTs were launched in the 1970s by the National Highway Transportation Safety Administration (NHTSA). They have been verified as accurate and proper by the Southern California Research Institute and several other studies.

Seven drug categories are recognized. Depressants, including alcohol, slow the body down. Stimulants, including the prevalent drug methamphetamine, speed things up. Hallucinogens include ecstasy. Dissociative anesthetics include PCP and the animal tranquilizer ketamine. Narcotic analgesics include Percocet. The other two categories are inhalants and cannabis.

Drug Recognition Experts (DREs) define drugs "as any substance, which when taken into the human body, can impair the person's ability to operate a vehicle safely. "

While DREs look at seven categories, for the sake of time, only alcohol and cannabis were covered during this session. Tests used to help DREs determine impairment include Horizontal and Vertical Gaze Nystagmus, walk and turn, and one-leg stands.

NHTSA recommended that the legal limit for impaired driving drop from .08 to .05, recognizing that alcohol can impair at very low levels. There is no level determined for cannabis, but impairment can be measured nonetheless, particularly through eye tests.

All impairing drugs have some effect on the eyes. Stimulants, hallucinogens, and cannabis all

make the pupils large. Narcotic analgesics make pupils small. Depressants, inhalants, and dissociative anesthetics don't act on a person's pupils, but they do react to the Horizontal Gaze Nystagmus (HGN) test. HGN is an involuntary jerking of the eyes as they gaze to the side. Depressants, including alcohol, inhalants, and dissociative anesthetics, all cause HGN.

The first condition looked at in HGN is a lack of smooth pursuit as the eyes follow an object horizontally. Simply put, a stimulus is held in front of a subject's eyes at a distance of 12 to 15 inches and is moved to the side until the eye doesn't have any white in the corner of it. If the eye begins to twitch after four seconds, the person is impaired. Lack of smooth pursuit begins at 0.02 and 0.03 blood alcohol content (BAC). The next two clues show up at the 0.08 level. Onset of nystagmus prior to 45 degrees is a quantifier as to how impaired the person is.

After completing an HGN, law enforcement officers will perform a Vertical Gaze Nystagmus (VGN).

VGN only shows up in depressants, inhalants, and dissociative anesthetics. In alcohol, it only turns up when a person consumes more alcohol than is normal for that person. In other words, an otherwise light drinker who hits the 0.08 mark may have VGN too, where a seasoned drinker would not. VGN is very similar to HGN except for the up and down movement.

Two other eye tests performed to determine if a person is under the influence are lack of convergence and rebound dilation.

These tests have more to do with determining cannabis impairment. Cannabis is one of those drugs that does not cause HGN. It does, however, dilate the pupils.

Determining lack of convergence involves using a stimulus to draw circles in front of the suspect's face, then bringing the stimulus to about two inches in front of his eyes and allowing the eyes to converge. Lack of convergence alone does not mean a person is under the influence. Lack of convergence occurs in about 7% of the population with no drugs in them at all. But officers couple the test with driving patterns, dilated pupils, and elevated pulses and blood pressures.

Rebound dilation is done in a dark room. A light is shone directly into the suspect's eyes and the pupil contracts. If the pupils then grow bigger, and bigger, and bigger while the light continues to be shone, the person is under the influence. Normally, when driving at night a driver's pupils are wide open. However, if a car approaches with its high beams on and the driver is unimpaired, her pupils will contract and stay that way until the car goes by. But if the driver is on cannabis, his pupils will enlarge as the vehicle approaches. Obviously, that driver is not seeing correctly.

The discussion then turned to how boards deal with licensees under the influence and how the body processes alcohol.

Up to 40% of cases that come before the Oregon Physical Therapist Licensing Board involve substance abuse. It could be licensees driving under the influence, self-reporting, or others turning them in. Regardless of how it's reported, questions arise over how the Board deals with

the licensee's impairment and the nexus to practice of treating a patient or potentially having access to confidential records.

For alcohol, board investigators can mathematically draw those connections and determine the level of impairment at the time of incident or when an individual was treating a client or had access to confidential records. There is no formula for anything else. Not for cannabis. Not for heroin. Not for methamphetamines.

A fictional scenario set up the general guidelines for alcohol impairment.

In this scenario, a licensee had a long Friday. There were difficult patients, the computers didn't want to work, and the insurance company for some reason decided to decline some records previously submitted. A friend called and said, "Hey, let's go out." The friend is paying and providing a designated driver. No problem.

The licensee arrives home at 3 a.m. and notices a sticky note on the refrigerator reminding him he has a client at 9 a.m. No problem again. He drank responsibly even though he wasn't paying and had a designated driver. With nearly five hours of sleep, he believes he'll be fine. His goal is to be sober when he awakes at 8 a.m.

With alcohol, time is your only ally. There is no other method to decrease BAC. The body releases alcohol at a general rate of 0.015 an hour. To have a BAC of 0.00 at 8 a.m., the licensee would have to had a BAC of 0.075 when he went to bed at 3 a.m.

In the scenario, the licensee consumed two drinks in the first hour, from 6 to 7 p.m. He then consumed one drink per hour after that. He had two in the last hour due to having "one more for the road" before the bar closed at 2 a.m.

The problem is the BAC peaks one to two hours after the last drink is consumed and in this scenario the consumption rate still was faster than the dissipation rate.

The licensee's BAC at 3 a.m. was not 0.075. Because the body delays processing alcohol and the dissipation rate is slower than the consumption rate, at 3 a.m. the licensee's BAC would have been 0.115. At 8 a.m., then, the licensee would still have a BAC of 0.040. The question for boards then becomes is this licensee impaired when treating a patient or accessing confidential records.

A licensee needs to think before they drink because a relaxing evening can put the licensee and his patients at risk. There are high expectations in the health industry and licensees need to be at their best with every patient. Licensing boards see too many cases of impairment and have a responsibility to take action.

Alcohol is the only drug with a consistent and predictable effect on the body. If someone consumes Benadryl, for example, they could either fall asleep or feel like they've consumed four cups of coffee. That makes alcohol easily measured.

A comparison of laws and regulations between Oregon and California and how they affect disciplinary actions was next on the agenda. Several real case studies were used to drive home

the points. The names were changed to protect the guilty.

In Oregon, the Board makes it a practice to obtain the police report, court records, and interview the individual arrested for a DUI. How truthful a licensee is becomes a factor in disciplinary actions. For example, if the Board receives a police report that states the arrestee's BAC was 0.28 and the person claims to have only consumed two beers, the licensee's truthfulness becomes a factor. But it's not just arrestees the Board must consider. Many licensees who have never been arrested nonetheless show up at work impaired or have longstanding drug or alcohol problems. It's a big enough issue to cause Board members to lecture at PT schools about what to look for in self-impairment, impairment in colleagues, and when a colleague should be reported.

A number of applicants come to Oregon who had had their licenses suspended or revoked in California. Case laws, statutes, and rules vary greatly between the states. What can be done to a licensee in California can't be done in Oregon. So they come to Oregon and find a job, even though they can't go back and practice in California. It would be interesting to look at the patterns of migration after discipline and what the various rules and statutes are across the states.

Six case studies were presented, three PTs and three PTAs. All had disciplinary actions taken against them in California and all were licensed or renewed their licenses in Oregon after the California action. They were given pseudonyms to protect their identities.

The cases showed not only discrepancies between Oregon and California laws and regulations, but with other states as well.

In the first case presented, California licensee Tom Zodiac was convicted of his third DUI in 2012 with a BAC in excess of 0.198. His prior arrests also included controlled substances. The Physical Therapy Board of California requires an extensive rehabilitation program for those determined to be addicted to alcohol or other drugs, including enrolling in a three-year rehabilitation program followed by a year's probation. Zodiac decided that was too much, surrendered his license, and moved to Oregon.

Zodiac was already licensed in Oregon when he surrendered his California license. He had disclosed his two prior arrests when he was licensed in 2011 and disclosed his third DUI when he applied for renewal. He also provided all treatment and court records. The Oregon board issued a Confidential Advisory Letter requiring monthly self-reports for one year. Zodiac has since obtained licenses in Pennsylvania and Virginia and renewed a previous Texas license, having disclosed all his previous arrests to each jurisdiction. He currently practices in Virginia.

Oregon has a matrix of looking at prior arrest and determining how old it was, if the applicant or licensee supplied all pertinent legal documents, and if they disclosed everything to the board. Because Zodiac met all the criteria, he was licensed without any issue. Confidential Advisory Letters are enforceable, but are not considered a disciplinary action. It's a treatment issue. He disclosed to all four states and has no actions against him in any other state.

It's very typical of an addict to move to other jurisdictions where they are not known and their behavior has not yet been observed, as is evidenced in the next case as well.

Another California applicant, dubbed Jay Le'know, was convicted of three DUIs, two of which occurred within 30 days and one while he was in PT school in Oregon. Le'know is an angry drunk. His priors included an assault on a police officer who was trying to arrest him for DUI. Le'know is not someone California would even offer the rehabilitative program. His license was denied so as not to subject consumers to that type of behavior. That doesn't mean he can't apply at a later date if he proves rehabilitation.

The third DUI occurred while Le'know was a PT student. He was housed in a detention center three blocks from the school and he would attend school and return to the detention center at night. The school had no idea because of privacy laws. While Le'know initially began an application in Oregon, he instead applied for and took the NPTE in Colorado, which doesn't require disclosure of misdemeanors. He then reapplied to Oregon through endorsement, which is easier to obtain than through an initial process. He too was issued a Confidential Advisory Letter requiring him to report quarterly to the Board and his employer. While his Oregon license has lapsed, he is currently licensed in Colorado and Texas.

The two cases show a reoccurring theme with relocation. Le'know sought out jurisdictions with looser laws. He may not have ever practiced in Colorado. He just found it was easier to be licensed there and once you have a license it's easier to apply to another state through endorsement.

Paz Linderman was another California licensee. She was convicted of DUI in 2005, which resulted in an accident. Her BAC was 0.12. She was convicted of DUI again in 2009. This time her BAC was 0.22 and she resisted arrest. She was ordered to serve five years probation, which she violated, and her license was revoked.

Linderman then tried to reinstate her lapsed Oregon license. Like the others, Linderman was driving outside her work parameters when she was arrested. None of them were driving to or from work. If Oregon does not have a nexus to the practice, then it cannot take disciplinary action. Linderman disclosed all her actions when she applied for reinstatement and it was granted. Her Confidential Advisory Letter required her to monthly self-reports and quarterly reports from the treatment program. She currently resides in California where she cares for her elderly parents.

In applying for reinstatement in Oregon, Linderman wrote the board that California's rehabilitation program was so severe she would not be able to work full time to support herself and pay for the program.

Part of California's rehabilitation requirements is a clinical diagnostic evaluation. The licensee is bound to whatever that order requires. The six months of outpatient rehab was not part of the original order, but was required after her evaluation. Clearly, the professional who assessed her determined she has a severe addiction problem, which is why her requirements were so severe.

Mary K. Mark is also an angry drunk. She was licensed to practice in California but was convicted of DUI in Oregon in 2009. When officers arrived they found her asleep behind the wheel with a BAC of 0.21. She was sentenced to diversion. When she applied for renewal of her California license, she did not disclose the conviction. Then, in 2012, she was convicted of domestic battery. Her significant other told authorities that at one point she straddled him with a knife to his chest and threatened to plunge it into him. When he started to cry, she climbed off him and hit him in the face with a couch cushion.

Her medical records indicated she had been diagnosed as alcohol dependent with chronic lapses. She also failed to disclose the arrest or conviction when she applied for renewal. She subsequently surrendered her license.

In Oregon, Mark disclosed her 2009 DUI arrest on her renewal application. She was issued a Confidential Advisory Letter that required monthly self-reports for six months. Her last Oregon license renewal was in 2012, and she has not disclosed her 2012 arrest to the board. She currently resides in Minnesota and reportedly is applying for a license there.

Jim Beam is somewhat of a success story. While a California licensee, he was convicted of DUI in 2008, with both alcohol and controlled substances. He reportedly was headed to work after taking double the amount of his prescribed medication. His BAC was 0.18. In 2011, he again was convicted of DUI with a BAC of 0.22. A third DUI in 2012 also included a controlled substance and alcohol. He too stipulated to license surrender because he believed the rehabilitation program to be too harsh.

It's harsh for a reason. Treatment consists of a behavior modification program and behavior modification takes time. It's not until the three-year mark that one begins to see long-term success. If a licensee is going to go into a rehabilitation program under California rules, they are going to do it for three years. The probationary order will state three plus one, because California requires completion of the program and a year of sobriety. Beam didn't like that.

While his California disciplinary action was pending in California, Beam applied for an Oregon PTA license. It was issued with the requirement that he be supervised onsite for a minimum of a year and that the supervisor submit a report to the Board. In addition, he was required to submit monthly self-reports for a year. He now has been practicing in Oregon for more than two years without incident.

The final case presented at the session is not a success story. California licensee Jules McGhee was convicted of DUI in 2006 and issued a citation by the California Board. In 2009, she was convicted of a second DUI, which included an open container violation. She literally was drinking and driving. Her BAC was 0.24. Subsequently, her license was revoked.

McGhee was co-licensed by Oregon, which took no action after her 2006 arrest. After her 2009 conviction, she was issued a Confidential Advisory Letter requiring monthly self-reports and quarterly reports from her employer for a year. In 2013, she was arrested for DUI and child endangerment for having her child with her in the vehicle while driving impaired. A stipulated agreement after that arrest required onsite supervision and a Board-ordered Chemical Addiction

Evaluation. She arrived at the evaluation impaired. Subsequently, the stipulated agreement was amended with McGhee agreeing not to practice until further order from the Board.

California and Oregon laws differ in several respects. The enforcement section of California's Physical Therapy Practice Act mentions drugs and alcohol four times. That's not a coincidence. It's in there because it has been a recurring problem. Also mentioned is "habitual intemperance." Intemperance means without moderation. Any time someone reaches a BAC of 0.20, that's evidence of intemperance. Enforcement therefore kicks in after two or more instances. The act also allows denial of a license to anyone who exhibits unprofessional conduct prior to application.

California law also specifically allows denial, suspension, or revocation of a license based on conduct "substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued." The conduct only has to "evidence present or potential unfitness." So impaired licensees don't actually have to touch patients to face disciplinary action. If conduct outside their work shows evidence of potential unfitness, the state can take action.

Oregon, on the other hand, must show nexus to practice to take disciplinary action. In the 2002 Dearborn v. Real Estate Agency case, Oregon's Supreme Court ruled there was not sufficient nexus between a broker's conduct and his real estate activities to permit disciplinary action under Oregon's statutes.

In 1996, Harold Dearborn was charged with seven criminal counts of providing drugs to a minor and engaging in sex acts in the minor's presence. He pleaded guilty to two drug possession charges and was placed on probation. One of the terms of his probation was that he was to have no contact with minors. Based on his conviction, the Real Estate Commission proposed a two-year license revocation.

Oregon's statute states that discipline can be imposed for "conviction of a felony, or misdemeanor substantially related to the licensee's trustworthiness or competence to engage in professional real estate activity." The Commissioner determined that Dearborn posed a risk to clients because he had access to other people's homes as part of his profession, which could potentially put him in contact with minors as well as give him access to prescription drugs. Furthermore, the Commissioner argued, someone with a drug habit could potentially use escrow funds to buy drugs.

The court focused on the words "substantially related" in the Oregon statute. It ruled that drug convictions, on their own, did not give the Commission to ability to revoke the broker's real estate license because there was no evidence the conduct arose out of a licensed real estate activity.

Recent cases pulled from ProForum's Professional Licensing Report show most states operate as Oregon does, not California. Seven cases were considered:

- A physician drinking while on call in Oregon

- A counselor who left her foster child in her car at work, also in Oregon
- An Oregon teacher who drove her truck into her husband's car in a suicide attempt
- A Pennsylvania barber arrested for assault
- A podiatrist who applied to have his license reinstated in Pennsylvania after being convicted of murder
- A dentist licensed in Florida who was convicted of child pornography
- An Ohio teacher convicted of disorderly conduct

Except for the podiatrist, in all these cases the licensee prevailed at the highest court in their states because the courts ruled there was no nexus to the practice.

Another difference between Oregon and California is Oregon's reliance on Confidential Advisory Letters to enforce treatment and rehabilitation. In California, actions are by law public information. It's non-negotiable between health-related boards and licensees. California takes the view that it has an obligation to consumers to let them know the licensee is in a rehabilitation program so they can make an educated decision as to whether or not they want to utilize those services.

Oregon has revised its statutes to allow for "substantially related" conduct, but still tends to err on the side of nexus to practice.

Still, Oregon goes beyond what many states do during the investigation phase of an incident. It requires the licensee to provide a letter or description of the incident in his or her own words; to provide police reports, court records, and diversion records as applicable; to provide treatment records; and to submit to a person-to-person interview.

The significance of Oregon's measures was shown in a case where an applicant was licensed in another state. He had been convicted of identity theft and in the interview just said he allowed himself to use someone else's credit card. The state took him at his word. By demanding police reports, court records, and other records, Oregon discovered his conviction stemmed from stealing patients' credit cards and using them to view pornography at work. He was subsequently denied in Oregon.

In establishing disciplinary actions, boards must understand state statutes, rules, and case law. They must determine if the incident is related to the licensee's practice. Actions taken by other states also should come into play. Whether or not the licensee fully disclosed should be considered. Then the board must decide who is going to monitor the licensee and who is responsible for remediation.

Troy E. Costales has served as a public member of the Oregon Physical Therapist Licensing Board for the past six years. Prior to this appointment, he served 10 years on the Oregon Real Estate Board as a public member with two terms as the Vice-Chairman. He has been the Governor's Highway Safety Representative for the State of Oregon since 1997 as Administrator of the Transportation Safety Division. He received his Executive Master of Public Administration degree from Portland State University.

Jason Kaiser is Executive Officer of the Physical Therapy Board of California (PTBC), where he has served since 2009. Jason has served the PTBC in a number of capacities, including Manager over the Applications & Licensing Services Unit as well as Manager of the Consumer Protection Services Unit. In 2012, Jason was appointed Executive Officer of the PTBC. He currently sits on the Continuing Competency Committee of the FSBPT.

Sherri Paru, PT has been the Clinical Advisor/Investigator for the Oregon Physical Therapist Licensing Board since 2002. Sherri received her PT degree from Ithaca College in 1991. She is a Certified Investigator through CLEAR (Council on Licensure, Enforcement and Regulation). Sherri is the co-producer of the Boundary Violation Vignette Series for Physical Therapists and has co-presented several lectures on professional boundaries, ethics, social media, and investigative techniques for FSBPT, APTA, and CLEAR.

Donald Woodbury is a Polk County, Florida, Deputy Sheriff and a Drug Recognition Expert certified by the International Association of Chiefs of Police. He has been with the Polk County Sheriff's Office since 2008.