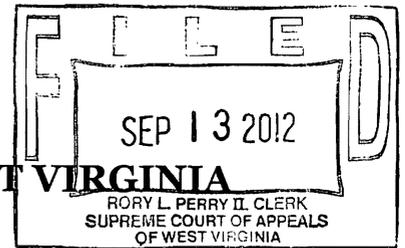


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 12-0422



Ferdinand Sorongon,

Petitioner,

v.

**West Virginia Board Of Physical
Therapy,**

Respondent.

**Appeal from a final order
of the Circuit Court of Kanawha
County (11-AA-119)**

PETITIONER'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT

The Board concedes the first assignment of error in this appeal - the Circuit Court “did err when finding that a physical therapy assistant required direct supervision.” (Respondent’s Brief at 11.) Therefore, this Reply Brief focuses only on Mr. Sorongon’s second and third assignments of error concerning the Board’s application of a “direct line of sight or hearing” requirement to define “immediate treatment area.”

In defense of the Circuit Court’s decision affirming the West Virginia Board of Physical Therapy’s revocation of Ferdinand Sorongon’s license, the Board claims it is “unrefuted” that an investigator “observed a physical therapy aide perform physical therapy treatments with the Petitioner not in the immediate treatment area.” (Respondent’s Brief at 8.) This assertion, however, is far from “unrefuted.” The Board’s argument assumes its conclusion and glosses over the fundamental issue in this case: the *meaning* of “immediate treatment area,” as that term is used in the statutes governing a physical therapist’s supervision of physical therapy aides.

The Board claims that because Mr. Sorongon allegedly was not within the “direct line of sight and hearing” of a physical therapy aide whom the investigator observed in the gym with two patients, he was not in the “immediate treatment area” and, therefore, was not supervising the aide in accordance with the statutes. The Board’s so-called “direct line of sight and hearing” requirement, however, finds no support in the statute or rules that applied at the time of the investigator’s inspection. While the Board claims the term “immediate treatment area” means a “direct line of sight and hearing,” nonetheless, the Board’s narrow interpretation draws an unsupported and overly-exacting requirement from a vague and ambiguous term.

The Board later clarified this ambiguity when it enacted a rule explicitly defining “immediate treatment area” to require a direct line of sight and hearing between the physical therapist and his aide. But this later enactment highlights the ambiguity that existed at the time of the Board’s inspection of Mr. Sorongon’s facility, when physical therapists like Mr. Sorongon were left to guess as to the meaning of “immediate treatment area.” And this ambiguity cannot be cured by retroactive application of the new rule.

The Board attempts to overcome this lack of fair notice with arguments about the Consent Agreement between Mr. Sorongon and the Board, but the Consent Agreement does not (and cannot) hold Mr. Sorongon to a more exacting standard than what is contained in the statute or rules.

Similarly, the Board tries to justify its decision with testimony containing allegations of more egregious violations of the “direct supervision” requirement, but the Circuit Court properly excluded this testimony as inadmissible. At the end of the day, the Board unfairly held Mr. Sorongon to a higher “direct supervision” requirement than what was outlined in the then-existing statute and rules. The revocation of Mr. Sorongon’s license was in error and should be reversed.

II. ARGUMENT

A. **The Applicable Direct Supervision Requirements Were Unfairly Vague Because They Did Not Adequately Define “Immediate Treatment Area.”**

At the time of the Board’s May 26, 2010, inspection of Mr. Sorongon’s facility and its subsequent July 1, 2010, Statement of Charges, physical therapists were permitted to enlist the assistance of physical therapy aides in their practices, so long as the aides worked “under the direct supervision” of a licensed physical therapist. W.Va. Code § 30-

20-2(h) (1999). The code then defined “direct supervision” as “the actual physical 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 Board’s inspection and its subsequent statement of charges, the code and rules in effect at the time did not provide any further guidance. In particular, the code and rules did not define the “immediate treatment area” where physical therapists were expected to be present.

During the Board’s May 26, 2010, inspection of Mr. Sorongon’s facility, the Board’s investigator claims that she observed a physical therapy aide in the gym area while an elderly female patient performed seated leg exercises and a younger male patient used a wall ladder to practice sitting and standing from his wheelchair. Although the investigator noted that she did not see Mr. Sorongon in the gym in the brief time she observed these activities, as the Board candidly admits, the investigator “had no idea where Petitioner was at the time” she entered the gym. (Respondent’s Brief at 16.)

Nevertheless, because Mr. Sorongon was not visibly present to the investigator when she observed these two patients exercising in the presence of a physical therapy aide, the Board concluded that Mr. Sorongon failed to adequately supervise the aide because, according to the Board, he was not in the “immediate treatment area.” The Board based its conclusion on its view that “immediate treatment area” meant “the area where the physical therapist can see and hear the physical therapy aide.” (A.R. 141; 477–78.)

The Board cannot dispute that neither the statute nor the rules provided any guidance on the meaning of “immediate treatment area.” The Board also cannot dispute

that physical therapists have contacted the Board from time to time to seek clarification on the meaning of the direct supervision requirement, and the Board would provide guidance on these terms on an ad hoc basis. The Board tries to minimize the importance of this testimony, but both of the Board representatives who testified at the hearing confirmed fielding these questions in the past. As Ms. Holstein, the Board's executive secretary, testified:

Q. Okay. From time to time does the Board get questions as to what the interpretation of direct supervision is?

A. Yes.

* * *

Q. Okay. Do you recall what the Board – how does the Board handle that when they get asked questions? Do they respond to it in writing or do you know?

A. Yes. If it has been asked before, we can do it verbally, but we have – the Board's Chair, we send the questions to her.

(A.R. 51–52.) And Ms. Fox, the investigator and a former Board member, similarly confirmed:

Q. Okay. During your time on the Board, was the Board given – did people pose questions to the Board about the supervision of aides?

A. Yes.

* * *

Q. So what was the answer the Board gave regarding the supervision of a physical therapy aide by the physical therapist?

A. Right, that they need to be in the immediate treatment area and sometimes things like that were clarified, what does it mean to be in the facility, what does it mean to be in the immediate treatment area. And among other things you have to be like in the

same room, you can't be in a separate room, you know. You couldn't have a person treating a patient in a patient room and the therapist is in the hallway working with someone. They need to be in that immediate treatment area. And that was generally considered, if you can't see them and you can't hear them, you're not in the immediate treatment area.

(A.R. 139–141.) Thus, the Board's own witnesses confirm that the term "immediate treatment area" is fraught with ambiguity, and Mr. Sorongon is not the first physical therapist to struggle with its meaning.

Ignoring this apparent confusion about the term "immediate treatment area," the Board blithely characterizes its direct line of sight and hearing requirement as within the "plain meaning" of the term "immediate treatment area." The Board offers no support for its interpretation. Indeed, terms like "immediate" and "area" relate to physical proximity; these terms do not require one to conclude that "immediate treatment area" is determined by the therapist's use of senses like sight or hearing to maintain constant direct contact with an aide.¹ Thus, on its face, the term "immediate treatment area" does not give a physical therapist any indication that her supervision of a physical therapy aide will be judged on whether she maintains a direct line of sight or hearing with the aide. To interpret this physical proximity requirement to include a more onerous visual or auditory requirement effectively rewrites the statute. Helton v. Reed, 219 W. Va. 557, 563, 638 S.E.2d 160 (W. Va. 2006) ("A statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled or rewritten to achieve some other resort.") Because the Board's wrongly used a "direct line of sight or hearing" requirement when it applied the "immediate treatment area" rule for direct

¹ Black's Law Dictionary (8th Edition), p. 764 (defining immediate).

supervision, it exceeded its authority to interpret the statutes, and its revocation of Mr. Sorongon's license should be reversed.

B. The Board's Subsequent Rule Defining "Immediate Treatment Area" Highlights the Preexisting Ambiguity and Cannot Be Used to Hold Mr. Sorongon to a Higher Standard.

Roughly one year after the Board investigated Mr. Sorongon's facility and brought charges against him for failure to properly supervise a physical therapy aide, the Board revised its rules to provide a restrictive definition of these supervision requirements. Specifically, the Board changed its rules to include a definition of "immediate treatment area" to mean "the area within the physical therapist's direct line of sight or within audible distance of the physical therapist and the ability of the physical therapist to immediately respond to calls for assistance from the patient or physical therapy aide." W.Va. C.S.R. § 16-1-2-2.5, 2.7 (effective 6/16/11). The Board tries to dismiss the importance of this rule, claiming that it merely formalized a standard that was already in place for years. But contrary to the Board's minimizing of this rule, its enactment highlights the key issue in this case: the unfair ambiguity of the term "immediate treatment area" existing prior to the rule's enactment.

Legislative bodies and administrative agencies are not in the habit of drafting superfluous statutes and rules. Rather, laws are written for a reason. Of course, if the intent of the new rule defining "immediate treatment area" was to raise the standard for supervising physical therapy aides, the Board's and Circuit Court's application of this raised standard to Mr. Sorongon would be retroactive and inherently unfair. Shanholtz v. Monongahela Power Co., 165 W.Va. 305, 311, 270 S.E.2d 1978 (1980). In its Response Brief, the Board denies that this new rule promulgated any new standard for direct supervision, and instead claims that the rule was adopted as a mere formality. But the

Board's justification for the new rule not only ignores law, it defies common sense. It is simply illogical for the Board to go through the effort of adopting a rule defining "immediate treatment area" solely to "formalize" an existing standard that posed no problems or confusion. Instead, like any rule promulgated to define terms, the new rule defining "immediate treatment area" was adopted to provide clarity on ambiguous language. Thus, the Board's decision to adopt a formal rule defining "immediate treatment area" (particularly given the multiple informal inquiries from physical therapists on the supervision requirements) confirms that this term was unfairly ambiguous.

In any event, the Board may not informally adopt and enforce new standards and later "formalize" them as a rule because doing so violates the requirements that the Board legislatively promulgate rules. See W.Va. Code § 29A-3-1. The new standards are considered a nullity until duly promulgated. See Coordinating Council for Indep. Living, Inc. v. Palmer, 546 S.E.2d at 464. Ultimately, whether the Board's goal in enacting this rule was to heighten the supervision requirements for physical therapists or merely to clarify a preexisting ambiguous standard, the Board's enactment of a rule defining "immediate treatment area" signals a change in the law, and it was fundamentally unfair and improper for the Board and the Circuit Court to retroactively subject Mr. Sorongon to this previously unpublished standard.

C. The Consent Agreement and Order Does Not and Cannot Put Mr. Sorongon "On Notice" of a More Exacting Direct Supervision Requirement.

In an attempt to avoid the ambiguities in the statute requiring direct supervision of physical therapy aides, the Board instead relies upon a February 5, 2009, Consent Agreement and Order, which the Board claims gave Mr. Sorongon adequate notice of

the Board's view on "immediate treatment area." (A.R. 316-22.) This Consent Agreement and Order concerned an investigation of Mr. Sorongon's facility in 2008, which concluded that Mr. Sorongon exceeded the supervision ratios for his facility and that an athletic trainer was providing therapy without adequate supervision. (A.R. 318.) Contrary to the Board's arguments, however, this Consent Agreement and Order does not excuse the Board from its responsibility to publish clear and unambiguous rules and only enforce those rules it has enacted.

First, the Consent Agreement and Order is not the illuminating document the Board portrays it to be. The Order cites Mr. Sorongon for incorrectly permitting an athletic trainer to conduct aquatic therapy in the facility pool while Mr. Sorongon was away in another room separated by a door. (A.R. 318.) From this Order, it can be understood that a physical therapist who is in another room with the door closed while his athletic trainer provides aquatic therapy in the facility pool is not in the "immediate treatment area." But even if this observation carried precedential weight in defining "immediate treatment area," it does not provide any guidance that the "direct line of sight or hearing" are requirements that the Board would use in this case.²

Second, whatever the Board may write into a Consent Agreement and Order, such an order cannot alleviate the Board of its obligation to promulgate clear and

² In the present appeal, the Circuit Court did not affirm a violation of the supervision ratios. (A.R. 475, 480-481). In fact, Cynthia Fox clearly stated that there was no finding in her investigation that Mr. Sorongon violated the supervision ratios. (A.R. 149) The Board, by conceding the first assignment of error, admits that the Consent Order is also inapposite here. Mr. Sorongon cannot be subject to licensure revocation based upon the fact that Kate Lamdin, a licensed physical therapy assistant, provided services in the pool area, which is a distinct room from the gym separated by a door since the direct supervision rules do not apply to licensed physical therapy assistants. (Respondent's Brief at 11). Nowhere in the Consent Order are the "direct line of sight or within audible distance" standards announced. (A.R. 318, 316-322.) The two issues addressed in the Consent Order simply do not apply to the instant license revocation issue.

effective rules and to enforce only those rules it has enacted. As the Board notes in its Response Brief, the Legislature empowered the Board with the authority to “propose rules for legislative approval . . . implementing the provisions of this article. . . .” W.Va. Code § 30-20-5(a)(4) (1999) (emphasis added). (Respondent’s Brief at 12–13.) Similarly, the Legislature permits the Board to create “[r]easonable rules establishing standards to insure that those activities of a physical therapy aide are performed in accordance with the definitional requirements specified in subsection (h), section two of this article. . . .” W.Va. Code. § 30-20-5(a)(4)(B) (1999) (emphasis added). Thus, the legislature clearly expects that the Board will create and enforce standards for the practice of physical therapy by following proper rulemaking procedures, and not by ad hoc application of new or enhanced standards by individual consent agreements. Coordinating Council for Indep. Living, Inc. v. Palmer, 209 W.Va. 274, 284, 546 S.E.2d 454 (2001) (rejecting the Tax Department’s attempt to effect policy by way of a letter to affected taxpayers without adopting new legislative rules, because such “implementation, extension, application or interpretation of the laws which it was charged to execute” must follow proper rule making procedures) (internal citations omitted). Because the Board has no authority to change or enhance statutory requirements on such an ad hoc basis, the Board cannot rely on the Consent Agreement and Order in this case to excuse its failure to enact rules clarifying ambiguous supervision requirements.

D. The Board Cannot Rely on Inadmissible Evidence to Overcome Its Overly Narrow Interpretation of “Immediate Treatment Area.”

Finally, the Board argues that even if its interpretation of “immediate treatment area” was overly narrow and even if Mr. Sorongon did not have fair notice that what the

investigator observed on May 26, 2010, would violate the direct supervision requirements, the Board was still somehow entitled to revoke Mr. Sorongon's license. But the Board does so by arguing that its case against Mr. Sorongon is based on more than the results of the May 26, 2010 investigation, and that additional testimony from a former employee named Francisco Bicol identifies more egregious conduct that would violate the direct supervision requirements under any interpretation. (Respondent's Brief at 6–8.) Contrary to the Board's arguments, however, the testimony of Mr. Bicol was inadmissible and cannot be used to bolster the Board's weak evidence in support of its revocation of Mr. Sorongon's license.

At the administrative hearing before the Board, the hearing examiner considered extensive testimony from several witnesses. The majority of witnesses were not included in the Board's initial investigation and were not interviewed until months after the Board had already issued its Statement of Charges. (A.R. 209, 227.) In its review of the administrative level hearing, the Circuit Court correctly concluded that the Board should not be able to rely upon evidence obtained after it issues its Statement of Charges. State ex rel. Hoover v. Smith, 198 W.Va. 507, 482 S.E.2d 124 (1997). (A.R. 480.) Thus, any evidence obtained from witnesses after the July 1, 2010, Statement of Charges was issued is inadmissible.

The Board acknowledges this evidentiary ruling, but nevertheless argues that, "Ms. Fox interviewed Mr. Bicol prior to the issuance of the July 1, 2010, Statement of Charges, and as such, Mr. Bicol's testimony would be admissible." (Respondent's Brief at 6.) This argument, however, is not supported by the record. First, Ms. Fox testified that she cannot confirm which portions of her interviews and document review had been completed and submitted to the Board before the Board issued the Statement of

Charges. (A.R. 176–77.) Indeed, although Ms. Fox indicated her “belief” that she talked to Mr. Bicol once before submitting her investigative report to the Board, she admits that she does not know when she spoke to Mr. Bicol, and therefore “couldn’t swear to that.” (A.R. 182.) Likewise, Mr. Bicol testified that he spoke to Ms. Fox on multiple occasions and could not remember when the first conversation took place. (A.R. 230–31.) Thus, without any indication that Mr. Bicol’s knowledge of supervision matters was submitted to the Board before the Statement of Charges was issued, the Board cannot rely on his testimony to support the revocation of Mr. Sorongon’s license.

The Board tries to bolster its use of Mr. Bicol’s testimony by noting that the Circuit Court made findings of fact regarding Mr. Bicol’s testimony. (A.R. 472–73.) But these findings of fact do not represent an endorsement of the use of Mr. Bicol’s testimony and they do not overrule the Court’s evidentiary determination that evidence gathered after the statement of charges was issued is inadmissible. In fact, the Discussion portion of the Court’s Order is properly limited to evidence available before the statement of charges was filed. It makes no mention of Mr. Bicol’s testimony and relies only on Ms. Fox’s testimony about her May 26, 2010, inspection of Mr. Sorongon’s facility. (A.R. 477–81.)

Finally, the Board quotes extensively from Mr. Sorongon’s testimony that an employee named J.D. sometimes accompanied other employees on home visits to provide support and safety. The Board argues that this testimony somehow demonstrates that Mr. Sorongon allowed this employee to travel to patient homes without Mr. Sorongon present in order to assist with physical therapy treatments in the role of a physical therapy aide. (Respondent’s Brief at 19.) But this is not what the record reflects. Indeed, despite counsel for the Board’s repeated questioning, Mr.

Sorongon consistently testified that this employee's assistance was merely a matter of safety and support and did not involve physical therapy treatment. (A.R. 275-76.)

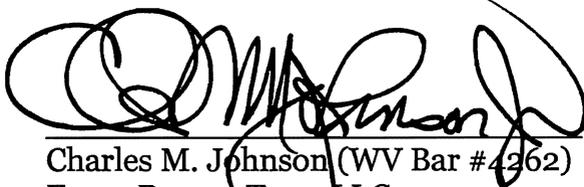
Thus, the Board's evidence in this case is limited to Ms. Fox's brief observations during her May 26, 2010, inspection of Mr. Sorongon's facility. Accepting Ms. Fox's testimony at face value, she observed a physical therapy aide in a gym with two patients. Ms. Fox did not see Mr. Sorongon in the gym, and the Board admits that she did not know where he was at the time and, a few minutes later, Ms. Fox confirmed his presence in the gym. (Respondent's Brief at 16.) Given the ambiguity of the meaning of "immediate treatment area" in the context of supervising physical therapy aides, and the weak evidentiary basis for the Board's findings, the Board abused its discretion in revoking Mr. Sorongon's physical therapy license.

III. CONCLUSION

For all of the reasons explained above and in Petitioner's Amended Brief, Petitioner Ferdinand Sorongon requests that this Court grant review, reverse the January 26, 2012 Final Order of the Circuit Court of Kanawha County, and reinstate Petitioner Ferdinand Sorongon's physical therapy license retroactive to August 29, 2011.

Respectfully submitted,

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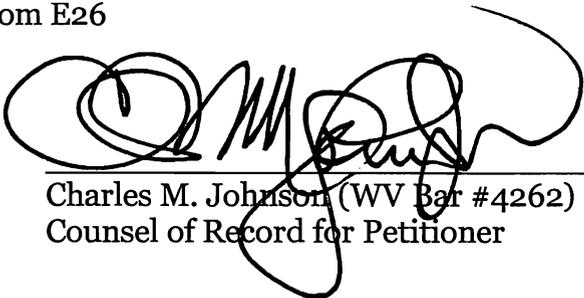
**West Virginia Board Of Physical
Therapy,**

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2012, true and accurate copies of the foregoing **Petitioner's Reply Brief** were hand delivered to counsel for all other parties to this appeal as follows:

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