

No. _____

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

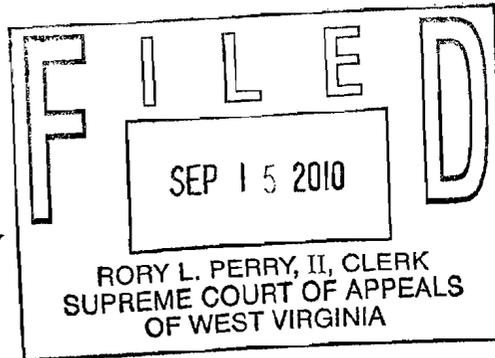
KENNETH A. HARRISON,

Respondent, Petitioner below,

v.

WEST VIRGINIA MEDICAL IMAGING
AND RADIATION THERAPY TECHNOLOGY
BOARD OF EXAMINERS,

Petitioner, Respondent below.



FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 09-CAP-28

PETITION FOR APPEAL

I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The Petitioner, the West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners (hereinafter "Board"), seeks to appeal a March 26, 2010 final Opinion Order Reversing Administrative Order by the Circuit Court of Monongalia County, West Virginia. Exhibit 1. This matter involves a determination by the Board that the Respondent had practiced outside the scope of his license in violation of West Virginia Code § 30-23-1 *et seq.* As a result of the Board's findings, it entered an administrative order taking disciplinary action against Respondent's license.

FILED

JUL 26 2010

JEAN FRIEND
CIRCUIT CLERK

The Respondent disagreed with the Final Order of the Board and filed a Petition for Appeal on or about October 27, 2009, in the Circuit Court of Monongalia County. On December 21, 2009, the Respondent filed a Motion for Stay of Administrative Order, a hearing was held on that motion on January 7, 2010, and the Court entered an Order Granting Stay of Administrative Order on January 21, 2010. Pursuant to the Court's Scheduling Order, entered February 16, 2010, the parties submitted memoranda of law in support of their positions, and a final hearing was held in this matter on March 18, 2010.

The Monongalia County Circuit Court issued its decision on March 26, 2010 reversing the Administrative Order issued by the Board. The Petitioner, West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners, now seeks to appeal this final Opinion Order Reversing Administrative Order.¹

II.

STATEMENT OF FACTS

The Board is a regulatory Board created for the purposes of regulating the practice of medical imaging and radiation therapy technology in the State of West Virginia. W. Va. Code § 30-23-1 *et seq.* Respondent is a Medical Imaging and Radiation Therapy Technologist licensed by Board holding license number 3908 and has been a practicing radiologic technologist since

¹ The original deadline for filing of this petition is July 26, 2010. On July 23, 2010, Petitioner made a motion for an extension of time of two (2) weeks to the Monongalia County Circuit Court on the basis of severe family medical emergency which was granted thereby extending the deadline until August 9, 2010. On July 26, 2010, counsel for the Respondent filed an objection to the Order granting the extension of time to which a hearing was set for August 17, 2010.. Therefore, out of an abundance of caution, counsel for Petitioner is submitting this Petition for Appeal in accordance with the original filing deadline and reserves the right to amend such petition.

1986. Tr. Vol. I, 160. Respondent was employed by WVUH as a CT Tech for approximately six (6) years until his termination in July 2008 Tr. Vol. I, 163-164.

On or about July 3, 2008, the Board was notified by Darlene Headley that Respondent had been terminated from his employment with WVUH for unfavorable conduct and practicing outside of the scope of a radiologic technologist after administering Benadryl intravenously without orders from a physician pursuant to the laws requiring the notification of the Board when a technologist has been terminated for reasons that had to do with licensure. Tr. Vol. I 21-22, 103-104. Ms. Headley, Petitioner's supervisor at WVUH, is employed as the Director of Radiology and Radiation Oncology. She is also a licensee of the Board and stated that it is not within the scope of a technologist's practice to administer drugs, including contrast, without a doctor's order. Tr. Vol. I, 101-102.

Upon being notified of Respondent's termination, on or about July 7, 2008, the Executive Director of the Board sent Respondent a letter via Certified Mail stating that the board was in receipt of a complaint and outlining that he had thirty (30) days to respond to these allegations. Tr. Vol. I 23-24; Board Ex. 2. On or about August 5, 2008, the Board received Respondent's response to the allegations via facsimile. Tr. Vol. I, 24; Board Ex. 3. In that response, Respondent admitted that he had administered Benadryl to a patient allegedly having a severe contrast allergy via the patient's IV access without orders from a doctor. Board Ex. 3. Respondent further stated in his response that he "panicked" and ran to get the Benadryl from the pixus machine. Board Ex. 3. At no time during the incident did the Respondent call a "code" or contact the emergency department. Tr. Vol. II. 45, 87. On or about December 11, 2008, the Board set this matter for hearing to convene on January 29, 2009. Tr. 98. Board Ex. 8.

Ms. Godby further testified that radiologic technologists do not commonly administer Benadryl “in any way, shape or form[,]” and that “[i]t is usually administered by a nurse under the supervision of a physician.” Tr. 54.

During Ms. Headley’s testimony, she stated that there are no hospital policies that would permit a technologist to administer IV drugs without an order from a doctor in existence. Tr. 202. Additionally, Ms. Headley stated that the proper chain of command for a situation such as that in this matter is that a technologist should first page the radiologist on call, if there is no response or the situation continues to rapidly decline, then the technologist should call a “code.” Tr. 105, Tr. Vol. II. 39, 42. There are no circumstances where a radiologic technologist should administer Benadryl, regardless of whether the patient has developed a rash and the physician is not responding, the patient is itching and the physician is not responding, the patient is having labored breathing and the physician has not appeared. “The technologist always has available to them the ability to call an emergency code at which time a team would arrive to provide [appropriate] care.” Tr. Vol. II. 24-25. All policies of WVUH consistently direct the radiologic technologist to contact the radiologist. “[R]egardless of how it is written [. . . , radiologic technologists] are always told to contact the radiologist and to assist them in, have the radiologist instruct them in what to do, get additional assistance, [or to] call a code.” Tr. Vol. II. 39.

Ms. Headley stated that the protocol sheet proffered by Petitioner, should not be read to permit the tech to administer Benadryl because they would not direct technologists to work outside their scope, rather radiologic technologists are directed to call the radiology resident. Tr. 206. Ms. Headley steadfastly maintained that technologists under her department and supervision, to her knowledge, “do not have any documentation, guidance, or anything else to lead them to

give medications without proper physician involvement.” Tr. 209. Ms. Headley further stated that the purpose of the protocol manuals are to outline the proper way to perform a CT scan. Further, Ms. Headley testified that “[t]hese protocols would never supercede the need for a physician’s order or a physician to be present.” Tr. Vol. II. 8-11.

Ronna Shaneyfelt is a licensee of the West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners and has been practicing as a technologist for thirty-seven years, and has been employed with WVUH since May of 2005. Tr. 56. Ms. Shaneyfelt was physically present on June 22, 2008 during the incident in question. Tr. 57. At the hearing, Ronna Shaneyfelt testified that she was doing the work-up on the patient during the incident in question. Tr. 57-58. Ms. Shaneyfelt stated that Petitioner was tending to the patient and that she was working in the scanner room when she noticed in the chart that the patient had a contrast allergy and alerted Petitioner to the same. Tr. 59-60. Upon being notified of the patient’s allergy to contrast, **Ms. Shaneyfelt testified that she went to observe the patient and noticed that there were some hives present, but no labored breathing or other signs of respiratory distress.** Tr. 60-65. (emphasis added). Ms. Shaneyfelt further testified that she asked the patient if he was feeling okay and that he nodded affirmatively. Tr. 65. Ms. Shaneyfelt paged the radiologist resident who responded within a few minutes of the page. Tr. 61, 63-64, 126. Dr. Mithra Kimyai-Asadi² was present in the scanner room within minutes of answering the page and being told of the allergic reaction. Tr. 127.

² Dr. Asadi is a post graduate year three radiology resident at WVUH and was the resident on call and was physically present in the department on the date of the incident at issue. Tr. 122, 124.

Ms. Shaneyfelt, in her experience, stated that she does not have the authority to push any drug outside of IV contrast and saline, which are within the protocol of her field of practice. Specifically, Ms. Shaneyfelt stated two reasons for her not having the authority to push drugs, “number one, [she did not] have an order; and number two, [she is] not an [Registered Nurse who could] push drugs.” Tr. 66. Ms. Shaneyfelt stated that the policy to follow should a technologist run into trouble was to contact the emergency room because it was closest in proximity to the CT suite. She also noted that there is a button on the wall that alerts the emergency room if there is a situation needing attention and that she had taken patients to the emergency room “many times.” Tr. 74-75. Ms. Shaneyfelt stated that “if the patient really became distressed, then [she] probably would have called the code,” and that she had a “yellow phone” with her in case she indeed needed to call the “code.” Tr. 75, 83.

After alerting Respondent to the patient’s allergy, Ms. Shaneyfelt observed Respondent rushing out of the scanning room and returning to the patient. She further recalled that while she did not physically see the Respondent push the Benadryl, she heard Respondent say that he had pushed 50 cc’s of Benadryl into the patient’s IV access. Tr. 60-61, 69. At no time did Dr. Asadi tell either Ms. Shaneyfelt or Respondent to administer 50 milligrams of Benadryl to the patient. Tr. 132. At no time did Dr. Asadi give prior orders, standing or otherwise, that directed a radiologic technologist to push IV Benadryl prior to the July 2008 incident. Tr. 134. Even though the radiology resident was not immediately present in the scanner room, Ms. Shaneyfelt did feel that Dr. Asadi was immediately available when she was needed. Tr. 87.

When Dr. Asadi arrived in the scanner room, she witnessed the Respondent listening to the patients lungs. Tr. 128. Respondent informed Dr. Asadi that he had given the patient

Benadryl for an allergic reaction and that the patient was fine. Tr. 129. After responding to the situation, Dr. Asadi only had recollection of Respondent explaining that the patient had developed hives; she further testified that Respondent had prepared a record of what he had done reflecting the same which she signed off on. Tr. 129-130. Joint Ex. 1, page 2. It is Dr. Asadi's understanding that radiologic technologists are supposed to page the radiologist on call concerning patients with allergic reactions to IV contrast. Tr. 130. Dr. Asadi stated that while the administering of Benadryl may have been the "right thing to do ultimately," it was a decision that is properly made by the physician, not the radiologic technologist. Tr. 133.

Dr. Asadi also stated that if the reaction was simply hives, which is all that was documented in the patient chart³, then the patient could probably have waited. Additionally Dr. Asadi stated that "if it were something like respiratory distress, then we would have probably called a code and not [given] Benadryl." Tr. 133.

Witness Kenneth Bragg has admitted that he was not present for the incident in question and he was in fact in a different scanner room with another patient, which was corroborated by both Ms. Shaneyfelt's and Ms. Headley's testimony. Tr. 67, 104, 144-145. Even Mr. Bragg testified that when he has dealt with patients having allergic reactions, he has either had the physician inject any drugs necessary because there are only certain lines that they are permitted to inject into or he has taken that patient to the Emergency Department. Tr. P. 155-156. Despite the fact that Mr. Bragg is of the opinion that he has the clinical and didactic education and background to push medications into patients, Mr. Bragg testified that he has never had to push

³ Joint Ex. 1, page. 2.

50 milligrams of Benadryl without a doctor's order because "the doctors usually were there, or [he] automatically shoved the patient into the ER⁴ and they dealt with it, if you didn't call a code." Tr. 152, 157-158.

The Respondent testified that staff brought the patient down and left him in the hall because there was another patient on the table when they arrived. Tr. 168. He further stated that there were no visible signs (ie. armband, etc) indicating any contrast allergies or evidence that the patient had been premedicated, so he proceeded with the three injections of contrast. Tr. 169. After administering the third dose of IV contrast, Petitioner returned to the patient to remove him from the scanner and noticed that the patient was breaking out with "some hives," at the same time Ms. Shaneyfelt informed him that the chart stated that the patient had an allergy and she paged the radiologist. Tr. 171.

Respondent then administered Benadryl through the patient's IV because the patient was, in his opinion, deteriorating as he was breaking out in more hives and allegedly having difficulty breathing. Tr. 174. Respondent stated that his immediate concern was that the patient was going to continue to deteriorate until ultimately reaching the level of a "full-fledge code." Tr. 175. Petitioner admitted that he had previously administered drugs to patients without a doctor's orders. Tr. 91. Board Ex. 3. In addition to this instance of administering Benadryl intravenously, Respondent stated that he, in his past experience, has "flushed central catheters [. . .], [done] angiograms, and [has] even gave adrenaline directly into the heart with catheterizations and plasties." Tr. 184.

⁴ Mr. Bragg provided testimony that the ER is about twenty (20) feet down the hall from the CT suites. Tr. 155-156.

Interestingly, Respondent made notations in the patient file regarding the incident. In those notations, he mentions that hives were present but makes no mention of any labored breathing or respiratory distress. Tr. Vol. II. 78, 83. Joint Ex. 1. Page 2. Respondent further made notations that 50 cc's of Benadryl had been administered in response to the hives which had developed and that the hives began to dissipate after the administration of said drug; again **Respondent made no notation regarding the affect of the medication on any supposed labored breathing or respiratory distress.** Tr. Vol. II. 78-81. (emphasis added). Respondent agreed that the presence of labored breathing or respiratory distress would rise to the level of urgency that it should be noted in the patient file, however did not make any mention of the labored breathing or any other sort of respiratory distress in his notations to the patient file.⁵ Tr. Vol. II. 79-81.

The training that Respondent had pertaining to oral, IV and sub Q and IM administration of medications was in Kansas in 1988. Tr. 185. Further, Respondent agreed that the training that he believes would permit his administering of drugs without a physicians order would not give him any authority to obtain the drug without a prescription. Tr. Vol. II. 74. Respondent also agreed that, while Benadryl may be obtained in a tablet or pill form over the counter at a local area drug store, this medication is distinguishable from the liquid form that he administered to the patient during this incident because, regardless of what training one may have, only someone with a prescription or prescription writing authority can obtain this form of Benadryl. Tr. Vol. II. 72-

⁵ During the oral presentations of the March 18, 2010 final hearing on the matter, Mr. Harrison's attorney stated that he had not properly recorded the patient's reaction in the chart because he is not confident with his writing skills.

74. The injectable form of Benadryl is a “secured item” that cannot be obtained over the counter, rather it requires a medical professional with prescription writing authority. Tr. Vol. II. 44.

Respondent admits that the injectable form of Benadryl cannot be obtained without a prescription. Tr. Vol. II. 72-73. Respondent admits that he does not have the ability or authority to write prescriptions to obtain the injectable form of Benadryl. Tr. Vol. II. 73. While Respondent did submit attendance sheets to the Board as proof of didactic experience, he admits that he cannot present these same forms to a pharmacist in order to write or obtain the injectable form of Benadryl which requires prescriptive authority to obtain. Tr. Vol. II. 74. Respondent further admits that he has not at any time been qualified as a medical doctor, registered nurse or licensed practicing nurse. Tr. Vol. II. 73.

Ms. Headley stated that “[i]f the patient warrants significant assistance or has trouble breathing or is in some way in need of emergency care, [the technologist] can call a code or [they] can get other medical professionals involved.” Tr. Vol. II. 42-43. She further provided that “[t]he emergency department, because of its proximity, because they are on the same floor and they are adjacent to the CT scanners, [] has always been a mechanism for [radiologic technologists] to use to get additional medical assistance to our patients.” Tr. Vol. II. 43. “The hospital provides several mechanisms for the technologists to get the additional medical support that they need, and that’s always what we guide the technologists to do[,]” therefore there are no appropriate situations that a radiologic technologist could or should inject drugs, outside of IV contrast, to patients without a doctor’s order. Tr. Vol. II. 49.

Based on the evidence submitted by both parties, the Hearing Examiner issued a Recommended Order which the Board adopted in *toto*. The Petitioner issued a Final Order on

September 25, 2009 suspending the Respondent's license for a period of two (2) years followed by a three (3) year probationary period.

III.

ASSIGNMENT OF ERROR

THE CIRCUIT COURT COMMITTED CLEAR LEGAL ERROR WHEN IT IMPERMISSIBLY SUBSTITUTED ITS JUDGMENT FOR THAT THE STATE BOARD WITH REGARD TO WHAT ACTIONS ARE WITHIN THE SCOPE OF PRACTICE FOR A RADIOLOGIC TECHNOLOGIST.

The parameters of a radiologic technologist's scope of practice and maintaining the health and safety of the public are at the heart of this matter - specifically do radiologic technologists have the inherent authority to dose and administer intravenous medications without consultation or direction of a licensed medical doctor and do medical institutions have the authority to broaden the scope of a radiologic technologists beyond that prescribed by law. On March 26, 2010, the Circuit Court reversed a Final Order of the Board on the grounds that such order was "arbitrary and capricious" stating that because "(1) the record shows that there are no relevant regulations, code sections, or institutional policies that expressly prohibit Rad Techs from administering Benadryl intravenously; and (2) that there [was] an applicable, but vague, institutional policy that could reasonably lead Rad Techs to believe that they are authorized to intravenously administer Benadryl when a patient develops a "mild to moderate allergic reaction" to Contrast." Exhibit 1 at pages 15-16. The Board submits to this Court that the Circuit Court's determination is in error and opens the door to conduct by its licensees that puts the public at a severe, if not fatal, risk of danger which is directly contrary to the Board's legislative - mandate to protect the public.

The West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners is a regulatory Board created for the purposes of regulating the practice of medical imaging and radiation therapy technology in the State of West Virginia. W. Va. Code § 30-23-1 *et seq.* In order to carry out its regulatory duties under the authority granted to it by law, the Board is empowered to refuse to issue, refuse to renew a license, suspend, revoke or limit any license or practice privilege of any licensee who, after hearing, has been adjudged by the Board to be in violation of any rules promulgated under Chapter 30, Article 23. W. Va. Code § 30-23-24(a)(4). This Court has long held that the decisions of administrative agencies, that have been established to oversee particularized areas of governmental functioning, must be given deference because it is within their areas of expertise to render final decisions in certain matters. *See In re Queen*, 473 S. E.2d (W. Va. 1996) (great deference must be given to selection of remedy by correctional officer's civil service commission because its members draw on a fund of knowledge and expertise all their own); *Berlow v. West Virginia Board of Medicine*, 458 S.E.2d 469 (W. Va. 1995) (*per curiam*) (Medical Board's determination of penalty of restricted practice should not have been overturned by circuit court because the penalty had been determined by those with special expertise to determine nature and duration of discipline); *West Virginia Department of Health v. West Virginia Civil Service Commission*, 358 S.E.2d 798 (W. Va. 1987) (it is province of Civil Service Commission, not the courts, to set punishment for state employees).

Further, in *North v. West Virginia Board of Regents*, 332 S.E.2d 141 (W. Va. 1985), this Court recognized the expertise of educators to determine the appropriate sanctions for misconduct committed by those persons for which they are responsible. In this instance, Petitioner's case was heard and a recommendation was made by an independent hearing examiner, a licensed attorney

with more than thirty (30) years of legal experience. The Respondent Board is comprised of eleven (11) members consisting of one (1) Radiologic Health Specialist from the Radiation, Tonics and Indoor Air Division of the West Virginia Department of Health and Human Resources; three (3) licensed practitioners, two of whom shall be Radiologists; three (3) licensed Radiologic Technologists, one of whom shall be an active medical imaging educator; one (1) licensed Nuclear Medicine Technologist; one (1) licensed Magnetic Resonance Imaging Technologist; and two (2) citizen members. W. Va. Code § 30-23-5. The members of Respondent Board are very qualified and knowledgeable of the practice of medical imaging and radiation therapy technologist and are in the best position to determine the appropriate sanctions for the Petitioner's violation of the Medical Imaging Act.

Other jurisdictions have agreed with West Virginia's analysis. *See Pasco Housing Auth. v. State of Wash., Pub. Emp. Rel. Comm'n*, 991 P.2d 1177 (Wash. Ct. App. 2000) (an administrative agency's determination of sanctions receives even greater judicial deference than those of a trial court because those remedies are peculiarly a matter of administrative competence); *Colorado Real Estate Comm'n*, 947 P.2d 933 (Colo. 1997) (court may not substitute its judgment for that of an agency vested with the discretion to impose sanctions); *Boyd v. Department of Revenue*, 682 So.2d 1117 (Fla. Dist. Ct. App. 1996) (it is not the position of an appeal court to re-weigh evidence and come to a different conclusion regarding sanctions imposed by the state employee relations commission).

The first ground on which the Circuit Court based its reversal of the Board's Order was that "the record shows that there are no relevant regulations, code sections, or institutional policies that expressly prohibit Rad Techs from administering Benadryl intravenously." Exhibit 1 at page

15. If this Court subscribes to the rationale of the Circuit Court, then a Rad Tech is permitted to both dose and administer the drug of his/her choice without any direction from a physician simply because there is not a statute expressly prohibiting specific drugs. Simply put, acceptance of the Circuit Court's rationale is a statement that the Legislature intended for a radiologic technologist to have the power to diagnose, dose and administer drugs thereby practicing medicine within the scope of their license. West Virginia Code § 30-23-9 outlines that the requirements for acquiring a radiologic technologists license includes, in pertinent part, acquisition of a high school diploma or its equivalent and successful completion of an accredited program in radiologic technology as approved by the Board. Considering that both the establishment of the Board and legislation were meant to protect the public, the Circuit Court's logic is adverse to the legislative intent and frightening at best.

While there is no statute expressly prohibiting a radiologic technologist from dosing and administering any drug, the Medical Imaging and Radiation Therapy Technology Practice Act does specifically speak to contrast media, the sole drug utilized by radiologic technologists in their day to day employment, stating in pertinent part that the scope of a Radiologic Technologist includes “[a]dministering contrast media **after consultation with, and under the supervision of, a physician who is immediately and physically available.**” W. Va. Code § 30-23-10(10) (emphasis added). This Court has stated that in interpreting any statute, it looks to the intent of the Legislature. “It is a cardinal rule of construction governing the interpretation of statutes that the purpose for which a statute has been enacted may be resorted to by the courts in ascertaining the legislative intent.” Syl. Pt. 4, *State ex rel. Bibb v. Chambers*, 138 W. Va. 701, 77 S.E.2d 297 (1953).

This Court further stated that whenever it interprets a statute it “should be read and applied as to make it accord with the **spirit, purposes and objects of the general system of law of which it is intended to form a part of**; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.” Syl. Pt. 5. *State v. Snyder*, 64 W. Va. 649, 63 S.E. 385 (1908) (emphasis added). “The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. Pt. 1, *Smith v. State Workmen’s Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

The Board properly held that, because the law speaks specifically to the one drug that radiologic technologists are permitted by law to administer, stating that contrast media requires consultation with a physician, it can be reasonably inferred that Mr. Harrison would have minimally needed an order from a physician before administering a drug outside of that specifically permitted, like Benadryl. Further holding that Mr. Harrison’s admitted independent administration of IV Benadryl without any involvement from a physician is a violation of the laws as they pertain to the scope of practice of Medical Imaging and Radiation Therapy Technology.

The second ground upon which the Circuit Court based its reversal of the Board’s Final Order was “that there is an applicable, but vague, institutional policy that could reasonably lead Rad Techs to believe that they are authorized to intravenously administer Benadryl with a patient develops a “mild to moderate reaction” to Contrast.” Exhibit 1 at page 16. Not only does this make the same conclusion regarding what a radiologic technologist’s ability to diagnose, dose and

administer medications intravenously, it also suggests that the legislature intended to permit institutions to usurp the laws as they pertain to the scope of practice of a radiologic technician by being able to broaden a tech's scope of practice above and beyond what is stated in the law. In the instant case, despite the fact that every licensed technologist who testified during the hearing on this matter stated that they had never had occasion to inject any drug without the order of a physician, the Petitioner cited a "protocol book." Both the Board and Mr. Harrison offered evidence during the hearing as to the amount of weight that should be afforded to that document, and the trier of fact made a determination as to the credibility of both views of the evidence presented. Petitioner has not alleged any instance of improper evidence, rather he has simply stated that he is not in agreement with the determination of the trier of fact.

Additionally, should it be determined that the legislature did intend for a radiologic technologist's scope of practice to be unilaterally broadened beyond that provided by law, the Circuit Court cited a institutional policy that required "mild or moderate" reaction, which, if Mr. Harrison's version of the facts below are to be accepted, is incorrect as Mr. Harrison has maintained that the purpose for his intravenously administration of a medication was an exigent circumstance. Mr. Harrison also agreed that the particular form of Benadryl in question can only be obtained by a physician or someone with a prescription from a physician. Again, the hearing examiner took all evidence presented, even Mr. Harrison's submission of a photocopy of the front panel of an over-the-counter box of Benadryl, under consideration when weighing all evidence before him. With its ruling the Circuit Court has improperly determined that the hearing examiner's choice between the two views of the evidence is clearly erroneous, despite the fact that well established law provides that cannot be clearly erroneous and should not be reversed even

if this Court is convinced that if it were sitting as trier of fact that it would have weighed the evidence differently. *Anderson v. City of Bessemer City, supra*, 470 U.S. at 473-74, 205 S. Ct. at 1511-12, 84 L.Ed.2d at 528. *See also United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S. Ct. 177, 179, 94 L.Ed. 150, 153 (1949). Petitioner has not proven that the hearing examiner based his conclusion on improper evidence. *State ex rel. Gareth W. Norton v. Ward D. Stone, Jr., etc., et al.*, 313 S.E.2d 456 (W. Va. 1985).

IV.

CONCLUSION

Based upon the foregoing, the Petitioner, the West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners, respectfully requests that this Court grant its appeal and reverse the Opinion Order Reversing Administrative Order dated March 26, 2010, and affirm the Order of September 25, 2009.

Respectfully submitted,

WEST VIRGINIA MEDICAL IMAGING
AND RADIATION THERAPY
TECHNOLOGY BOARD OF EXAMINERS,

By Counsel

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CERTIFICATE OF SERVICE

I, Nicole A. Cofer, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Petition for Appeal" was served by depositing the same postage prepaid in the United States mail, this 26th day of July 2010 addressed as follows:

Jacques R. Williams, Esquire
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315 High Street
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NICOLE A. COFER