PODIATRY:

Determining the proper arch support needed to make a shoe fit properly and placing such support in the shoe does not constitute the practice of podiatry by a shoe salesman.

OPINION NO. 207

May 20, 1971

FILED
207

Honorable R. Max Humphreys
Prosecuting Attorney
Grundy County
705 Main Street
Trenton, Missouri 64683

Dear Mr. Humphreys:

This is in response to your request for an opinion on the question whether a shoe salesman unlawfully practices podiatry when, as an aid to selling his merchandise, he recommends the size and type of arch supports needed, and places the arch supports in the shoes to make the shoes fit properly.

In Chapter 330, RSMo 1969, the legislature has considered podiatry to be independent of medicine or surgery or any other branch of the healing arts. Section 330.010, RSMo 1969, provides that "the definitions of the words 'chiropody' and 'podiatry' shall be synonymous and interchangeable and, for the purpose of such chapter, be held to be the local, medical, mechanical or surgical treatments of the ailments of the human foot, and massage in connection therewith. . . ." Section 330.020, RSMo 1969, provides that ". . . no one shall practice chiropody in this state unless duly licensed and registered as provided by law." Section 330.220, RSMo 1969, provides that "any person who shall practice chiropody in this state without having registered as provided in this chapter shall upon conviction be adjudged guilty of a misdemeanor." Section 330.200, RSMo 1969, is as follows:

> "It shall be deemed prima facie evidence of the practice of chiropody, or of holding oneself out as a practitioner within the meaning of this chapter, for any person to treat in any manner the human foot by medical, mechanical or surgical methods, or to use the title 'chiropodist' or 'registered chiropodist', or any other words, or letters, which designate, or tend to designate, to the public that the person so treating or holding himself or herself out to treat, is a chiropodist."

It is apparent that the salesman described in your opinion request does not treat the human foot by medical or surgical methods nor does he hold himself out as a practitioner of podiatry. The question whether a shoe salesman who determines what size arch support would be needed to make the shoe fit properly is a practitioner of podiatry apparently has not been presented to an appellate court in Missouri.

In the case of People v. Dr. Scholl's Foot Comfort Shops, Inc., 13 N.E.2d 750, 753, the Court of Appeals of New York decided a case in which it was alleged that Dr. Scholl's Foot Comfort Shops, Inc. was unlawfully practicing podiatry.

The court stated the facts as follows, l.c. 751-752:

> "The defendant sells, in addition to shoes, accessories such as arch and ankle supports, pads, and plasters. In fitting shoes, its salesmen are trained to use a mechanical device known as a pedograph. This registers an imprint which reveals the outer physical characteristics of the feet of the customer and, when read by the salesman, enables him to determine with greater accuracy the proper width, length and size of the shoe or arch support, if one is required. No charge is made for this service. The appellant states that this pedograph has been used by it for many years, and that it is used by a number of shoe stores throughout the country, and by hygiene and physical education departments in government institutions, hospitals, schools and colleges.
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> "Two special investigators, employed by the State Department of Education, visited the premises of the defendant, ostensibly for the purpose of purchasing shoes, but in reality to obtain evidence for this suit. Upon entering, the salesman took a pedograph imprint of the feet of one of the investigators, and in response to a question by this investigator, the salesman told her that the prints showed that she had a weak metatarsal, that her toes curved under, and that she needed arch supporters in order to receive the maximum comfort from her shoes. In further answer to a question by the investigator, requesting information concerning perspiring feet, she was

> told that this condition was traceable to weak feet, that her feet were in the 'third stage of weak feet,' and that she should take a course of treatments given by the licensed chiropodist, which treatments consisted of a chiropodic treatment and five vibratory massage treatments. . . . Thereafter, the investigator was again waited on by the shoe salesman, who took another pedographic imprint of her feet and made substantially the same remarks as on her prior visit; he advised the wearing of arches at all times, as her feet were in 'the third stage of flat feet.' . . ."

In ruling on the question whether such activity constituted the practice of podiatry, the court said, l.c. 753:

> "We next consider whether the acts of the salesman constituted the practice of chiropody. Clearly the use of the pedograph as a mechanical aid in determining the proper size of the shoe required does not constitute the practice of chiropody. Whether the statements by the salesman, in answer to the inquiries of the customer, constituted a diagnosis, is a more difficult question. It would be an unreasonable and harsh construction of the statute to hold that it was intended to prohibit shoe salesmen from pointing out to customers the manifest abnormalities of their feet when questions are put to them by the customers. It is clear from the record that the salesman at no time held himself out as being a podiatrist or being able to practice chiropody. On the contrary, he referred the customers to the duly licensed chiropodist. Some of the salesman's remarks may have verged close to diagnosis, but we should not hold that a mere remark concerning an obvious fact or a loose use of language concerning a manifest abnormality constitutes practicing podiatry."

In the case of Staley v. Board of Medical Examiners, 240 P.2d 61, the District Court of Appeals, Second District, Division One, California decided a case in which it was alleged that a shoe store owner was unlawfully practicing podiatry. The court said, l.c. 61-62:

> "For approximately twenty years plaintiff has been in the business of fitting and selling shoes. In connection therewith he has been manufacturing, recommending and selling corrective shoes and appliances for the human foot, to-wit: arch supports. He uses a conventional measuring rule to get the customer's shoe size, and with a pedograph he takes a footprint 'to get the curve of the arch.' With this information he proceeds to make a 'support to fit in the shoe, so the shoe fits better.' If the customer is not pleased with the supports, he is free to return them and get his money back."

The court further said, l.c. 62-63:

> "In this connection, appellant points out that respondent testified at the trial that he never told his customers what was wrong with their feet, but had them try several samples of arch supports, and when one was found that was comfortable, he proceeded to make a pair to order. That, on the other hand, one of the investigators for the Board testified that respondent told her precisely what was wrong with her feet, to-wit: that the trouble was in the heel and a long arch; that the arch slid or rolled forward, causing the feet to be out of line, which was apt to result in backache or some sacroiliac trouble. And that the other investigator testified that respondent told her that her metatarsals were in bad shape and that 'whether you know it or not, you are a subject for neuritis because you are injuring the nerves, the nerve endings in your feet, by walking on these metatarsals.'"

The trial court held that there was no practice of podiatry by such conduct and held, l.c. 63, that the shoe store owner:

> ". . . 'has the right * * * to recommend the purchase by prospective customers of corrective shoes and appliances * * * and in connection with such recommendation, to point out to such customers the manifest abnormalities of their feet and state to them his reasons for making such a recommendation; that such acts by plaintiff should not be interpreted and construed by

> the defendant Board as a "diagnosis" in violation of section 2141 of the Business and Professions Code of the State of California.' . . ."

In affirming the holding of the trial court, the appellate court said, l.c. 63:

> ". . . the [trial] court held that pointing out a manifest abnormality in a customer's feet, does not amount to a diagnosis. The evidence produced on behalf of respondent supports such a finding, even though the testimony of the investigators, if believed would have supported a different finding."

From the facts stated in your opinion request, it appears that all the saleman is doing is fitting the shoes and arch supports to the feet of his customers and selling them to such customers. By so doing, he is not treating, operating upon or prescribing for any physical ailment, injury or deformity of the feet.

The statute is penal in character and therefore must be strictly construed. It would be a strained construction of Chapter 330, particularly Section 330.200, to hold that the mere fitting of shoes to the feet of the customer, including parts of shoes such as arch supports, is the prescription for or recommendation of a mechanical appliance intended for the treatment of disease, injury or deformity of the feet.

CONCLUSION

It is, therefore, the opinion of this office that determining the proper arch support needed to make a shoe fit properly and placing such support in the shoe does not constitute the practice of podiatry by a shoe salesman.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Yours very truly,

John C. Danforth

JOHN C. DANFORTH
Attorney General