

BEFORE THE KANSAS OPTOMETRY BOARD

IN THE MATTER OF
WADE ABBEY, OD
License No: 1387-3

Case No.: 2020-02OAH
OAH No.: 21BO0001 BOPT

FINAL ORDER**Decision**

The Kansas Board of Examiners in Optometry (Board) has carefully considered the evidence presented and reviewed the applicable statutes, regulations and policies, and hereby suspends the Kansas license of the Respondent, Dr. Wade Abbey (Dr. Abbey), OD, to practice optometry in the State of Kansas for a period of six (6) months, contingent upon Dr. Abbey obtaining employment with an employer that is not in violation of the Kansas Optometry Act, and subject to a fine of Two Thousand Five Hundred Dollars (\$2,500) to be paid before the term of suspension is complete.

Statement of Case

The matter was initiated upon the Petition for Disciplinary Action, dated October 8, 2020, filed by the Disciplinary Counsel for the Board seeking discipline of Dr. Abbey's Kansas license to practice optometry. An Amended Petition for Disciplinary Action was filed on May 28, 2021.

This matter comes on for hearing on August 4, 2021 before the Board.

Appearing for the Board were: Dr. Gerard Lozada, President; Dr. Lora Durst; Dr. Dawn Bircher; and, Dr. Rebecca Sparks.

Dr. Rebecca Sparks participated in the hearing as a witness and abstained from the deliberative process. Dr. Ron Hansen and Malinda Holloway also participated as witnesses.

Timothy D. Resner appeared as the Board's disciplinary counsel.

Dr. Abbey appeared in person and with counsel, Diane L. Bellquist, Attorney. Christina Forshee participated as a witness.

Loren F. Snell, Jr., Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), was appointed and served as the Presiding Officer over the evidentiary hearing.

Evidentiary Rulings

A Prehearing Order was issued on July 20, 2021 in which the question of admissibility of exhibits was addressed. Following are additional orders issued on the date of hearing, supplementing the July 20, 2021 Prehearing Order:

Exhibit P was initially not admitted on a question of relevancy and subject to the proper foundation being provided. Foundation was provided by Ms. Forshee and Dr. Abbey. Noting the relevancy objection raised, Exhibit P was admitted as evidence.

Findings of Fact

- Aside from the period of time when Dr. Abbey's license to practice was revoked, as described herein below, Dr. Abbey has been practicing as an optometrist in the State of Kansas, since July 1, 1992. (Tr. p 174:22-24; Ex. 8).
- Dr. Abbey is currently employed by Kansas Physician's Eyecare Group (KPEG), physically located at 438 S. Rock Road, Wichita, Kansas. (Tr. p 174:17-21; Ex. 8). Dr. Abbey signed an Employment Agreement with KPEG on or about May 30, 2019. (Ex. B) Dr. Abbey began working for KPEG in November of 2019. (Tr. pp 183:24-184:7).
- Dr. Abbey was subject to discipline by the Board due to conduct that resulted in a criminal conviction in United States District Court on or about February 27, 2013. (Exs. 12, 15 and 16). Dr. Abbey's license to practice optometry was revoked by the Board by a Stipulation and Final Agency Order made effective on April 18, 2013. (Ex. 12).
- Dr. Abbey's license to practice optometry was reinstated by the Board in 2017, subject to specific restrictions. (Tr. pp 72:22-73:24; 179:11-13). The exact date of the reinstatement is unknown to the tribunal. The Board eventually removed the restrictions on Dr. Abbey's license to practice optometry in the State of Kansas. (Tr. pp 73: 25-74:11).
- According to records maintained by the Kansas Secretary of State's officer, KPEG is a professional association with the stated purpose of "The practice of medicine." (Ex. 10). The mailing address of KPEG is listed as the Legal Department of Stanton Optical, 3801 S. Congress Avenue, Palm Springs, Florida. (*Id.*). Dr. Michael Frank Parsons¹, M.D., is listed as being licensed by the Kansas Board of Healing Arts to perform medicine and surgery at KPEG. (*Id.*).
- KPEG is not licensed to engage in the practice of optometry, although KPEG does employ an optometrist, Dr. Abbey, and is therefore practicing optometry.
- According to records maintained by the Center for Medicare and Medicaid Services (CMS), the mailing address for KPEG is 3801 S. Congress Avenue, Palm Springs,

¹ The Certificate mistakenly identifies Michael Frank Parson.

Florida. (Ex. 11).

- Dr. Sparks serves as a member the Board, and for purposes of this matter, served as an investigative member. (Tr. p 38:12-22).
- In or about November of 2019 Dr. Sparks received a message from Dr. Jeremy Guenther questioning whether an optometry practice located at 438 S. Rock Road in Wichita, Kansas (Practice Location), was in compliance with the applicable legal standards. Dr. Sparks visited the location on November 16, 2019; however, it was not open for business at that time. Dr. Sparks took photographs of the outside of the Practice location. (Tr. pp 38:23-39:10; 41:18-22; 43:16-44:3; Exs. 1 and 3).
- Dr. Sparks visited the Practice Location and identified that signage on the outside of the Practice Location identified the business as Stanton Optical. (Ex. 1) A smaller sign located on an entrance door of the Practice Location identified KPEG as being a tenant within the building. (Ex. 2)
- Dr. Sparks went to the Practice Location on or about November 30, 2019. Upon entering the Practice Location, Dr. Sparks was asked by an employee if she was there for an eye examination. Dr. Sparks responded “no” and was allowed to look around the Practice Location. (Tr. p 39:11-17).
- In December of 2019 Dr. Sparks revisited the Practice Location. Dr. Sparks was again asked by an employee if she was there for an eye examination. Dr. Sparks responded “no.” The employee pointed out where the different frames were. Dr. Sparks walked around the Practice Location and took photographs. (Tr. pp 39:17-40:1; Ex. 2)
- Dr. Sparks testified the on the northern end of the Practice Location was a hallway area that led to the offices of KPEG, or the “clinical side.” (Tr. p 45 45:4-11). The area included a waiting room and reception desk for KPEG. (Tr. 86:12-19; Ex. 2).
- Dr. Sparks observed two (2) sets of doors into Stanton Optical. Dr. Sparks also observed a third door was located at the north end of the Practice Location, near the reception area for KPEG. From the outside there is a door under an awning below an AT&T sign. Upon entering that door there is a small hallway with two doors. The door on the left enters Stanton Optical near the KPEG location. The door to the right enters AT&T. (Tr. pp 46:14-47:4; 47:9-22; 85:24-86:11; Exs. 2, 18 and D).
- Dr. Abbey testified the door on the north end of the Practice Location under the AT&T sign is open to the public at all times while KPEG is open. (Tr. pp 187:21-188:6).
- Dr. Sparks sent a letter to Dr. Abbey dated December 13, 2019. (Tr. pp 49:4-50:10; Ex. 7). Dr. Sparks expressed concern that Dr. Abbey was practicing optometry “as part of or in affiliation with the Stanton Optical business.” (Ex. 7). Dr. Sparks also expressed concern that “Stanton Optical is an unlicensed for-profit entity that would

be prohibited by Kansas law from conducting an optometric practice. (*Id.*). Various provisions of the Kansas Optometry Law prohibit an optometrist from practicing in a location or advertising in a way that suggests the optometrist's practice is being carried on as part of or in association with the business on an unlicensed entity." (*Id.*). Dr. Sparks requested that Dr. Abbey provide copies of documentation and/or contracts associated with his practice at the Practice Location, as well as a written response to the allegations. (*Id.*).

- Dr. Sparks testified that she believed Dr. Abbey was still practicing at the Practice Location as of the date of the hearing. (Tr. p 51:8-11).
- Dr. Sparks testified she conducted online research of Stanton Optical and KPEG. Specifically, Dr. Sparks looked at the Google reviews. Dr. Sparks testified that she concluded from her research that Stanton Optical and KPEG were operating as one. Dr. Sparks testified to multiple examples she had observed from the Google reviews. Dr. Sparks testified that in her opinion the reviews supported the conclusion that the two (2) entities were operating as one (1). (Tr. pp 51:18-54:8).
- Dr. Sparks testified that the advertising on the outside of Stanton Optical indicating a free eye exam, in her opinion, gave the perception that Stanton Optical or their employees were providing the free eye exam. (Tr. p 54:12-21; Ex. 3). Dr. Sparks explained this would be an inappropriate relationship between a nonprofessional entity and a licensed optometrist, as Kansas law does not permit the nonprofessional entity to employ a licensed optometrist to provide optometric services. (Tr. p 54:12-21).
- Dr. Sparks was not aware if Dr. Abbey or KPEG were involved in the placement of the free eye examination advertising materials. (Tr. p 84:7-13).
- Dr. Sparks reviewed Stanton Optical website on or about November 6, 2019. (Ex. 4, pp KOB000009-11). Dr. Sparks noted that in the upper left corner of the website there was a box to check to "Book Eye Exam." Dr. Sparks was concerned that this was prominently displayed in association with Stanton Optical, giving "the perception that Stanton [Optical] and the optometrist at whatever location you would go to would be working together." (Tr. pp 55:18-56:5).
- Dr. Sparks observed that as of March 18, 2021 the Frequently asked Questions for the Stanton Optical website included a disclaimer that "Stanton Optical is not an eye care provider and does not provide eye examinations." (Tr. pp 56:15-57:6).
- Dr. Sparks also testified that Stanton Optical had placed a disclaimer at the Practice Location indicating the eye examinations were provided by KPEG. (Tr. p 56:6-14; Ex. I).
- Dr. Abbey testified the disclaimer had been placed in March or April of 2021. (Tr. pp 193:25-194:14; Ex. I).

- Dr. Sparks testified she called the toll-free number listed on the website for Stanton Optical. She spoke to a person and scheduled the appointment. The person thanked her “for calling Stanton Optical to schedule [her] eye examination.” Dr. Sparks then received an email confirming her eye examination at the Practice Location. (Tr. pp 58:12-59:17).
- Dr. Sparks testified she spoke to an employee of Stanton Optical, Samantha Hysom (Hysom). Hysom indicated she had primarily worked as an optician selling glasses to customers; however, from time to time she served as a technician for KPEG, operating an autorefractor, a fundus camera, a screening fields analyzer and an electric lensometer. Hysom had also been trained to operate a slit lamp. (Tr. pp 59:18-60:21).
- Dr. Sparks testified Hysom told her that the eye examination was not free. Rather, the patient paid for the eye examination and then received a credit for the amount paid to be applied toward the purchase of eyewear. (Tr. pp 61:14-62:12).
- Dr. Sparks testified that from her investigation there were multiple concerns: advertising for a free eye examination gives the indication KPEG and Stanton Optical are working together; lack of physical separation between the two (2) entities within a single space; and, staff are requested to work for and between both entities, giving the impression that KPEG and Stanton Optical are not separate businesses, but rather a single functioning unit. (Tr. pp 68:21-69:19).
- Dr. Sparks testified that Dr. Abbey is compensated a set fee for providing eye examinations at the Practice Location. Dr. Sparks testified that if Dr. Abbey provided more than twenty-five (25) eye examinations during a day Dr. Abbey was paid a bonus structure. This included the eye examinations advertised by Stanton Optical. (Tr. pp 70:17-71:11).
- Dr. Sparks testified that a side-by-side practice arrangement involves an optometry practice working close to a commercial optical dispensary business. (Tr. pp 75:24-76:5). The two (2) entities are separate, physically separate and the businesses are operated separately; however, the proximity allows customers to easily go from one business to the other. (Tr. p 76:6-11).
- Dr. Sparks testified that in her opinion, to be separate the entities had to operate separately as individual entities, the staff had to be employed separately, and there needed to be a physical separation. (Tr. pp 98:21-99:6). The physical separation should, according to Dr. Sparks, include a floor to ceiling opaque separation. (Tr. p 99:7-10).
- Dr. Sparks testified that the totality of the circumstances, including the advertising of free eye examinations, scheduling of eye examinations, the physical set up and

the operations of the two (2) entities: Stanton Optical and KPEG, caused her to have concerns in this matter. (Tr. pp 114:25-115:12).

- Dr. Hansen is a practicing optometrist and former member of the Board, having left the Board in October of 2020. (Tr. p 120:2-12).
- Dr. Hansen testified he had received a call from Dr. Tom Lentz in November or December of 2019 regarding concerns about the Practice Location. (Tr. pp 120:17-121:1). Dr. Hansen testified that Dr. Lentz was concerned there might be an “optometrist practicing in a manner that would be in violation of the Kansas Optometry Act.” (Tr. p 121:2-9).
- Dr. Hansen testified he visited the Practice Location in December 2019 or January 2020. (Tr. pp 121:22-122:8). Dr. Hansen observed inside the Practice Location and took pictures of the exterior of the Practice Location. (Tr. pp 122:9-124:4; Ex 17).
- Dr. Hansen testified he asked staff at the Practice Location if there was an eye doctor or optometrist and staff told Dr. Hansen that they had an eye doctor, Dr. Abbey. (Tr. pp 126:25-127:9).
- Dr. Hansen testified he was concerned about the lack of a physical separation or barrier between Stanton Optical and KPEG. (Tr. p 128:5-25). Dr. Hansen was also concerned that the staff member, who he perceived to be employed by Stanton Optical, seemed to indicate Dr. Abbey was employed by Stanton Optical. (*Id.*).
- Dr. Hansen acknowledged the door to the Practice Location listed Stanton Optical and KPEG as two (2) business entities operating at the Practice Location. (Tr. pp 136:23-137:4). Dr. Hansen observed the waiting room area, as well as the reception area at the Practice Location. (Tr. p 137:5-17; Ex. 2).
- Dr. Hansen testified that he believed physical separation required floor to ceiling separation with a separate entrance through a closable door. (Tr. p 142:12-25).
- Malinda Holloway is a licensed private detective, hired by the disciplinary counsel’s office. (Tr. pp 153:13-54:11).
- Ms. Holloway took photographs of the interior of the practice Location, as well as the exterior doors and signage. (Tr. pp 154:6-155:9; Ex. 18).
- Christina Forshee is a legal assistant at the Joseph, Holland and Craft Law Firm. (Tr. pp 164:23-165:1).
- Ms. Forshee reviewed websites for LensCrafter’s and Target Optical. (Tr. pp 165:22-166:18; Ex. P, pp 76, 77, 85 and 86). Ms. Forshee did not attempt to schedule an eye examination utilizing either of the websites from LensCrafter’s or Target Optical. (Tr. pp 172:6-173:1).

- Ms. Forshee also took pictures of the optical facilities at a Sam's Club location in Topeka, Kansas. (Tr. pp 166:19-167:7; Ex. P, p 78). Ms. Forshee did not attempt to enter the door depicted in the photograph. (Tr. pp 171:9-172:5).
- Ms. Forshee took pictures of a Success Vision location. (Tr. pp 168:21-169:2; Ex. P).
- Dr. Abbey testified he usually has a "Couple of girls" that assist him by doing the preliminary testing and help with patient flow. Dr. Abbey noted that there was a Management Services Agreement and Stanton Optical employees will help out on the KPEG side. (Tr. pp 189:5-14; 190:12-191:22; Ex. M).
- Dr. Abbey testified he understood KPEG and Stanton Optical were separate companies. (Tr 195:2-4).
- Dr. Abbey testified he had no input in or control over Stanton Optical's advertising. (Tr. pp 199:21-200:1).
- Dr. Abbey took photographs of three optical locations in the Wichita area. (Tr. pp 200:14-22; 204:5-13; Ex. P, pp 80-84 and 87-91).
- Included within the photographs taken by Dr. Abbey were pictures of the Target optical store at 21st and Greenwich streets in Wichita, Kansas. (Ex. P, pp 80-84). The Target Optical store includes an optometrist office. The optometrist office is separated from the optical side by a door. (Ex. P, pp 80-81). There is also a door on the outside of the Target building that serves as an entrance to the optometrist office. (Ex. P, p 84).
- Also included within the photographs taken by Dr. Abbey were photographs of a Wal-Mart located on Broadway in Wichita, Kansas. (Tr. p 205:3-7). The photographs depict that there is an optometrist office located within the optical department at Wal-Mart. (Ex. P, pp87-89). The photographs further depict that the optometrist office is separated from the optical department by a door. (*Id.*). Furthermore, the optometrist office can be accessed by a separate door located on the outside of the building. (Ex. P, p 91).
- Dr. Abbey testified that each of the locations he visited had signage outside of the optical store advertising the optometrists' offices. (Tr. pp 203:12-25; 207:10-15; 207:23-208:6; Ex. P, pp 82, 83 and 90).
- Dr. Abbey testified that his previous employer's office, Dr. Mosteller, was a side-by-side with LensCrafters but was separated by a wall and had separate entrances. (Tr. p 219: 7-20).
- Dr. Abbey testified that he believed the physical setup of Stanton Optical and KPEG was permitted because KPEG was a medical clinic, and because he had been told by

the attorneys that it was in compliance. (Tr. pp 222:5-223:14).

- Dr. Abbey is the only employee of KPEG that works at the Practice Location. All other employees are shared between Stanton Optical and KPEG pursuant to the Management Services Agreement. (Tr. pp 232:16-233:3).
- On or about October 12, 2020 Disciplinary Counsel for the Board filed a Petition for Disciplinary Action against Dr. Abbey, seeking discipline with regards to Dr. Abbey's license to practice optometry.
- On May 28, 2021 an Amended Petition for Disciplinary Action was issued. (Exhibit 19) It is alleged that Dr. Abbey is employed by KPEG to provide optometric services; however, "KPEG is not organized, authorized or licensed to engage in the practice of optometry in the State of Kansas." Moreover, it is alleged that Dr. Abbey's optometry practice arrangement with Stanton Optical indicates Stanton Optical is engaged in the practice of optometry, which Stanton Optical is not organized, authorized or licensed to do, and that Dr. Abbey's optometric practice was being conducted as a part of and in association with Stanton Optical. It is alleged that Dr. Abbey is aiding and abetting Stanton Optical and/or KPEG in the illegal practice of optometry at the Practice Location and has otherwise engaged in "unprofessional conduct."

Analysis and Conclusions of Law

The Board has jurisdiction over this matter pursuant to K.S.A. 74-1504. The Board may revoke, suspend or restrict the license of an optometrist, or grant a period of probation, whenever it is established that an optometrist has violated the Kansas Optometry Law, K.S.A. 65-1501 *et seq.*²

The relevant portions of the Kansas Optometry Law defines unprofessional conduct as relates to the practice of optometry as: "(1) Using fraudulent or false advertisement." "(2) Engaging in the practice of optometry as an agent or employee of a person not licensed under the optometry law." "(3) Conduct likely to deceive, defraud or harm the public." "(5) Aiding or abetting the practice of optometry by an unlicensed, incompetent or impaired person." and "(18) Allowing improper interference with the licensee's professional judgment in providing patient care."³

In considering the evidence presented in this matter, the Board concluded that Dr. Abbey was engaging in the practice of optometry as an agent or employee of a person not licensed under the Kansas Optometry Law.⁴ Dr. Abbey was employed by KPEG to provide optometry services and KPEG is not licensed to practice optometry, but rather is a licensed medical facility.

² K.S.A. 74-1504(a)(3).

³ K.S.A. 65-1516(b).

⁴ K.S.A. 65-1516(b)(3).

The Board further concluded Dr. Abbey was aiding or abetting the practice of optometry by an unlicensed entity, Stanton Optical and/or KPEG.⁵

The Board concluded that the business arrangement with Stanton Optical through which Stanton Optical refers patients to Dr. Abbey and creates the impression that Stanton Optical is engaged in the practice of optometry or that Dr. Abbey's Optometry practice is part of and in association with the business of Stanton Optical, an unlicensed entity.⁶

The Board concluded the evidence had not proven Dr. Abbey was engaged in or using fraudulent or false advertising or that Dr. Abbey's conduct was intended to deceive, defraud or harm the public.

In considering the relevant Board of Examiners in Optometry regulations, the Board concluded as follows:

- a. Dr. Abbey's professional judgment was not affected and there was no indication from the evidence that any patients were harmed as a result of Dr. Abbey's conduct.⁷
- b. The office arrangement of Dr. Abbey resulted in Dr. Abbey maintaining an office or practice location as part of or in association with a business entity that is unlicensed to practice optometry.⁸ The evidence established Dr. Abbey's practice was associated with Stanton Optical, an unlicensed entity. It was noted that the mailing address for KPEG was the same as the legal department for Stanton Optical. It was also noted that Dr. Abbey's practice was associated with KPEG, a medical practice, to avoid the applicability of some optometry regulations.
- c. The advertising by Stanton optical implied Dr. Abbey was practicing in association with Stanton Optical, an entity that is not licensed to practice optometry.⁹
- d. Stanton Optical and KPEG were not physically separated.¹⁰ It is noted by the Board that the examples of physical separation demonstrated by the photographs offered by Dr. Abbey, all involved a door separating the optometric practice from the ophthalmic goods practice. There was no such separation between Stanton Optical and KPEG.
- e. Although Dr. Abbey was not the author of the advertising utilized by Stanton Optical, he was still responsible for advertising that benefited him in his practice of optometry. The fact that Dr. Abbey had no input or direct control over Stanton Optical's advertising was not a defense.¹¹

⁵ K.S.A. 65-1516(b)(5).

⁶ K.S.A. 65-1516(b)(18).

⁷ K.A.R. 65-4-5.

⁸ K.A.R. 65-10-1(c)(2).

⁹ K.A.R. 65-10-2(b)

¹⁰ K.A.R. 65-10-3.

¹¹ K.A.R. 65-11-1.

- f. The advertising utilized by Stanton Optical advertising a free eye examination implied that Dr. Abbey “is engaged in or maintains an office for the practice of optometry as part of, or in association with, the business or operation of an unlicensed person or entity.”¹²
- g. While Stanton Optical had placed disclaimer signage in March or April of 2021, KPEG had not placed the same signage, furthering the implication that Dr. Abbey was associated with an unlicensed entity in providing optometry services.¹³

It was noted by the Board that Dr. Abbey had an opportunity to attempt to rectify the various violations identified by the evidence and did not take any steps to address the concerns that had been raised by the Board in the letter sent on December 13, 2019.

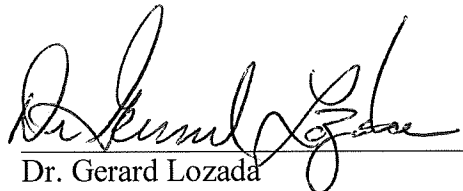
Decision

Based upon the foregoing findings of fact and conclusions of law, having heard the testimony of the witnesses(es), considered the evidence presented, reviewed the applicable statutes, regulations and policies, and otherwise being duly and fully informed in the premises of this matter, the Board suspends the license of the Respondent, Dr. Wade Abbey, OD, to practice optometry in the State of Kansas for a period of six (6) months, contingent upon Dr. Abbey obtaining employment with an employer that is not in violation of the Kansas Optometry Act, and subject to a fine of Two Thousand Five Hundred Dollars (\$2,500) to be paid before the term of suspension is complete.

This Final Order is effective upon service.

IT IS THEREFORE ORDERED:

1/12/2022
Date



Dr. Gerard Lozada
Kansas Board of Examiners in Optometry

Notices

- 1. This is a Final Order and becomes effective upon service.

¹² K.A.R. 65-11-2(g).

¹³ K.A.R. 65-11-3.

2. **Within fifteen (15) days** after service of the Final Agency Order, any party may file a Petition for Reconsideration.¹⁴
3. Either party to this agency proceeding may seek judicial review of the Final Order by filing a timely petition in the District Court.¹⁵ Reconsideration of the Final Order is not a prerequisite to judicial review. A petition for judicial review is not timely unless filed **within thirty (30) days** following service of the Final Order.¹⁶
4. A copy of any petition for judicial review must be served upon the Kansas Board of Examiners in Optometry. The agency officer designated to receive service of a petition for judicial review is:

Jan Murray,
Executive Officer
Kansas Board of Examiners in Optometry
3109 W. 6th St., Ste. B
Lawrence, KS 66049

¹⁴ K.S.A. 77-529.

¹⁵ K.S.A. 77-613.

¹⁶ K.S.A. 77-613.

Certificate of Service

On January 18, 2022, I certify that a copy of the foregoing was placed in the United States first class mail, postage prepaid, addressed to:

Wade Abbey, OD
438 South Rock Road
Wichita, KS 67207

Wade Abbey, OD
4615 Mark Twain
Derby, KS 67304

and, I further certify that I caused a copy of the foregoing to be served electronically through OAH's e-filing system to:

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