

12-0422

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FERDINAND SORONGON,  
Petitioner,

v.

Civil Action No.: 11-AA-119  
Judge Louis H. Bloom

WEST VIRGINIA BOARD OF  
PHYSICAL THERAPY,  
Respondent.

FINAL ORDER DENYING PETITION FOR APPEAL AND  
AFFIRMING THE BOARD'S FINAL ORDER

FILED  
2012 JAN 26 PM 3:39  
KATHY S. BRISCHLER, CLERK  
KANAWHA COUNTY CIRCUIT COURT

On September 26, 2011, came the petitioner, Ferdinand Sorongon ("Petitioner"), counsel, Charles M. Johnstone, II, and the respondent, the West Virginia Board of Physical Therapy ("Board"), by counsel, Katherine Campbell, Assistant Attorney General, for a hearing on the Petitioner's Petition for Appeal, filed on September 19, 2011. The Petitioner appeals from the Board's Final Order entered on August 29, 2011, which adopted the Hearing Examiner's Recommended Order and revoked the Petitioner's physical therapy license and ordered the Petitioner to pay the Board the costs of the proceedings in the amount of \$27,148.30. Upon review of the Petition for Appeal, the parties' proposed findings of fact and conclusions of law filed herein, the underlying administrative record, and the applicable law, the Court is of the opinion that the Petition for Appeal should be denied and the Board's Final Order affirmed, based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Board is the state administrative agency charged with the responsibility of administering and enforcing state laws and regulations pertaining to the practice of physical therapy in the state of West Virginia including, but not limited to, the practice of physical therapists and physical therapist assistants. See W.Va. Code § 30-20-1, *et seq.*

T. Close  
1/4

2. The Petitioner is a licensee of the Board as a physical therapist and is the owner of Kanawha Valley Physical Therapy Center ("KVPTC"), which maintains offices in Dunbar, West Virginia and Teays Valley, West Virginia. March 17, 2011, Record at 246, 249 (hereinafter "3/17/11 R. at \_\_\_\_\_").

3. In April of 2008, the Board received a complaint against the Petitioner alleging that the Petitioner permitted a physical therapy assistant to be supervised by an athletic trainer, that physical therapy treatments were being performed by unlicensed staff, and that, at times, physical therapists were exceeding the number of physical therapist assistants and physical therapy aides that a physical therapist may supervise at any given time. Board's Exhibit 3, Consent Agreement and Order, unnumbered p. 2, ¶ 5; 3/17/11 R. at 251. Although the Petitioner contested the allegations made, after consultation of his then counsel, the Petitioner entered into a "Consent Agreement and Order" with the Board, on February 5, 2009. Board's Exhibit 3; 3/17/11 R. at 252.

4. In the Consent Agreement and Order, which was reviewed and agreed to by the Petitioner, as noted by his signature on the same, the Board made the following pertinent findings: 1) that the Petitioner, as owner of KVPTC and supervising physical therapist on site, had granted clinical supervision of physical therapy assistants and physical therapy aides to an athletic trainer on staff, which included clinical supervision; 2) that the athletic trainer on staff, who is considered a physical therapy aide, admitted he was routinely permitted to perform aquatic therapy in the pool while the supervising physical therapist was not present in the immediate treatment area; and 3) that the athletic trainer on staff admitted he functioned much as a physical therapist assistant performing patient treatments, without the necessary supervision. Board's Exhibit 3, pp. 2-3, ¶¶ 7-9. The Board ultimately found probable cause regarding the

lack of appropriate supervision by a licensed physical therapist and the delegation of clinical supervision of physical therapy assistants and physical therapy aides to an athletic trainer; but, did not find probable cause that the Petitioner was exceeding the supervision ratio at KVPTC. *Id.* at p. 3, ¶ 11.

5. As a result of the Consent Agreement and Order, the Board placed the Petitioner on a probationary period of two years beginning on February 5, 2009. During the probationary period, the Board was permitted to designate an individual to perform random and unannounced visits to the Respondent's facility at KVPTC, including record review, to check for compliance with West Virginia law relating to physical therapists. Board's Exhibit 3, p. 5, ¶ 2.

6. Following the entry of the Consent Agreement and Order, the Board sent random and unannounced investigators to the Petitioner's facility, with the last random visit conducted by Ralph Ulzman on January 18, 2010. However, no patients were being treated at the time of the visit, and as such, only records were inspected and no violations were found. November 18, 2010, Record at 42-44 (hereinafter "11/18/10 R. at \_"); Board's Exhibit 4.

7. Trish Holstein ("Ms. Holstein"), the Executive Secretary of the Board, testified that following Mr. Ulzman's visit to the Petitioner's facility, the Board received a telephone call from a former employee of the Petitioner, named Francisco Bicol, alleging that there were issues with the manner in which the Petitioner operated his facilities. 11/18/10 R. at 33, 45-46. The information was reported to the Board and the Board decided to immediately send one of its Board members, Shannon Snodgrass ("Ms. Snodgrass"), to conduct a random inspection of the Petitioner's Dunbar, West Virginia facility. 11/18/10 R. at 45-47.

8. Ms. Snodgrass spent a couple of hours at the Petitioner's Dunbar facility. She created no written or verbal reports of her visit, but did recommend that the Board retain an investigator to conduct a more thorough inspection of the Petitioner's facilities. The Board retained Cynthia Fox, a former Board member, to conduct a random inspection of the Petitioner's facility. 11/18/10 R. at 47-48.

9. Ms. Fox is a licensed physical therapist and was once a Board member as well. While on the Board, she was a member of the Complaint Review Committee and completed CLEAR training which is for those individuals serving on regulatory boards. 11/18/10 R. at 91-93.

10. On May 26, 2010, Ms. Fox visited the Petitioner's Dunbar facility for an unannounced inspection of the facility. Prior to going to the facility, Ms. Fox spoke with Ms. Snodgrass and reviewed the Consent Agreement and Order that was in effect between the Petitioner and the Board. 11/18/10 R. at 95-96, 98. Ms. Fox arrived at the Dunbar facility at approximately 1:30 p.m. and was at the facility for approximately one hour. 11/18/10 R. at 98, 119.

11. When Ms. Fox arrived she introduced herself to the receptionist, who then walked her through the facility back to the office area, at which point she met the Petitioner. 11/18/10 R. at 110, 104. Ms. Fox then walked back through the facility to the gym area. 11/18/10 R. at 105.

12. Ms. Fox testified that when she first arrived at the facility and walked through the gym area she observed Sherry Sayre ("Ms. Sayre"), a physical therapy aide, with an elderly female patient who was performing some type of seated leg exercise. 11/18/10 R. at 105, 107.

However, Ms. Fox testified that no other staff members were present in the gym area, including the Petitioner. 11/18/10 R. at 110. When Ms. Fox came back to the gym area, after walking through the facility, she testified that Ms. Sayre was still in the gym area, but the female patient was no longer performing exercises. However, she testified that another patient in a wheelchair

was in the gym area performing some type of pull-up exercise and no other staff member besides Ms. Sayre was in the gym area. 11/18/10 R. at 110-111. Ms. Fox stated that she spoke to the male patient in the wheelchair for approximately five minutes, at which point another staff member, Steven Jeffrey, entered the gym area. 11/18/10 R. at 112-113.

13. During her visit, Ms. Fox also observed a second treatment area down the hallway from the gym area, that she called the "plinth area." 11/18/10 R. at 114-115. Ms. Fox testified that a person in the plinth area can only see a small portion of the gym area by standing in a certain spot and that if a person is in the actual spaces with the beds where the patients are treated then they would not be able to see into the gym area. 11/18/10 R. at 115. Ms. Fox also testified that she tested whether a person in the gym area would be able hear a person in the plinth area, by shouting out for the Petitioner while she was in the plinth area. 11/18/10 R. at 116-117.

According to Ms. Fox, no one responded or reacted to her shouting. To make sure people were still present in the gym area; Ms. Fox ran back down the hallway and saw Ms. Sayre and the Petitioner in the gym area, with no reaction from either one of them. 11/18/10 R. at 117-118.

14. Ms. Fox also testified that after she first arrived at the Petitioner's Dunbar facility, she observed Kate Lambdin, a physical therapy assistant, in the pool treating two patients. 11/18/10 R. at 120. According to Ms. Fox, a person in the pool has no direct line of sight into the gym and plinth areas. 11/18/10 R. at 121.

15. Ms. Fox did testify that on the date of her visit she did not observe Steven Jeffrey, a physical therapy aide, treating patients, but only observed Ms. Sayre and Ms. Lambdin performing patient treatments. 11/18/10 R. at 146-147. She also testified that she did not see the Petitioner supervising more than two persons, assistants or aides on the day of her visit to the Dunbar facility. 11/18/10 R. at 149.

16. After her visit to the facility, Ms. Fox requested documents from the Petitioner, specifically, requesting the documents for the male patient confined to the wheelchair that she observed performing exercises in the gym area with only Ms. Sayre present on the day of her visit. Upon review of the document, Ms. Fox determined that the male patient was being treated on May 26, 2010, for one hour of physical therapy, as signed off by the Petitioner. 11/18/10 R. at 129-130; Board's Exhibit 7. Ms. Fox also testified that during her investigation she conducted a telephone interview with a former employee of the Petitioner, Francisco Bicol. 11/18/10 R. at 130. According to Ms. Fox, a summary of the conservation was forwarded to the Board as part of her investigation. 11/18/11 R. at 130, 132.

17. Francisco Bicol ("Mr. Bicol") is a licensed occupational therapist with no disciplinary action against him as of the date of the hearing. 3/17/11 R. at 110-111. Mr. Bicol had worked for the Petitioner from September 2006 to August 2010, when he resigned his position. Mr. Bicol testified that he is currently in litigation with the Petitioner regarding the terms of his employment and did not leave his employment with the Petitioner on good terms. 3/17/11 R. at 111-114. Mr. Bicol was the individual who made the complaint to the Board regarding practices at his facilities leading to the investigation. 3/17/11 R. at 115-116.

18. While employed by the Petitioner, Mr. Bicol testified that about ninety percent of the time the Petitioner was not present during patient treatments performed by physical therapy aides, Ms. Sayre and Mr. Jeffrey. 3/17/11 R. at 132, 135. He also testified that on a regular basis he would observe Mr. Jeffrey perform patient treatments without the Petitioner present in the gym area, the modalities area, or the pool area. 3/17/11 R. at 133-135. Finally, Mr. Bicol testified that there were times while working for the Petitioner that he observed Ms. Lambdin, Mr. Jeffrey, and Ms. Sayre all treating patients at the same time.

19. According to the testimony, Sherry Sayre and Steven Jeffrey are neither licensed physical therapy assistants nor licensed physical therapists. 11/18/10 R. at 34-35. If an individual is not licensed by the Board, then the Board has no authority over that person to regulate them and that individual is considered a physical therapy aide by the Board. 11/18/10 R. at 35-36.

20. The Board offered numerous other witnesses' testimony to support the allegations made in the Statement of the Charges. However, the Court need not address such testimony, as the testimony of Ms. Fox regarding her observations at the Petitioner's Dunbar facility on the May 26, 2010 visit, as well as that of Mr. Bicol, support the Board's Decision. Furthermore, the Petitioner offered no evidence to rebut the above testimony other than his own testimony that he has always given the proper supervision to his employees. 3/17/11 R. at 267-268.<sup>1</sup>

21. Following Ms. Fox's visit to the Petitioner's Dunbar facility and after reviewing documentation and conducting interviews of some former employees of the Petitioner, Ms. Fox submitted an Investigation Report to the Board on or about June 18, 2010. Petition for Appeal, p. 4. The Investigation Report was never offered into evidence by the Board during the administrative hearing. *See Record*. As a result of the Investigation Report, on July 1, 2010, the Board issued a "Statement of Charges" against the Petitioner finding probable cause to file a complaint for disciplinary action. The Board, by unanimous vote, found probable cause regarding the lack of appropriate supervision by a licensed physical therapist, lack of appropriate direct supervision of a physical therapy aide, and for exceeding the supervision ratio of physical therapists assistants and aides. Board's Ex. 6, ¶ 14.

---

<sup>1</sup> The Petitioner argues that because he is not the only licensed physical therapist working at KVPTC that the Board had the burden to show that the other physical therapist was not present at the time of the alleged direct supervision and supervision ratio violations. Although the Court disagrees with the Petitioner's position, Ms. Fox clearly testified that no other staff member, including the Petitioner, was present in the gym area while Ms. Sayre was performing patient treatment and that while in the pool there is no direct line of sight to the gym or plinth areas. Furthermore, the Petitioner had the opportunity to cross-examine all the Board's witnesses and develop the record on this issue.

22. Specifically, the allegations in the Statement of Charges are the following:

- a. That on May 26, 2010, the Board's Ethics Investigator, Cynthia Fox, conducted an unannounced site visit.
- b. That during this visit the Ethics Investigator found violations of the supervision ratio by observing the [Petitioner's] treatment activities that day along with interviewing staff and patients and further record review.
- c. That it was discovered that the [Petitioner] routinely supervises all three of his staff, which includes two physical therapy aides and a physical therapy assistant, while they are performing direct patient care.
- d. That due to the physical layout of the [Petitioner's] facility that direct supervision of a physical therapy aide performing treatments in the plinth area, which are routinely performed by Aide Stephen Jeffrey, while the [Petitioner] is in the gym would not be possible by the [Petitioner].
- e. That Physical Therapy Aide Stephen Jeffrey is being supervised by Physical Therapy Assistant Kate Lambdin while he is conducting patient treatments.

Board's Exhibit 6, ¶¶ 8-12. In the Statement of Charges, the Board further notified the Petitioner that the acts listed above, if proven to be true, "would constitute a violation of W.Va. Code §§ 30-20-2(h)(1), 30-20-10(b)(9) and (b)(10), and W.Va. C.S.R. §§ 16-1-9.1.c.(3) and 16-1-2.4, and the Consent Agreement and Order entered into on February 5, 2009."<sup>2</sup>

23. At the beginning of the hearing on November 18, 2010, the Petitioner presented a written motion in limine requesting the hearing examiner to: (1) exclude any evidence, testimony and argument that the Petitioner violated any allegation made in the Statement of Charges that was obtained after July 1, 2010, the date the Board issued the Statement of Charges and (2) exclude any evidence, testimony, and argument not related to one of the allegations made against the Petitioner in the Statement of Charges. The hearing examiner denied the Petitioner's motion in

---

<sup>2</sup> W.Va. Code §§ 30-20-2 (1999) and 30-20-3 (1999) were amended and reenacted in 2010, changing the "Definitions" code section to W.Va. Code § 30-20-3 (2010), with no change to the definition of "direct supervision." See W.Va. Code § 30-20-3(5)(2010). W.Va. Code §§ 30-20-10(b)(9) and (b)(10)(1999), as contained in the Statement of Charges, relate to the suspension and revocation of licenses and the Board's authority to take disciplinary action against its licensees. However, both code sections were amended and reenacted, with the effective date of June 11, 2010, and no longer contain the same subject matter. The 2010 Legislative Amendment also added seven new code sections, including W.Va. Code §§ 30-20-19, 30-20-20, and 30-20-21, which address investigations, complaints, discipline, hearing procedures, and judicial review.

limine both at the time of the hearing and in the Recommended Order. Recommended Order, p. 21, ¶ 15.

24. On August 29, 2011, the Board entered a Final Order, adopting in its entirety the Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Decision and revoked the Petitioner's physical therapy license and ordered the Petitioner to pay to the Board the costs of the proceedings in the amount of \$27, 148.30. Specifically, the Hearing Examiner's Findings of Facts and Conclusions of Law sustained the allegations outlined in the Statement of Charges in their entirety. Recommended Order, pp. 20-21, ¶ 14.

25. On September 19, 2011, the Petitioner filed the present appeal asserting that the Board's Final Order is based on findings of fact and conclusions of law that are erroneous, plainly wrong, and contrary to the substantial evidence on the whole record. The Petitioner also asserts that the conclusions of law in the Board's Final Order are in violation of statutory provisions and improperly extend the statutory authority of the Board. Petition for Appeal, p. 1.<sup>3</sup>

#### STANDARD OF REVIEW

The Court reviews the Board's Final Order pursuant to the West Virginia Administrative Procedures Act, which states as follows:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or

---

<sup>3</sup> The Petitioner also argues that the hearing examiner failed to provide a ruling on many of the proposed findings submitted by him as required by W.Va. Code § 29A-5-3. However, the Court finds no merit to this argument as the Hearing Examiner's Recommended Order is sufficiently clear that the Petitioner's proposed findings were not overlooked or concealed. See Syl. pt. 2, *Modi v. West Virginia Bd. of Medicine*, 195 W.Va. 230, 465 S.E.2d 230 (1995)(citations omitted); Recommended Order, p. 3.

- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g). Furthermore, on appeal a circuit court reviews questions of law presented *de novo* and findings of fact by the administrative officer are accorded deference unless the court believes the findings to be clearly wrong. *See* Syl. pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996). The “clearly wrong” and “arbitrary and capricious” standards of review are deferential ones, which presume that an administrative agency’s actions valid as long as the decision is supported by substantial evidence or a rational basis. *Webb v. West Virginia Board of Medicine*, 202 W.Va. 149, 569 S.E.2d 225 (2002).

#### DISCUSSION

1. At the time of the issuance of the Statement of Charges, Rule 9.1.c.3 of the Board’s administrative rules allowed a physical therapist to supervise only two (2) persons, physical therapy assistants or aides, at any one time.<sup>4</sup> A physical therapy assistant is “a person who assists in the practice of physical therapy by performing patient-related activities delegated to him or her by a licensed physical therapist and performed *under the supervision* of a licensed physical therapist...” W.Va. Code § 30-20-2(i)(1999)(emphasis added). A physical therapy aide is a person, other than a physical therapy assistant, who assists a licensed physical therapist in the practice of physical therapy *under the direct supervision* of such licensed physical therapist. W.Va. Code § 30-20-2(h)(1999)(emphasis added). Direct supervision is the “actual physical

---

<sup>4</sup> The rule has since changed to allow a physical therapist to supervise four persons at any one time. W.Va. C.S.R. § 16-1-8.1.c.

presence of the physical therapist in the immediate treatment area where the treatment is being rendered.” W.Va. Code § 30-20-2(h)(1)(1999). At the time of the hearing, the “immediate treatment area” was interpreted by the Board to mean the area where the physical therapist can see and hear the physical therapy aide. 11/18/10 R. at 141.<sup>5</sup>

2. Pursuant to W.Va. C.S.R. § 16-2-6.6, a complaint and notice of hearing by the Board must state the substance of each offense with sufficient details in order to reasonably apprise the licensee of the nature, date and place of the conduct or condition complained of therein. Citing to W.Va. C.S.R. § 16-2-6.6, the Petitioner argues that the Board erred in its Final Order to revoke the Petitioner’s physical therapy license because the hearing examiner should only have considered evidence obtained during the Board’s investigatory period and only that evidence which related to the allegations made in the Statement of Charges issued by the Board on July 1, 2010. Specifically, the Petitioner argues that the majority of evidence offered by the Board at the administrative hearing was directed at showing that Sherry Sayre, a physical therapy aide, was performing patient treatments without being under the direct supervision of the Petitioner. According to the Petitioner the Statement of Charges does not even mention Ms. Sayre’s name or contain an allegation suggesting that the Petitioner routinely allowed physical therapy aides to perform patient treatments without being under his direct supervision. Petition for Appeal, p. 14. However, the Statement of Charges clearly contains language that upon review of the investigation the Board found probable cause regarding the lack of appropriate direct supervision of a physical therapy aide, which would include Sherry Sayre. Board’s Ex. 6, ¶ 14. Thus, the Petitioner was reasonably apprised of said allegation.

---

<sup>5</sup> This interpretation by the Board has since been adopted as part of the Board’s legislative rules. See W.Va. C.S.R. § 16-1-2.7.

3. Similarly, according to the Petitioner, the Statement of Charges only identifies one date, May 26, 2010, upon which the violations the Board alleged the Petitioner committed were to have occurred and that any information obtained after the issuance of the Statement of Charges and not related to the May 26, 2010 visit, should not have been allowed to be offered by the Board at the administrative hearing. *Id.* The Petitioner argues that the allowance of such evidence at the administrative hearing violated constitutional and statutory provisions applicable to the administrative proceeding, as well as the Board's own legislative rule as to how contested hearings against a licensee are to be conducted. Petition for Appeal, p. 15; *See* W.Va. C.S.R. § 16-2-6.6, *supra*. Thus, the Petitioner asserts the Board's Final Order was contrary to the evidence on the whole record and was arbitrary, capricious and an abuse of the Board's discretion because allegations not made in the Statement of Charges were considered and sufficiently relied upon by the Board in its Final Order to revoke the Petitioner's physical therapy license. Petition for Appeal, pp. 15, 18.

4. In support of the above argument, the Petitioner cites to *State ex rel. Hoover v. Smith*, 198 W.Va. 507, 482 S.E.2d 124 (1997). In *Smith*, the Supreme Court of Appeals of West Virginia addressed the issue of whether a hearing examiner for the West Virginia Board of Medicine has authority to issue subpoenas at the request of the licensee during the investigatory stage and whether the failure to do so violated the licensee's due process rights. *Id.* at 510, 514, 127, 131. In discussing said issue, the Supreme Court of Appeals of West Virginia stated that the Board of Medicine collects information about a pending complaint during its investigatory stage. Then once the investigation is complete and after an administrative hearing, the Board of Medicine adjudicates whether the licensee under investigation should be disciplined. *Id.* at 515, 132. The

Supreme Court of Appeals of West Virginia went on to note that the “Board of Medicine’s investigatory stage ends when the ‘contested case’ is brought against the individual under investigation and that a ‘contested case’ is the case that has moved from the investigatory stage to the adjudicatory stage.” *Id.* at 515 n.12, 132 n.12. Furthermore, a “ ‘contested case’ means a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing...” *Id.*; *W.Va. Code* § 29A-1-2(b)(1982).

5. Pursuant to the language in *Smith*, the Court does find that it was legal error to admit evidence obtained by the Board after its issuance of the Statement of Charges to prove the allegations contained within the Statement of Charges. Clearly the issuance of the Statement of Charges ended the Board’s investigatory stage of those charges, as the Board stated it found probable cause to file a disciplinary action against the Petitioner and advised the Petitioner of his right to present evidence and defend against said charges at a hearing.<sup>6</sup> *See* Board’s Ex. 6, ¶ 13, Statement of Charges (stating that the Board reviewed all the information obtained during [Ms. Fox’s] investigation prior to its finding of probable cause to issue the Statement of Charges). Thus, the Court does agree with the Petitioner that the Board should only have been allowed to present evidence obtained prior and up to July 1, 2010, the date the Board issued the Statement of Charges.

6. Notwithstanding the above error, the Court is of the opinion that the Board’s Final Order should be affirmed, as the Board presented sufficient evidence obtained during its investigatory stage and/or as to conduct occurring only on May 26, 2010, to substantiate two of the violations alleged in the Statement of Charges. Ms. Fox’s testimony about her observations

---

<sup>6</sup> The Court notes that clearly the Board had the authority to issue another statement of charges against the Petitioner, upon a finding of probable cause, based on information obtained from an investigation conducted after the issuance of the subject Statement of Charges, dated July 1, 2010.

at the Petitioner's facility during the May 26, 2010 visit support a finding that the Petitioner failed to provide direct supervision of a physical therapy aide and failed to provide appropriate supervision, as alleged in the Statement of Charges and as required both by the applicable code sections and the Consent Agreement and Order. Specifically, Ms. Fox saw first-hand a physical therapy aide performing patient treatment in the gym area without the physical presence of the Petitioner or any other physical therapist in the immediate treatment area. Such testimony clearly supports the Board's Final Order that the Petitioner violated the "direct supervision" section of the applicable code section, as well as the Consent Agreement and Order, as alleged in the Statement of Charges. Board's Ex. 6, ¶¶ 14-15. Ms. Fox also observed a physical therapist assistant performing treatment on two patients in the pool area and testified that a person in the pool has no direct line of sight into the gym or the second treatment area ("plinth area") down the hallway from the gym area. This testimony supports the Board's allegation of lack of appropriate supervision by a physical therapist. *See* W.Va. Code § 30-20-2(i), *supra*. Thus, even if the only evidence that should have been considered was that of Ms. Fox's testimony as to her observations on May 26, 2010, such evidence still supports the Board's Final Order that the Petitioner violated not only the Board's statutory supervision provisions relating to physical therapy assistants and aides, but also the probationary term of the Consent Agreement and Order, as entered into and agreed upon by the Petitioner. Although the Court notes that revocation of the Petitioner's license is a harsh penalty, in the instant case the Petitioner had previously been disciplined by the Board for the same or similar conduct and in fact, was still under the probationary period set forth in the Consent Agreement and Order.

