BEFORE THE WEST VIRGINIA BOARD OF MEDICINE

WEST VIRGINIA BOARD OF MEDICINE,

Petitioner,

v.

SHAKUNTALA MODI, M.D.,

Respondent.

ORDER

This proceeding arises under the West Virginia Medical Practice Act, West Virginia Code § 30-3-1, et seq., and is a disciplinary proceeding involving the status of the license to practice medicine and surgery in the State of West Virginia of Shakuntala Modi, M.D. (hereinafter "Dr. Modi"). The West Virginia Board of Medicine (hereinafter "Board") is the duly authorized State agency to oversee and conduct physician disciplinary hearings pursuant to the provisions of W.Va. Code § 30-3-14.

Procedural History

This matter was initiated by a Complaint and Notice of Hearing issued by the Board on January 24, 1992, setting hearings for March 17 and 18, 1992. Respondent filed a timely Answer

received by the Board on February 22, 1992. On March 2, 1992, the evidentiary deposition of Louis W. Tinnin, M.D. was taken in Morgantown, West Virginia, pursuant to proper notice.

On March 16, 1992, the Board received notice that a Rule to Show Cause had issued on March 13, 1992, in the Circuit Court of Ohio County, West Virginia, pursuant to Dr. Modi's Petition for a Writ of Prohibition (Civil Action No. 92C165). The Rule to Show Cause temporarily stayed the scheduled hearing. On March 20, 1992, the Board petitioned the West Virginia Supreme Court of Appeals for the issuance of a Writ of Prohibition and the Court issued a rule directing Circuit Court Judge Spillers and Dr. Modi to appear on April 28, 1992, to show cause why a Writ of Prohibition should not be awarded to the Board. Dr. Modi filed a response to the Board's petition, argument was made before the Supreme Court of Appeals on April 28, 1992, and the Court issued its per curiam decision in West Virginia Board of Medicine, Petitioner, v. Honorable George L. Spillers, Judge of the Circuit Court of Ohio County, West Virginia, and Shakuntala Modi, M.D., Respondents, No. 21061, issuing the Writ of Prohibition sought by the Board.

The Board then entered an Order dated June 1, 1992, rescheduling the hearing to July 8 and 9, 1992, and Dr. Modi filed a Motion for Continuance on June 25, 1992, which was opposed by the Board. Hearing Examiner Edward Goldberg granted Dr. Modi's continuance motion and set the hearing for October 27, 28, and 29, 1992, by Order entered August 5, 1992. The hearing was convened on said scheduled dates and Dr. Modi was present in person and by counsel, Jolyon McCamic. The Board was represented by its Executive Director, Ronald D. Walton and by counsel, Deborah Lewis Rodecker. The Board called as its witnesses Dr. Modi, Mr. Walton, Allen Stanley Chips, William David Abbott and by deposition, Louis W. Tinnin, M.D., and submitted twelve (12) exhibits which were made part of the record. Dr. Modi testified on her own behalf and called as her witnesses Brian L. Weiss, M.D., William J. Baldwin, D.D.D., Irene Hickman, D.O., David Bradley Cheek, M.D., Jacqueline Gordon, Joel Whitton, M.D., George Perlman, and Alan F. Zerla. Dr. Modi submitted four (4) exhibits which were made part of the

record. Both parties timely filed their Memoranda of Law with the Hearing Officer and at the Hearing Examiner's request, the Board submitted additional materials which were made part of the record. A stenographic record of the hearing was prepared pursuant to 11 CSR 3 11.

In accordance with 11 CSR 3 12, the stenographic record of the hearing, and all the Exhibits and Memoranda of Law were provided to Board members for his or her individual consideration in December 1992, prior to the Board's regularly scheduled meeting on January 11, 1993. The Hearing Examiner's Recommended Decision (hereinafter Hearing Examiner's Recommendation) was received at the Board offices on January 6, 1993, and submitted to and received by the Board members prior to the Board's meeting on January 11, 1993. At the January 11, 1993, regular meeting, where a quorum of the Board was present and voting, the Board considered all of this information. By a majority vote, with Dr. Singh abstaining due to a declared conflict of interest, and in accordance with 11 CSR 3 7, the Board reached its decision. On January 14, 1993, the Board issued its decision, incorporating the Hearing Examiner's Recommendation with extensive changes, and properly served it on Dr. Modi and her counsel.

Dr. Modi appealed the January 14, 1993, Board Order to the Circuit Court of Ohio County and the circuit court reversed and vacated the Board's Order, finding it arbitrary and an abuse of discretion. Specifically, the circuit court found that the Board failed to give a concise and explicit statement of facts upon which the Board based its decision, failed to supply reasons for rejecting Dr. Modi's proposed findings of fact and for rejecting the hearing examiner's determination that expert testimony offered on behalf of Dr. Modi from persons other than physicians licensed to practice in the United States should be considered by the Board, and acted arbitrarily in imposing upon Dr. Modi the requirements regarding consent forms and billing practices with respect to depossession therapy.

The Board appealed the circuit court's order to the West Virginia Supreme Court of Appeals and the Court issued its Order, written by Justice Albright, on November 17, 1995. This

Order reversed the circuit court's order and remanded the case to the Circuit Court of Ohio County and the Board of Medicine with directives. Justice Workman filed a concurring opinion on December 4, 1995. Modi v. West Virginia Board of Medicine, 465 S.E. 2d 230 (W.Va. 1995). The Board filed a Petition for Rehearing on the issue of whether a medical license is a property right or a privilege, Dr. Modi filed a response, and the Court elected not to grant the Board's Petition. Upon request by the Board and pursuant to the Court's directives, Judge Broadwater of the Circuit Court of Ohio County, West Virginia remanded Civil Action 93-CAP-5 to the Board for reconsideration by Order dated December 20, 1995.

In accordance with 11 CSR 3 12, the stenographic record of the hearing, and all the Exhibits and Memoranda of Law, the Hearing Examiner's Recommendations dated January 6, 1993, the Board of Medicine Order dated January 14, 1993, the West Virginia Supreme Court of Appeals' opinion and concurring opinion, Judge Broadwater's Order remanding the case to the Board, and Dr. Modi's counsel's letter dated February 28, 1996, and Dr. Modi's patient consent agreement were provided to Board members for his or her individual review and consideration, prior to the Board's regularly scheduled meeting on March 11, 1996. A quorum was not present and available to vote on this case on March 11, 1996. At the next regular meeting of the Board on May 6, 1996, with a quorum of the Board present and voting, the Board thoroughly considered all of this information. By a unanimous vote, with Dr. Singh not participating in the decision or voting due to a declared conflict of interest, and in accordance with 11 CSR 3 7, the Board reached its decision. Dr. J. Smith, Dr. Faheem, Dr. Brooks, and Dr. Mathias were not present for the meeting. Mr. Grome, P.A.-C, as a former member of the Complaint Committee during the period when Dr. Modi's case was before the Complaint Committee, did not participate in the decision or vote. Dr. Berry presided.

Issues

1. Whether Dr. Modi's treatment of the patient on June 1, 1990, utilizing spirit releasement, depossession therapy, and/or past life therapy violated West Virginia Code § 30-3-14(c)(17) and 11 CSR 1A 12.1(x) in that spirit releasement, depossession therapy, and/or past life therapy is not care and treatment recognized by a reasonable, prudent physician engaged in the same specialty as being acceptable under similar conditions and circumstances?

2. Whether Dr. Modi's treatment of the patient on June 1, 1990, utilizing spirit releasement, depossession therapy, and/or past life therapy admittedly without first obtaining full, informed and written consent from the patient violated West Virginia Code § 30-3-14(c)(14) and (17) and 11 CSR 1A 12.1(y) in that, by the accepted standards of medical practice in the community, spirit releasement, depossession therapy and/or past life therapy constitutes experimentation on human subjects and, therefore, requires the physician to first obtain from the patient full, informed and written consent?

3. Whether Dr. Modi's billing to the patient's insurer for the care and treatment of the patient on June 1, 1990, violated West Virginia Code § 30-3-14(c)(5) and (17) and 11 CSR 1A 12.1(p) in that this billing was a falsely filed report which Dr. Modi knew was false because spirit releasement, depossession therapy, and/or past life therapy is not a form of psychotherapy recognized as acceptable under similar conditions and circumstances by a reasonable, prudent physician engaged in the same specialty?

4. Whether Dr. Modi's use of spirit releasement, depossession therapy, and/or past life therapy in treating the patient on June 1, 1990, and subsequent billing to patient's insurer was unprofessional conduct and therefore violated West Virginia Code § 30-3-14(c)(17) and 11 CSR 1A 12.1(j)?

Discussion

As related in the procedural history, this case came to the Board on remand from the West Virginia Supreme Court of Appeals with directions to reconsider the issues and issue an appropriate order that is a reasoned, articulate decision setting forth the underlying evidentiary facts leading to its conclusions. In light of these directives by the West Virginia Supreme Court of Appeals in its decision styled Modi v. West Virginia Board of Medicine, 465 S.E. 2d 230 (W.Va. 1995), (herein attached as Exhibit II) and after a review of the complete record and thorough consideration of all the evidence, the Board has chosen for clarity and readability to depart from its customary practice of adopting, modifying, or rejecting the Findings of Fact and Conclusions of Law recommended by a Hearing Examiner, solely by referencing pages, sections, or numbers of the Hearing Examiner's recommendations (the "cut and paste" method) and, in this order, will set out in full the evidentiary facts and conclusions of law that led to its reconsidered decision. As the Hearing Examiner's Recommendations dated January 6, 1993, failed to recommend to the Board enumerated findings or conclusions, this Board Order, giving proper weight to the recommendations of the Hearing Examiner, will refer to the Hearing Examiner's findings and conclusions by page number of his decision.

Dr. Modi, by counsel, submitted two hundred and eighty-four (284) findings of fact and twelve (12) conclusions of law in its post-hearing submission to the Hearing Examiner dated December 7, 1992. Dr. Modi, by counsel, submitted to the Board, by letter dated February 28, 1996, her patient consent form. This letter and the patient consent form are attached to this Order as Exhibit I. The Board, by counsel, submitted a Memorandum of Law dated December 7, 1992, and did not submit any additional evidence on remand. The Board hereby adopts those proposed findings of fact, conclusions of law, and arguments advanced by the parties that were expressly adopted in the Hearing Examiner's Recommendations of January 6, 1993, and, in

addition, makes the following findings of facts and conclusions of law. To the extent that the following findings or conclusions are consistent with those proposed findings of fact, conclusions of law and arguments advanced by the parties that were expressly adopted in the Hearing Examiner's Recommendations of January 6, 1993, the same are adopted, and conversely, to the extent that the same are inconsistent with these findings and conclusions, they are rejected. To the extent that these findings or conclusions are consistent with any other proposed findings of fact and conclusions of law submitted by the parties, the same are hereby adopted, and conversely, to the extent that the same are inconsistent with these findings and conclusions, they are rejected. To the extent that the testimony of any witness is not in accord with these findings and conclusions, such testimony is not credited. Any proposed finding of fact, conclusion of law, or argument proposed and submitted by a party but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

Findings of Fact

CASE SUMMARY

Pursuant to 11 CSR 3 13.2, the Board hereby adopts the recommended case summary findings of fact of the Hearing Officer and adds, for clarity, the following findings:

1. Dr. Modi has held a license to practice medicine in West Virginia since 1977, and specializes in psychiatry, receiving her speciality board certification from the American Board of Psychiatry and Neurology in 1980.

2. William Abbott (hereinafter "patient") was referred to Dr. Modi by a certified hypnotherapist and on June 1, 1990, Dr. Modi treated the patient in her Wheeling, West Virginia medical offices.

3. Dr. Modi completed a psychiatric evaluation of the patient and noted her diagnostic impressions as "depressive neurosis 300.4."

4. As reflected in her evaluation report, Dr. Modi's treatment of the patient consisted of 3.5 to 4 hours of continuous session of hypnosis. Dr. Modi recommended to the referring hypnotherapist that the patient should receive regular weekly therapy, exploring with hypnosis the patient's problems, but advised against continuing the treatment with her personally because the patient lived 2.5 hours away.

5. Dr. Modi filed a claim for payment for $480.00 with the patient's insurer for her treatment of him on June 1, 1990. The claim form reflects charges for one hour for "new patient comprehensive" and three hours for "psychotherapy."

6. On June 8, 1990, the patient filed a complaint with the Board against Dr. Modi for her care and treatment of him on June 1, 1990.

7. By letter dated July 17, 1990, Dr. Modi filed an answer to the patient's complaint and in said answer admitted utilizing spirit releasement or depossession therapy in her treatment of the patient on June 1, 1990, but denied any violation of West Virginia statute or regulation.

ADMISSIBILITY AND WEIGHT OF EXPERT TESTIMONY

Pursuant to 11 CSR 3 13.2, the Board hereby adopts the recommended findings of fact of

the Hearing Examiner (Hearing Examiner's Recommendation at 16) concerning the admissibility of the testimony of various expert witnesses about spirit releasement, depossession therapy, and/or past life therapy and Dr. Modi's treatment of the patient on June 1, 1990.

Pursuant to 11 CSR 3 13.2, the Board hereby adopts the recommended findings of fact of the Hearing Examiner (Hearing Examiner's Recommendation at 16) concerning the appropriate weight to be given to the testimony of various expert witnesses about spirit releasement, depossession therapy and past life therapy and Dr. Modi's treatment of the patient on June 1, 1990, and adds, for clarity, the following findings:

8. As the appropriate standard under 11 CSR 1A 12.1(x) is that the care, skill, and treatment of the patient is recognized as being acceptable under similar conditions and circumstances by a reasonable, prudent physician engaged in the same or similar specialty, (emphasis added) the testimony of Dr. Modi's witnesses, William J. Baldwin, (a dentist, clinical psychologist, minister, and hypnotherapist) Dr. Irene Hickman, (an osteopath) and David Bradley Cheek, M.D. (an obstetrician and self-taught practitioner of psychosomatic medicine) cannot be dispositive of whether or not the spirit releasement, depossession therapy or past life therapy treatment was acceptable, as none of these witnesses are engaged in the same or similar medical specialty as Dr. Modi.

9. As the appropriate standard under 11 CSR 1A 12.1(y) is that the treatment of the patient constitutes experimentation on a human subject, by the prevailing standards of medical practice in the community (emphasis added) the testimony of Dr. Modi's witnesses, William J. Baldwin, (a dentist, clinical psychologist, minister, and hypnotherapist) Dr. Irene Hickman, (an osteopath) and David Bradley Cheek, M.D. (an obstetrician and self-taught practitioner of psychosomatic medicine) cannot be dispositive of whether or not the spirit releasement, depossession therapy or past life therapy treatment was experimentation on a human subject as these witnesses failed to demonstrate familiarity with the prevailing medical standards of practice

in Dr. Modi's community.

10. Three psychiatrists testified in this matter, one of whom is not licensed to practice medicine in the United States, and the testimony of all three psychiatrists was properly admitted.

11. Dr. Joel Whitton, Dr. Modi's Canadian psychiatrist witness, held himself out as knowledgeable about spirit releasement, depossession therapy, and past life therapy treatment but testified that he didn't "have enough experience with depossession therapy," TR. at 473 and 478, and the Hearing Examiner properly gave more weight to the two U. S. licensed psychiatrists, based not on their residency or place of licensure but based on their expertise and knowledge of acceptable, accepted, and experimental psychiatric treatment.

RECOGNITION OF THESE THERAPIES AS ACCEPTED TREATMENT

Pursuant to 11 CSR 3 13.2, the Board hereby finds that the Hearing Examiner failed to make findings of fact as to whether or not spirit releasement, depossession therapy, or past life therapy is a recognized and accepted form of treatment of a patient in similar condition and circumstances as the patient Dr. Modi treated on June 1, 1990, and therefore makes the following findings of fact:

12. Psychotherapy is the treatment of mental or emotional disorders or related physical ills by psychological treatment. TR. at 280, 443, and 594.

13. Within psychotherapy, there are many subspecialties including hypnotherapy. Hypnotherapy is psychotherapy of a patient while the patient is under hypnosis. TR. at 446.

14. Hypnotherapy is an accepted treatment recognized by reasonable, prudent psychiatrists and may be used for the treatment of diabetes, hypertension, and other medical conditions. TR. at 296, 550.

15. Spirit releasement, depossession therapy, and past life therapy utilize some of the recognized elements of hypnotherapy, but spirit releasement, depossession therapy, and past life therapy are not synonymous with hypnotherapy. TR. at 363, 453, 459.

16. Spirit releasement, depossession therapy or past life therapy are not accepted treatment in terms of being recognized in the standard psychiatric treatises or medical text books or other medical literature. BD EX 11 at 11, 65 (Tinnin deposition); TR. at 320 (Dr. Weiss).

17. The *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)* and the *International Statistical Classification of Diseases and Related Health Problems* do not recognize spirit releasement, depossession therapy or past life therapy. TR. at 589 (Dr. Modi); Dr. Modi's EX 3.

18. Dr. Modi's expert, Dr. Weiss, testified that those psychiatrists who utilize past life therapy "write in the privacy or secrecy of their office because they're afraid of their reputations or their careers or just being considered weird or strange." He acknowledged that this could be because this is not accepted as standard treatment. TR. at 263, 314.

EXPERIMENTAL TREATMENT AND INFORMED CONSENT

Pursuant to 11 CSR 3 13.2, the Board hereby adopts the recommended findings of fact of the Hearing Examiner (Hearing Examiner's Recommendation at 26 - 29) concerning the

experimental nature of Dr. Modi's treatment of the patient on June 1, 1990. The Board hereby further adopts the recommended findings of fact of the Hearing Examiner (Hearing Examiner's Recommendation at 29) concerning both the necessity for and also the absence of the patient's informed consent prior to the initiation of Dr. Modi's treatment of the patient on June 1, 1990, including his finding that Dr. Modi failed to disclose to the patient the risks of her proposed treatment (Hearing Examiner's Recommendation at 29-31) The Board hereby rejects the Hearing Examiner's finding that written consent is not required by West Virginia law (Hearing Examiner's Recommendation at 30) as an incorrect statement of West Virginia law and adds the following findings:

19. West Virginia law places a duty upon physicians to disclose information to the patient as to the particular medical procedure contemplated. What information must be disclosed is judged by the patient's need for information material to his or her decision as to whether to accept or reject the proposed method of treatment but, in general, would include a description of the benefits and risks of the proposed treatment, the alternative treatment(s) if any and their risks and benefits, and the likely results if the patient remains untreated. Cross v. Trapp, 294 S.E. 2d 446 (W. Va. 1982)

20. Whether any particular medical risk should be disclosed by the physician to the patient depends on both the existence of the risk and the materiality of the risk. Id. Although Dr. Modi's expert, Dr. Weiss, testified that hypnotherapy is risk-free in the hands of an ethical practitioner, TR. at 322, 327, he did not testify that spirit releasement, depossession therapy and/or past life therapy is risk-free; he did testify twice that it is possible that "possession" entities can actually be created by the therapeutic process. TR. at 332. The Board's expert, Dr. Tinnin, testified that there was a risk of damage to the patient with spirit releasement, depossession therapy and/or past life therapy. BD EX 11 at 69.

21. West Virginia law allows a causal relationship between the physician's failure to

disclose information and damage to a patient to be shown if a reasonable person in the patient's circumstances would have refused to consent to the treatment if the risks had been properly disclosed. Adams v. El-Bash, 338 S. E. 2d 381 (W. Va. 1985)

22. The patient testified that he would have refused Dr. Modi's treatment if he had been fully advised of what the treatment consisted of and the risks had been disclosed. He came to Dr. Modi for relief of pain, not believing himself to be haunted or possessed by spirits, and found the spirit releasement, depossession therapy, or past-life therapy provided to him by Dr. Modi "unbelievable," a "witch-doctor session," and abusive and harmful to him. TR. at 129, 131, 142, 144-7, and 176.

23. West Virginia law recognizes two exceptions to the required physician disclosure of relevant information to the patient before initiating treatment: 1) an emergency in which harm from failure to initiate treatment is imminent, and 2) when the physical or emotional results of the disclosure to the patient could jeopardize the patient. Cross v. Trapp, 294 S.E. 2d 446 (W.Va. 1982)

24. As West Virginia law places the burden of proof on the non-disclosing physician to show that one or both of the exceptions existed and therefore justified his or her nondisclosure of the required information, Id., and as Dr. Modi failed to demonstrate that either or both exceptions existed prior to her initiation of treatment of the patient on June 1, 1990, Dr. Modi was required to disclose to the patient what information she knew he needed to make an informed decision.

25. Dr. Modi failed to disclose the risks of her proposed treatment to the patient.

26. West Virginia law requires that before a physician performs any procedure or prescribes any therapy that by the accepted standards of medical practice in the community would constitute experimentation on human subjects, the physician must get full, informed and written

consent. (emphasis added) W.Va. Code § 30-3-14 (c) (14).

27. The Board's expert, Dr. Tinnin, found the patient's treatment by Dr. Modi experimental, BD EX 11 at 12, and Dr. Modi's expert, Dr. Weiss, testified that the therapy needs to be studied, tested, and proven. TR. at 289. Dr. Modi herself testified as to how much she is learning from practicing this therapy and that her list of ailments that are helped or cured by the therapy is growing longer and longer every day. BD EX 1 at 3,5; TR at 28-30.

29. By the accepted standards of medical practice in the community, spirit releasement, depossession therapy and/or past life therapy constitute experimentation on human subjects, and therefore, Dr. Modi was required by statute to obtain full, informed and written consent from the patient before initiating treatment on June 1, 1990.

30. Dr. Modi failed to obtain full, informed and written consent from the patient before initiating treatment on June 1, 1990 . TR at 64.

The Board would note that Dr. Modi's "Informed Consent Agreement,"conveyed to the Board by letter dated February 28, 1996, and attached to this Order as Exhibit I, in its opinion, fails to address the West Virginia legal requirements of informed consent in that it does not address the risks of the proposed treatments, alternate treatment methods and risks thereto and likely results if the patient remains untreated. As this "Informed Consent Agreement" was not

introduced at the hearing and is not therefore a part of the record, the Board declines to make a finding of fact concerning this document.

INSURANCE BILLING

The Board hereby rejects the Hearing Examiner's findings that Dr. Modi's reliance upon depossession therapy is legitimate care and treatment and that Dr. Modi is entitled to bill for same, (Hearing Examiner's Recommendation at 33) as being inconsistent with the record, the law and the remainder of the Hearing Examiner's recommendations. The Board hereby makes the following findings :

31. Spirit releasement, depossession therapy, or past-life therapy is experimental and not treatment recognized by reasonable, prudent physicians in the same specialty but whether Dr. Modi knowingly falsely billed the patient's insurer or was entitled to bill and receive payment for this treatment from the patient's insurer depends upon the contract language of the patient's medical insurance policy, and Dr. Modi's knowledge of the language in the policy.

32. As the record does not contain evidence of the contract language of the patient's medical insurance policy and Dr. Modi's knowledge, if any, of the policy language, no finding of fact can be made by the Board as to whether Dr. Modi knowingly falsely billed the patient's insurer or whether Dr. Modi was entitled to bill and receive payment from the patient's insurer for the spirit releasement, depossession therapy, or past-life therapy treatment of the patient on June 1, 1990.

Conclusions of Law

Pursuant to 11 CSR 3 13.2, the Board hereby adopts the recommended conclusions of law of the Hearing Examiner and adds, for clarity, the following conclusions :

1. Dr. Modi is a physician licensed in the State of West Virginia and the West Virginia Board of Medicine is the state agency charged with licensure and discipline of physicians under W. Va. Code § 30-3-1 et seq.

2. The West Virginia Board of Medicine has jurisdiction over the subject matter and over Dr. Modi.

3. The Board bears the burden of proving the allegations in its complaint by clear and convincing evidence.

4. It has been shown by clear and convincing evidence that Dr. Modi's use of spirit releasement, depossession therapy, and/or past-life therapy treatment on the patient on June 1, 1990, without appropriate information disclosure to the patient, was a failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonable, prudent physician engaged in the same or a similar specialty as being accepted under similar conditions and circumstances. Dr. Modi is therefore subject to discipline for violation of W. Va. Code § 30-3-14 (c) (17) and 11 CSR 1A 12.1 (x).

5. It has been shown by clear and convincing evidence that the spirit releasement,

depossession therapy, and/or past-life therapy treatment provided by Dr. Modi to the patient on June 1, 1990, by the accepted standards of medical practice in the community, constituted experimentation on a human subject, therefore requiring that Dr. Modi first obtain from the patient full, informed, and written consent, which she failed to do. Dr. Modi is therefore subject to discipline for violation of W. Va. Code § 30-3-14 (c) (14) and (17) and 11 CSR 1A 12.1 (y).

6. It has not been shown by clear and convincing evidence that the spirit releasement, depossession therapy, and/or past-life therapy treatment provided by Dr. Modi to the patient on June 1, 1990, and her subsequent billing to the patient's third party insurer for said treatment constitutes filing a report that Dr. Modi knew was false, thus subjecting her to discipline for violation of W. Va. Code § 30-3-14 (c) (17) and 11 CSR 1A 12.1 (p).

7. It has not been shown by clear and convincing evidence that the spirit releasement, depossession therapy, and/or past-life therapy treatment provided by Dr. Modi to the patient on June 1, 1990, and her subsequent billing to the patient's third party insurer for said treatment constitutes unprofessional conduct, departure from or failure to conform to the standards of acceptable and prevailing medical practice by Dr. Modi, thus subjecting her to discipline for violation of W. Va. Code § 30-3-14 (c) (5) and (17) and 11 CSR 1A 12.1 (j).

8. It has been shown by clear and convincing evidence that in the absence of the restrictions and conditions placed upon her medical license herein, Dr. Modi is unqualified to practice medicine in the state of West Virginia.

Decision

The Hearing Examiner's Recommendation is attached hereto and to the extent specified, and consistent with the findings and conclusions set forth in this Order, it is incorporated by reference herein. Based upon the foregoing Findings of Fact and Conclusions of Law and giving weight to the Proposed Order found in the Hearing Examiner's Recommendation, and in accordance with West Virginia Code § 30-3-14 (c) (14) and (17), § 30-3-14(i), 11 CSR 1A 12.1 and 12.3, the Board hereby ORDERS:

1. That Dr. Modi is PUBLICLY REPRIMANDED for her failure to secure the requisite informed consent of her patient on June 1, 1990, before initiating the spirit releasement, depossession therapy, and/or past-life therapy treatment; and

2. Within thirty (30) days of the date of this Order, Dr. Modi shall pay a civil fine of one thousand ($1,000.00) dollars to the West Virginia Board of Medicine; and

3. Within one year of the date of this Order, Dr. Modi will furnish proof to the Board of Medicine of completion of six (6) hours of continuing medical education (CME) with the educational subject matter of ethical principles and/or guidelines for patient information concerning psychiatric medical treatment. This six (6) hour requirement is in addition to the regular CME requirements for licensing; and

4. Within sixty (60) days of the date of this Order, Dr. Modi will develop and submit to the Board for review and approval a patient informed consent form incorporating the legal

requirements outlined in Findings of Fact 19 through 21 and more fully in Cross v. Trapp, 294 S.E. 2d 446 (W.Va. 1982) and Adams v. El-Bash, 338 S. E. 2d 381 (W. Va. 1985).

DATED this 30th day of May, 1996.

A. Paul Brooks, Jr., M.D.
President

William T. Wallace, Jr., M.D., M.P.H.
Secretary

BEFORE THE WEST VIRGINIA BOARD OF MEDICINE

WEST VIRGINIA BOARD OF MEDICINE,

Petitioner,

vs. West Virginia License Number 11178

SHAKUNTALA MODI, M.D.,

Respondent.

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF EDWARD C. GOLDBERG, HEARING EXAMINER

Dated: January 6, 1993

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BEFORE THE WEST VIRGINIA BOARD OF MEDICINE

WEST VIRGINIA BOARD OF MEDICINE,

Petitioner,

vs. (License Number 11178)

SHAKUNTALA MODI, M.D.,

Respondent.

I.

INTRODUCTION

Shakuntala Modi, M.D., (Dr. Modi), has held a license to practice medicine in West Virginia since 1977 (License Number 11178). She specializes in psychiatry and maintains an office in Wheeling, West Virginia. She has been Board certified since 1980 (Tr. 10/29, pp. 544 - 545)

This proceeding arises under the West Virginia Medical Practice Act, West Virginia Code §30-3-1, et seq., and is a **disciplinary proceeding** involving the status of Dr. Modi's license to practice medicine and surgery in West Virginia. The West Virginia Board of Medicine ("The Board") is the duly authorized State agency to oversee and conduct physician

disciplinary hearings pursuant to the provisions of West Virginia Code §30-3-14.

The Respondent, Dr. Modi, is charged by the Petitioner, the West Virginia Board of Medicine, with the following:

> Improperly caring and treating William Abbott in a lengthy afternoon session occurring on June 1, 1992 in the Wheeling office of Dr. Modi.
>
> Use of depossession therapy incident to the care and treatment of William Abbott on June 1, 1990.
>
> Conducting and performing certain improper and experimental procedures upon William Abbott on June 1, 1990.
>
> Performing said improper and experimental procedures upon William Abbott on June 1, 1990, without first obtaining Mr. Abbott's full, proper, written and informed consent.
>
> Engaging in a form of psychotherapy on June 1, 1990, which is not recognized as acceptable under similar circumstances and conditions by reasonable, prudent psychiatrists practicing in the United States.
>
> Filing a false insurance report with William Abbott's insurer as a result of the June 1, 1990 afternoon session with Mr. Abbott.
>
> Engaging in unprofessional conduct in her billing practice relating to the June 1, 1990 session with Mr. Abbott.
>
> Utilization of depossession therapy in the care and treatment of other patients which is improper, per se.

Although some of these charges are somewhat overlapping and interrelated in part, they are all very serious allegations.

The Respondent vigorously denies each and every charge set forth herein, as well as the charges in the Complaint and the Notice of Hearing dated January 24, 1992. She maintains that in all respects she has acted properly in the care and treatment of Mr. Abbott on June 1, 1990, and in the care and treatment of all of her patients, in general. She further asserts that she has acted professionally and in no way has acted improperly in connection with her billing practices.

The Memorandum of Law, dated December 7, 1992, which was submitted in behalf of the Petitioner, begins by indicating that "[T]his is an odd case." (Pet. Mem. p. 1) This is indeed a very unusual matter which is now before the West Virginia Board of Medicine. There are few cases known throughout the country which are even similar to the subject controversy. In addition to the unusual aspects of this controversy, this is also a very difficult case to resolve, since there is considerable reliable, relevant, material and credible evidence which has been submitted by both of the parties in support of their respective positions.

Accordingly, before analyzing the facts, issues and applicable law, it is extremely important to focus attention on (a) who has the burden of proof, and (b) what is the requisite standard of proof.

II.

BURDEN OF PROOF

Even though the "standard of proof" question represents one of the few uncontroverted areas in this proceeding, it is, nevertheless, important to focus attention upon same.

The West Virginia Legislature has not enacted a statute which delineates "standard of proof" in a matter before the West Virginia Board of Medicine. It is, however, clear from the severe nature of the permissible sanctions which may be imposed upon a physician, that the Legislature intended that the Board of Medicine meet a very high standard of proof in order to impose disciplinary sanctions upon a physician.

Further, the Supreme Court of Appeals of West Virginia also has not ruled upon the requisite standard of proof as it relates to the Medical Practice Act and physicians. It has, however, ruled upon the standard of proof required to revoke or impose limitations and qualifications upon the license of a lawyer within the State of West Virginia.

As recently as July 25, 1991, The Committee on Legal Ethics of the West Virginia State Bar vs. Gorrell, (_____WVa _____, 407 S.E. 2d 923), declared that the "burden is on (the) Committee to prove, by full, preponderating and clear evidence (the) charges contained in the Committee's Complaint." The Gorrell case refers to other numerous West Virginia cases which substantiates the full, preponderating

and clear evidentiary standard. Subsequent to Gorrell, the West Virginia Supreme Court also applied this same standard in Committee on Legal Ethics vs. Moore (____WVa_____, 411 S.E. 2d 452).

As I have previously concluded in West Virginia Board of Medicine vs. David C. Shamblin, M.D., a physician's license is a property right bestowed upon the few individuals in our society who meet very specific and stringent educational, training and other criteria. Since extensive prerequisites, conditions and qualifications must be demonstrated before one may become a licensed physician, it must necessarily follow that before the Board can revoke, limit or modify a physician's license to practice medicine (or impose any disciplinary action whatsoever upon a physician), certain very high standards of proof must be met.

The preponderance of the evidence, or the weight of the evidence standing alone, is simply not enough to impose sanctions upon a physician.

Accordingly, it is incumbent upon the Petitioner to prove each and every allegation it has lodged against Dr. Modi by full, clear and preponderating evidence.

Is there such convincing evidence to substantiate the charges set forth in the subject Complaint and Notice of Hearing?

III.

FACTS AND OTHER INFORMATION REGARDING MR. ABBOTT'S TREATMENT

There are only three (3) individuals who have direct and first hand knowledge of what occurred on the afternoon of June 1, 1990. Accordingly, it is important to focus upon the testimony of William David Abbott, the patient; Stanley Allen Chips, the observer; and Shakuntala Modi, M.D., the physician. (See Tr. 10/27, p. 24 et seq., p. 78 et seq., p. 119 et seq. Tr. 10/29, p. 542 et seq.) Unfortunately, Dr. Modi erased the videotape of this lengthy session. Mr. Abbott consented to Dr. Modi's use of a video tape during the session, and, by Mr. Abbott's testimony, this video tape was "for her reference...as long as it was kept confidential and the patient/doctor privilege" protected (Tr. 10/27, pp. 128 - 129).

Petitioner maintains that since Dr. Modi erased the tape of the session, that "an inference arises that he, rather than she, is telling the truth..." with regard to how much time was dedicated to taking a history of her new patient (Pet. Mem. p. 19, Tr. 10/29, pp. 570, 604, Bd. Ex. 1).

Even though Dr. Modi did keep a video tape of her session with Patient "X", and perhaps the erased video tape should have been part of Mr. Abbott's record, an inference, or presumption, against Dr. Modi's credibility is unfair and not supported by legal authority (Tr. 10/28, pp. 248 - 249). The record is clear that it was evident on June 1, 1990, that there

would not be an ongoing physician/patient relationship by and between Dr. Modi and Mr. Abbott (Tr. 10/27, p. 109). On the other hand, the record is absent of any intentional or willful attempt by Dr. Modi to circumvent the process of determining what occurred during the session with Mr. Abbott and subsequent thereto.

The facts regarding Mr. Abbott's treatment set forth in paragraphs 92 through 118, inclusive, of the Respondent's Proposed Findings of Fact and Conclusions of Law are adopted and incorporated herein, except as otherwise noted.

Mr. Abbott definitely expected "instant relief" on June 1, 1990.

> Q. And you anticipated that you were going to have instant relief, is that the idea?
>
> A. If not permanent relief, instant relief, and if not total relief, at least some degree of it, yes, sir.
>
> Q. Dr. Modi didn't tell you that, did she?
>
> A. She told me she knew what my problem was and she thought she could help me.
>
> Q. That's what Mr. Chips told you Dr. Modi said?
>
> A. That's what Dr. Modi also told me.
>
> Q. He also -- Dr. Modi also said that she knew what the problem was and she was going to cure it?
>
> A. She didn't say she would cure it. Her words were, I think I know what your problem is and I think I can help you. (Tr. 10/27, pp 189 - 190.)

IV.

ISSUES PROPOUNDED

The issues in this matter are substantially straightforward; the more difficult challenge is the resolution of the issues.

The Petitioner has substantially articulated the pertinent issues in this matter (Pet. Mem. p. 6).

1. Has the Petitioner submitted full, preponderating and clear evidence that the Respondent violated the provisions of West Virginia Code §30-3-14(c)(17) and Board Regulation 11 CSR 1A 12.1(x) in her care and treatment of patients, and specifically in her care and treatment of William Abbott on June 1, 1990, by using depossession therapy, because such depossession therapy is not care and treatment recognized by a reasonable, prudent physician engaged in the same specialty as being acceptable under similar conditions and circumstances?

2. Has the Petitioner submitted full, preponderating and clear evidence that the Respondent violated the provisions of West Virginia Code §30-3-14(c)(14), (17) and Board Regulation 11 CSR 1A 12.1(y), in her care and treatment of William Abbott on June 1, 1990, by performing procedures or prescribing a therapy that by the accepted standards of medical practice in the community constitutes experimentation on human subjects without first obtaining fully, informed and written consent?

3. Has the Petitioner submitted full, preponderating and clear evidence that the Respondent violated the provisions of West Virginia Code §30-3-14(c)(5), (17) and Board Regulation 11 CSR 1A 12.1(p) by filing a false report with

William Abbott's insurer, because depossession therapy is not a form of psychotherapy recognized as acceptable under similar conditions and circumstances by a reasonable, prudent physician engaged in the same specialty?

4. Has the Petitioner submitted full, preponderating and clear evidence that the Respondent violated the provisions of West Virginia Code §30-3-14(c)(17) and Board Regulation 11 CSR 1A 12.1(j), by engaging in unprofessional conduct, in her use of depossession therapy and in her billing to the insurer, all as set forth in the Board's Complaint and Notice of Hearing dated January 24, 1992?

5. If the Petitioner has met its burden of proof with regard to the subject charges (or any one thereof), then what is the appropriate disciplinary sanction or sanctions to impose upon Respondent?

V.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In direct response to the above mentioned five (5) issues propounded herein, it is my opinion that the Petitioner has failed to sustain its difficult, but required, standard of proof, except with regard to the allegations referred to within the above propounded Issue 2.

A. Statement of the Case.

The Statement of the Case contained on pages 3 through 6 of the Petitioner's Memorandum of Law, is adopted and incorporated herein, with a few minor modifications and additions.

A Complaint and Notice of Hearing was entered by the Petitioner on January 24, 1992. A hearing was to be convened on March 17 and 18, 1992, in the offices of the West Virginia Board of Medicine. An Answer was timely filed by the Respondent.

On March 2, 1992, the evidenciary deposition of Louis W. Tinnin, M.D., was taken in behalf of the Board. A Rule to Show Cause was issued on March 13, 1992, in the Circuit Court of Ohio County, West Virginia, pursuant to a Petition for a Writ of Prohibition brought by Dr. Modi, which stayed the hearing originally scheduled for March 17 and 18, 1992 (Civil Action Number 92-C-165). The Board petitioned the West Virginia Supreme Court of Appeals for the issuance of a Writ of Prohibition asserting that the Ohio County Circuit Court lacked jurisdiction. The West Virginia Supreme Court of Appeals, on March 20, 1992, ruled that the Circuit Court Judge of Ohio County must appear before the said Supreme Court on April 28, 1992, to show cause why a Writ of Prohibition should not be awarded.

Thereafter, Dr. Modi filed her Reponse to the Board's Petition with the West Virginia Supreme Court of Appeals, and arguments were made on April 28, 1992, before the Supreme Court of Appeals.

On May 29, 1992, the West Virginia Supreme Court of Appeals issued the Writ of Prohibition sought by the Petitioner herein, which prohibited the Honorable George L. Spillers,

Judge of the Circuit Court of Ohio County, West Virginia, from interfering further in the subject disciplinary proceeding.

Thereafter, the Board entered an Order bearing date June 1, 1992, which rescheduled the hearing on July 8 and 9, 1992. A Motion for Continuance of said hearing was entered by the Respondent and was opposed by the Board. The undersigned Hearing Examiner, by Order entered August 5, 1992, set the hearing for October 27, 28 and 29, 1992.

The hearing was convened as scheduled on October 27, 1992, and the undersigned conducted the proceedings as Hearing Examiner. Dr. Modi was present in person and represented by Counsel, Jolyon W. McCamic. The Board was present by its Executive Director, Ronald D. Walton, and represented by Counsel, Deborah Lewis Rodecker. The Petitioner called as its witnesses, Shakuntala Modi, M.D.; Allen Stanley Chips; William David Abbott; and Ronald D. Walton.

The hearing reconvened on October 28 and 29, 1992, and the Respondent presented as her witnesses, Brian L. Weiss, M.D.; William J. Baldwin, D.D.D.; Irene Hickman, D.O.; David Bradley Cheek, M.D., Jacqueline Gordon; Joel Whitton, M.D.; George Perlman; and Alan F. Zerla. Dr. Modi testified on her own behalf. Twelve (12) Exhibits of the Board were made a part of the record, (one of which Bd. Ex. 10, was sealed), and four (4) exhibits of the Respondent were made a part of the record. At the close of the hearing, the Hearing Examiner requested that the parties file simultaneous Memoranda of Law

on December 7, 1992. Both parties complied with this directive. The Memorandum of Law of the Petitioner and the Proposed Findings of Fact and Conclusions of Law (and the memorandum in support thereof) are hereby made a part of the record in this matter, except as otherwise noted below.

Subsequent to the filing of the briefs, counsel for Petitioner acknowledged receipt of the proposed Finding of Fact and Conclusions of Law, submitted by the Respondent; and further stated that paragraphs 22, 23 and 24 of the aforesaid brief submitted by the Respondent was not supported by "any evidence in the record of this case." A review of the Hearing File substantiates the Petitioner's remarks; and accordingly, paragraphs 22, 23 and 24 on page 7 of the Respondent's Proposed Findings of Fact and Conclusions of Law have been completely disregarded by the Hearing Examiner. (Even if the omitted material was supported by the evidence, it would not be determinative of the issues in this matter.)

By a brief transmittal letter bearing date December 9, 1992, counsel for the Respondent indicated that he had failed to paginate paragraphs contained on pages 31 through 52 of Respondent's Brief. The substituted paginated paragraphs are now part of the record.

Pursuant to my request, Petitioner's counsel provided the undersigned and counsel for the Respondent with copies of three (3) cases involving somewhat parallel issues from other jurisdictions (The Virginia Board of Medicine Order

styled In Re: Alice T. Phillips, M.D.; and the Order from the Minnesota Board of Medical Examiners in the case styled In The Matter of the Medical License of Paul G. Patterson, M.D., and an Order from the Wisconsin Board of Nursing styled In The Matter of Disciplinary Proceedings against Kris Knight (Statz), R.N.. These three (3) Orders, over the objection of the Respondent, are made a part of the record in this matter. It is my understanding that the Order In Re Alice T. Phillips, M.D., was appealed by Dr. Phillips, and the Virginia Board's Order was affirmed November 28, 1990, by the Prince William County Circuit Court, Virginia (Case Number 29989). The fact patterns contained within these three (3) cases are not directly in point with the subject controversy.

B. Standard of Care and Treatment.

The Petitioner maintains that under West Virginia law, the testimony of an expert witness on the applicable standard of care and treatment rendered by a physician may be admitted into evidence only if the expert maintains a current medical license in one of the states of the United States. Petitioner relies heavily on West Virginia Code §55-7b-7 which would exclude testimony of William J. Baldwin, David Bradley Cheek, Irene Hickman and Joel Whitton (Pet. Mem. pp. 7-10).

It is important to, therefore, focus attention upon West Virginia Code §55-7b-7 which provides, in part, that the requisite "standard of care and treatment and a defendant's failure to meet said standard, if at issue, shall be

established in **medical professional liability cases** by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court. Such expert testimony may only be admitted in evidence if the foundation therefor is first laid establishing that: (a) The opinion is actually held by the expert witness; (b) the opinion can be testified to with reasonable medical probability; (c) such expert witness possesses professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert opinion testimony is addressed; (d) such expert maintains a current license to practice medicine in one of the states of the United States; and (e) such expert is engaged or qualified in the same or substantially similar medical field as the defendant health care provider." (Emphasis added.)

Although William Abbott filed a civil action in the Circuit Court of Ohio County, West Virginia, against Dr. Modi which contains certain allegations of "medical professional liability", the testimony of an expert witness on "standard of care" in this subject disciplinary action before the Board is not controlled by West Virginia Code §55-7B-7. (Tr. 10/27, pp. 207 - 216, Respondent's Ex. 1)

A malpractice action was prepared and filed in behalf of Mr. Abbott against Dr. Modi approximately two (2) weeks after his session with Dr. Modi in Wheeling. The Complaint requests one million dollars in compensatory damages and

another one million dollars in punitive damages for injuries sustained resulting from the June 1, 1990 session in Dr. Modi's office, notwithstanding the provision in West Virginia Code §55-7b-5, which in part states that "no specific dollar amount or figure may be included in the Complaint..."

The principles set forth in the West Virginia Rules of Evidence, Rule 702, Testimony by Experts, control in the subject controversey. The test of admissibility of an expert's testimony in this disciplinary action is much less stringent than in a civil action directly involving the issue of a physician's malpractice. Rule 702 provides a more liberal discretionary standard. "If scientific, technical, or other specialized knowledge, will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

West Virginia Code §55-7b-1 is a part of the medical, professional liability law which was enacted by the Legislature in 1986. The purported purpose of the enactment, in general, was to provide for a comprehensive reform in the common law and statutory rights of victims of malpractice, in the regulation of rate making and other practices of liability insurance carriers, and "to effectively regulate and discipline the health care providers..." (Id.) The Legislature with the enactment of West Virginia Code §55-7b-7, which deals with

a physician's standard of care, did not include disciplinary actions before the Board of Medicine within its coverage. The statute is very precise in that it refers to "defendant's (not respondent's) failure to meet said standard (of care), if at issue, shall be established in medical professional liability cases by the plaintiff (not a petitioner) by testimony of one or more knowledgeable, competent expert witnesses if required by the court (not Board)." (Matters in parenthesis supplied.)

If the Legislature had intended that Code §55-7B-7 should apply to disciplinary proceedings under the West Virginia Board of Medicine, then it would have included same with specificity within the language of the statute itself.

Accordingly, the testimony of William J. Baldwin (Tr. 10/28, pp. 346 - 347), Irene Hickman (Id. p. 373), David Bradley Cheek (Id. pp. 390 - 401, 404), and Joel Whitton (Id. p. 441), is admitted into evidence as it relates to the standard of care and treatment exercised by Dr. Modi.

The aforesaid witnesses have presented some scientific knowledge and a considerable degree of specialized knowledge within their testimony, and the same is helpful to the Hearing Examiner in understanding the evidence in this proceeding.

Although the testimony of Louis Tinnin, M.D., and Brian Weiss, M.D., both being licensed psychiatrists in the United States, is given greater weight than the other experts in this matter, I, nevertheless, admit the testimony of

(a) Dr. Whitton, the distinguished Canadian psychiatrist, (b) David Bradley Cheek, M.D., obstetrician and self-taught practitioner of psychosomatic medicine, and (c) Irene Hickman, D.O., hypnotherapist, author and lecturer, and (d) William J. Baldwin, dentist, clinical psychiatrist, minister and hypnotherapist, with respect to that part of their testimony which is scientific and technical, in nature, and/or based upon their respective specialized knowledge of psychotherapy, hypnotherapy and depossession therapy.

Although the record does reflect that Dr. Tinnin is a Diplomat of the American Board of Psychiatry and Neurology and the record does not reflect whether or not Dr. Weiss is a Diplomat of that Board, I have not given Dr. Tinnin's testimony more weight, nor is his testimony deemed more credible as a result of this impressive recognition by his piers. On the other hand, the fact that Dr. Weiss is generally more well known than Dr. Tinnin throughout the country gives his testimony no additional significant weight.

These two (2) psychiatrists presented conflicting testimony with regard to the level of care, skill and treatment which is recognized by a reasonable, prudent physician engaged in the same or similar specialty as being acceptable under similar conditions and circumstances, as set forth in Board Regulation 11 CSR 1A 12.1(x).

When the entire testimony of Dr. Tinnin is compared and contrasted to the entire testimony of Dr. Weiss, there does

not appear to be the full, clear and preponderating evidence which is required to demonstrate that Dr. Modi's level of care, skill and treatment fell below that which is acceptable under the law. The obligation of Dr. Modi to obtain the informed consent of the patient will be later discussed herein. Although there is considerable evidence adduced by Dr. Tinnin's testimony that "depossession therapy is not acceptable"; the very persuasive testimony from Dr. Weiss indicates that, in effect, depossession therapy, by whatever name it may also be referred to, is acceptable care treatment.

Dr. Weiss appeared very knowledgeable in his understanding of depossession therapy throughout his entire testimony (Tr. 10/28, pp. 256 - 345). Although Dr. Weiss acknowledged that "depossession therapy" is not deemed standard treatment, it does not necessarily follow that the utilization of depossession therapy, in itself, constitutes an unacceptable level of care and treatment rendered by Dr. Modi to Mr. Abbott, or to any of her other patients. (Id. p. 314)

Dr. Modi, according to the testimony of Mr. Chips, dedicated at least 45 minutes to an hour to Mr. Abbott prior to the actual session which involved the subject depossession therapy (Tr. 10/27, p. 103). The testimony of Mr. Chips, a relatively disinterested party (when compared to Dr. Modi and Mr. Abbott) is important in connection with the workup prior to the depossession session, as well as the later discussed issues of informed consent, or the lack thereof, and other

relevant issues.

Q. And did Dr. Modi indicate to you that she would take whatever it was the insurance company paid?

A. Exactly.

Q. Did she tell you what her normal charges were?

A. Yes, she did.

Q. Do you recall what that was?

A. $120 per hour.

Q. And what arrangements, then, did you make to meet with Dr. Modi?

A. That evening, after I saw Bill Abbott, I called her up, discussed the things he was describing to me, and briefed her on this history he brought in and asked her if she had time available for this client, that I would like to see her use the regression hypnotherapy in session since he is more along her lines of a psychiatric patient. I would like to see how that would work.

Q. Did you consider this -- the agitation that you have described, did you consider this was an emergency kind of --

A. I -- at that time, I had honestly thought that it was.

Q. Okay, and you told Dr. Modi this?

A. I had mentioned that he looked like he was desperately needing some kind of medical and emotional assistance.

Q. Okay, what did -- did Dr. Modi then indicate that she had a cancellation the following day?

A. Exactly. She said she had a cancellation.

Q. And what time was the appointment, if you recall?

A. I think it was 1:00 or 1:30.

Q. Okay, and did Mr. Abbott then come by to pick you up the following day?

A. It was arranged that I would -- that he would come to my office and I would go ahead and drive him up to her office.

Q. That is, you would drive?

A. Yes.

Q. And what was the reason for that?

A. I wanted to drive because I didn't trust him, that he was capable of safely driving.

Q. Okay, and how is it you were going to go up with him? What's the reason, do you say?

A. For an education. I wanted to see how -- at the time, my doors were open for about five months and I was still wanting more education, which I still always do.

Q. Sure, we all do, and okay, how was it you happened to get there, or did you drive or did Mr. Abbott drive?

A. Well, when he got to my house, I mentioned, well, let's get into my car and he said, no, we will take mine. And I felt a little more comfortable because he wasn't wearing his gun and his uniform, but he then -- I said, okay, we will take your car, then let me drive. And then he said, no, I will be okay. And then I said, are you sure, and he said, yeah, he says, I'm -- you know, I feel fine, and I won't have any problems, something of this nature.

Q. Were you aware that he had medication of Xanax, the anti-depressant?

A. He wrote that down on the form in my office.

Q. Were you aware of what Xanax was at that point?

A. Only by hearsay.

Q. Well, did it cause you concern that he was under medication? Did that have any effect on your feeling or your reaction?

A. Yes.

Q. Okay, and when you drove up, what occurred?

A. We were on our way up on 77 and he drove off the shoulder of the highway and luckily he got back onto the road and we didn't get into an accident.

Q. Did you say anything to him?

A. At that point, I said, are you okay, do you want me to drive, and he kept insisting that he would drive.

Q. Okay, and then was there another incident?

A. Yeah. Then we got on to 70 to come toward Wheeling and we were ready to go across the bridge in the City of Wheeling and the cars were stopped because of construction and he came up toward the end of the cars and skidded for probably about 30 feet, to a halt, and was able to stop before we hit the back-end of that car.

Q. Did he say anything to you, any explanation for why he --

A. Obviously, was just quiet, as you just about, you know, get yourself into a car wreck. I was a little frustrated, so I just was quiet at that point.

Q. Okay, before that, did you have any discussions with him regarding hypnotherapy or his condition or any other discussion?

A. On the car ride up, I said -- you know, I said, this is going to be a very -- might be a very new experience for you. The best thing to do with this type of hypnosis is to just let it happen and see what -- you know, see what comes out of it, what seems to -- what his experiences are, to try to stay open-minded and just see what happens.

Q. Did he agree or disagree?

A. Yeah, he said, that sounds reasonable, and that's fine.

Q. Okay, and when you arrived at -- when you arrived at Dr. Modi's office at approximately 2:30?

A. Yeah, we showed up there quite late.

Q. Okay, and Mr. Abbott was occupied briefly with the secretary, giving some form information, if that's a term?

A. Yes, that's correct.

Q. And you then went in and spoke with Dr. Modi?

A. Yes.

Q. And did you have this documentation, this notebook of records with you?

A. He had brought them with him, yes.

Q. Did you give those to Dr. Modi?

A. I don't think I gave them to her, but I don't recall how she ended up with them.

Q. Okay, and what did you tell Dr. Modi during this period of time?

A. I sat down while he was filling out the forms and asked her about the methods that she uses in hypnotherapy. And at that point, she sat and we discussed the symptoms that he was telling me about, all these shaking of the insides, the pain in his rectum, the

fluttering of the eyelids, the headaches, the ringing in the ears, and she had explained to me that anything can happen under hypnosis, so that I would best just be quiet and watch.

Q. Okay, and after Mr. Abbott finished the form information, that took about 15 minutes?

A. Yes.

Q. And then Dr. Modi then began a review of the documents with him?

A. Yes, uh-huh, at that -- when he came into the room, yes.

Q. And then after reviewing the documents, she then went in and discussed on a one-on-one basis, that is, in the sense of his personal psychiatric problems, and dealt with them in that sense?

A. Yes, she did -- she looked through the booklet, she looked through the things I wrote down about everything he described to me, and then she proceeded with an oral examination of everything that he has been through, what he has complained about.

Q. Okay, and did Dr. Modi then go on to explain her practice?

A. Yes.

Q. And that included psychotherapy, pharmotherapy and hypnotherapy?

A. Hypnotherapy, just whatever she does is what she explained to him.

Q. Okay, and do you recall her explaining to Mr. Abbott, that is, that hypnotherapy -- you had to not be startled by what he discovered?

A. Yes.

Q. That is, that the patient determines what is going to -- that is, it's the patient who tells the psychiatrist what is happening,

is that correct?

A. Yes, that whatever --

Q. And she explained that?

A. Whatever he describes happening, to allow it -- him to disclose what's -- what he describes is happening with his problems, memories, whatever, and I think she even mentioned something about other patients that she had that had similar problems and came out with different labels described by the patient.

Q. That is would the other patients use the spirits or entities and such things as that?

A. Apparently.

Q. And the patients, when she described them -- she wouldn't disclose the names, she would just discuss it as an abstract case, is that the idea?

A. Yes, yes.

Q. And after 45 minutes to an hour, perhaps?

A. The therapy or the --

Q. No, no, no, the work-up of the medical records and the explanations.

A. Oh, yes, 45 minutes to an hour, yes.

Q. Okay, and then the session began, correct?

A. Yes, that's correct.

(Tr. 10/27, pp. 97 - 103.)

Under the circumstances, I must conclude that Dr. Modi did not commence depossession therapy without obtaining sufficient background information. Certainly, Dr. Modi could

have spent more time with Mr. Abbott prior to the actual therapy, and she should have documented her file with specificity; however, it is important to recognize that Mr. Abbott did not live near Wheeling and time was a factor.

It is Mr. Abbott's contention that Dr. Modi "briefly ... went over the medical records, skimmed over them, looked through them, (and) didn't ask me anything pertinent to them, and she explained to me that she felt that she knew what my problem was and that she could help me with it and for me to bear with her and to understand -- to bear with her and to put up with what, you know, she was going to do..." (Tr. 10/27, p. 125). Mr. Abbott indicates in his testimony that Dr. Modi stated to him that if "I didn't understand that she would explain..." (Id. p. 125). Notwithstanding this testimony, I still conclude that Dr. Modi sufficiently reviewed the material presented to her by Mr. Abbott, given the entire circumstances as they occurred on June 1, 1990.

While the Petitioner has indicated that no person at the subject Board's hearing specifically acknowledged, challenged, or even addressed Dr. Tinnin's statement that depossession therapy was malpractice, in itself, I find that there are no reported West Virginia cases, nor do I find other cases from other jurisdictions which hold that depossession therapy, in itself, constitutes malpractice.

C. Experimentation.

Dr. Modi is also accused of experimentation upon human subjects. Dr. Modi indicates that she is learning everyday about the human mind. She claims that depossession therapy not only helps, but, actually **does** cure many physical ailments. (Bd. Ex. 1, Tr. 10/27, pp 28 - 30)

Dr. Modi is indeed experimenting when she places her patients under hypnosis and claims that she is "learning phenomenal things everyday." (Bd. Ex. 1, p. 5)

Dr. Tinnin's statements regarding the experimental nature of Dr. Modi is supported by full, preponderating and clear evidence.

> Q. Let me ask you this, Dr. Tinnin, if you have formed an opinion regarding whether the use of depossession therapy by the accepted standards of medical practice in the community constitutes experimentation on human subject?
>
> A. I believe that it does constitute experimentation.
>
> Q. And could you explain why you believe that?
>
> A. I believe that because there is no existing body of knowledge that informs our treatment approaches that includes depossession therapy or anything of that sort. The principles on which depossession -- the assumptions that are held for depossession therapy make assumptions about supernatural forces that simply are not a part of our basic scientific assumptions about our science.
>
> Q. Are you able to testify with reasonable medical probability regarding this opinion that you have?

A. Yes, I am.

(Bd. Ex. 1, pp. 12 - 13)

All of the experts testifying in behalf of Dr. Modi generally seem to concur that "depossession therapy", as practiced by the Respondent, is considered controversial within the medical community.

Dr. Weiss when testifying in response to my question regarding the Shirley McClain book and "past life therapy" stated:

> THE WITNESS: I'm sorry, Shirley McClain wrote a book called Out On A Limb. It came out in about 1981, or '82, or around that, and she introduced the not (sic) of past lives in that book, and reincarnation. And the book was an international best seller, and what happened was people started saying I have had an experience like that or I have -- it popularized it, and people started talking about it.
>
> My point was that 25% of the population believed in it before her book popularlized it. She was on all of the talk shows, magazines everywhere. It gave people an excuse or a reason to talk about it without being as fearful. Oh, if Shirley McClain says it's okay, they talked about it, but she's not a scientist, she's not a researcher or a clinician, she's in show business, so she could only take it so far. And now it's up to the people with **more clinical training to go further with it, to study it, to prove it, to test it, to bring it to the public in credibility terms.** (Emphasis added)

(Tr. 10/28, pp. 288 - 289)

As Petitioner has argued, if this applies to "past life therapy", then it must also apply to the type of therapy Dr. Modi used with Mr. Abbott and other patients (Pet. Mem. p. 17). Dr. Modi and the other experts who have testified in her behalf may refer to or designate Dr. Modi's therapy by various names. It may even be designated or coded by the health insurance form as a less "loaded" term than depossession therapy; but, it is clear and convincing that her form of therapy should be further studied, tested and proven by experts in the field, with the results properly disseminated to the public. By this conclusion, I am not in any way finding nor implying that Dr. Modi is practicing what is commonly referred to as "exorcism", which is definitely outside psychiatric protocol. Dr. Modi did not utilize exorcism in the care and treatment of Mr. Abbott. (Tr. 10/28, p. 499)

On the other hand, her form of therapy is experimental within the context and meaning of West Virginia Code §30-3-14c(14)(17) and Board Regulation 11 CSR 1A 12.1y.

If her form of therapy was simply deemed "non-standard" and/or "controversial" and subject to ridicule by her piers, then this would not in itself lead us to conclude that Dr. Modi is necessarily engaging in experimentation. It is the unproven, unclassified nature of her therapy which tip the scales so heavily against her contention of not being engaged in experimentation.

Petitioner's objection to the entry into the record of a copy of DSM-IV is overruled. Again, it does not prejudice the Petitioner and, in fact, it actually substantiates its position. The DSM IV is accepted as evidence as being that which **may** become a part of the DSM in a future publication. The term "possession i.e. conviction that the individual has been taken over by a spirit, power deity, or religious practice" is **not** part of the current DSM and, therefore, its absence reinforces the conclusion that Dr. Modi has been engaged in a form of experimentation in her practice.

D. Informed Consent.

In addition, despite Dr. Modi's apparent good intentions, she has, nevertheless, failed to provide the requisite informed consent to Mr. Abbott during the subject June 1, 1990 session. Neither Mr. Abbott, Mr. Chips, nor Dr. Modi, herself, has presented evidence which fulfills the requirements of proper informed consent. It was incumbent upon Dr. Modi, not Mr. Chips (nor any other hypnotherapist, or author, etc.) to inform Mr. Abbott of the risks of treatment relating to alternative methods of treatment and the results likely to occur if a patient remains untreated (Cross vs. Trapp, 294 S.E. 2d 446, [WV 1982], cited in Adams vs. El-Bash, 338 S.E. 2d 381, 385, 386 [WV 1985]).

Dr. Modi, even by her own testimony, did not reveal to Mr. Abbott the risks incident to his treatment. This is required under the West Virginia law, even though her treatment

was not surgical in nature as in Cross vs. Trapp. (Id.) Perhaps Dr. Weiss has misstated his claim that hypnotherapy is risk free if administered by the proper practitioner (Tr. 10/28, pp. 322, 327). From common knowledge, it appears to this Hearing Examiner that there is no "risk free" form of medicine, especially that which involves hypnotherapy and depossession therapy, which is not even as well established as other more traditional procedures and therapies.

Dr. Tinnin's testimony outweighs the testimony of Dr. Weiss with respect to the issue of "informed consent". There is risk of damage to the patient when depossession therapy is used (Bd. Ex. 11, p. 69). On the other hand, Dr. Tinnin is incorrect in his insistence upon **written** documented informed consent, under the West Virginia law (Id., p. 70). There is simply no such legal requirement for written informed consent in West Virginia which this Hearing Examiner is aware of at this time.

Dr. Tinnin's testimony with regard to the communication of risks incident to therapy is adopted and incorporated herein for all pertinent purposes, except the testimony regarding the written documentation portion of informed consent.

If Mr. Abbott was informed by Dr. Modi of the risks incident to his treatment, it is possible that he may have refused to undergo the treatment. On the other hand, the record is clear that certainly Mr. Abbott needed help and desired "instant relief" (Tr. 10/27, p. 189).

Simply because Mr. Abbott was given to understand that Dr. Modi was to use depossession therapy and past life therapy on June 1, 1990, this information should have been transmitted by the physician to Mr. Abbott, the patient, and not by an intermediary, such as Mr. Chips (Tr. 10/27, p. 200). I find an absence of credible evidence in the record which indicates that Dr. Modi informed Mr. Abbott of the **risks** incident to treatment, when compared and contrasted to the **benefits** of such treatment.

In view of the fact that Mr. Abbott was definitely in need of instant relief (although this did not constitute an emergency relationship of physician and patient), and recognizing Mr. Abbott's complicated medical history and Mr. Chips' representations to him with regard to what to expect from Dr. Modi, I find that Dr. Modi's failure to obtain the requisite informed consent is somewhat mitigated, but, definitely not excused.

Accordingly, Dr. Modi has violated West Virginia Code §30-3-14c (14) and (17) and Board Regulation 11 CSR 1A 12.1(y).

The requirements of Cross vs. Trapp and Adams vs. El-Bash, supra, apply in this case even though invasive surgery was not involved. The West Virginia law does not distinguish invasive procedures to the body versus invasive procedures into the mind, as in the subject controversy. The portion of Dr. Weiss' testimony which discounts the need for consent

is rejected (Tr. 10/28, pp. 322 - 324).

Dr. Weiss is unfamiliar with the West Virginia law regarding form consent and, accordingly, more weight should be given to Dr. Tinnin's basic understanding of the thrust of informed consent. (Bd. Ex. 11, pp. 69 - 70)

The Respondent argues that the West Virginia Medical Practice Act and the West Virginia Legislative Rules, etc., "do not give what is acceptable treatment by reasonable, prudent physician engaged in the specialty of psychiatry." (Res. Mem., p. 53) Respondent further argues that the same do not set forth "a procedure to determine what is or what can be acceptable treatment by a reasonable, prudent physician" (Id, pp. 53 - 54). The law does not require such specificity with regard to acceptable treatment since it is important to maintain flexibility in determining what is acceptable care and treatment, as medical advances, cost factors and other considerations become significant in the treatment and care of patients.

In theory and in actual practice, the West Virginia Medical Practice Act, and the rules promulgated thereunto, do set forth a reasonable, fair procedure to determine what is acceptable treatment. Physicians who appear before the West Virginia Board of Medicine are routinely afforded a fair and impartial hearing. Respondents, such as Dr. Modi, are indeed protected with fundamental, constitutional safeguards

throughout the entire process.

E. False Reporting, Improper Billing and Unprofessional Conduct.

The Board has not established by full, preponderating and clear evidence that Dr. Modi rendered a false report to Blue Cross/Blue Shield. It was not incumbent upon her to mention that she utilized depossession therapy when she rendered her bill. She is a psychotherapist and she used psychotherapy in general in the care and treatment of Mr. Abbott, and, therefore, she is entitled to the use of the therapy code upon the insurance form (Bd. Ex. 2).

The totality of the evidence indicates that Dr. Modi's reliance upon depossession therapy is legitimate care and treatment, and Dr. Modi is entitled to bill for same. The billing for her services did not constitute a false report, false billing, nor unprofessional conduct on her part. She has not engaged in exorcism, nor has she billed for same.

F. Recommended Sanctions.

Dr. Modi's license should not be revoked, nor suspended. Her therapy with Mr. Abbott did not effectively preclude him from obtaining alternative assistance from other health providers, including psychiatrists and/or hypnotherapists, after they terminated their professional relationship, which began and ended on June 1, 1990. The record clearly indicates that she is effective with many of her patients.(Tr. 10/29, pp. 420

et seq., 512 et seq., 531 et seq.)

A public reprimand is, however, warranted for her failure to secure the informed consent of Mr. Abbott prior to the commencement of therapy. There is little question that she should have directly explained to Mr. Abbott the benefits, as well as the risks, incident to her therapy. She should also have clearly indicated to him that her form of psychotherapy is considered controversial, by many. Even though this failure to obtain the informed consent of Mr. Abbott on June 1, 1990, occurred in the course of a practitioner's unblemished practice, it should not be overlooked and condoned.

I would further recommend that Dr. Modi be required to participate in some form of education prescribed by the Board which emphasizes the need for informed consent, especially when one is practicing as a pioneer in a controversial area. It is my opinion that Dr. Modi did not understand, and may still not fully understand, the need to inform her patients of the risks incident to psychotherapy, hypnotherapy and especially that which is termed "depossession therapy". It is not enough to inform patients of the anticipated benefits of treatment. It is also important to explain the risks incident thereto. Even though Dr. Modi appears to sincerely believe in the benefits of depossession therapy, she must provide her patients with an opportunity to make a meaningful decision whether or not to undergo such therapy.

Further, it is the recommendation of the undersigned that a civil fine of $1,000.00 be assessed.

The aforesaid sanctions are made pursuant to West Virginia Code §30-3-14(i)(6) and (8).

VI.

CONCLUSION

Depossession therapy or any form of psychotherapy must be practiced within the framework of analyzing and weighing risk and benefit. The practice of psychiatry as well as medicine, in general, cannot be viewed as balancing a mathematical equation with known certainty on each side. On the contrary, psychotherapy, which includes depossession therapy as Respondent maintains, must involve the careful weighing of probabilities, rather than certainties. Dr. Modi failed to inform Mr. Abbott of same.

Accordingly, the "Memorandum of Law" submitted by the Petitioner is adopted, and incorporated herein, unless otherwise noted, with respect to, and only with respect to, the issues regarding experimentation without informed consent. Further, except as otherwise noted, the "Proposed Findings of Fact and Conclusions of Law" submitted by the Respondent are fully adopted and entirely incorporated herein with regard to all of the remaining matters in issue.

Dated: January 6, 1993.

Respectfully submitted,

Edward C. Goldberg
Hearing Examiner

CERTIFICATE OF SERVICE

I, EDWARD C. GOLDBERG, a Hearing Examiner for the West Virginia Board of Medicine, do hereby certify that I have served a true and exact copy of the foregoing Recommended Findings of Fact and Conclusions of Law of Hearing Examiner, upon the Petitioner, by hand delivering same to its business address located at 101 Dee Drive, Charleston, West Virginia, on this the 6th day of January, 1993; and I further certify that I have served a true and exact copy of the foregoing Recommended Findings and Fact and Conclusions of Law of Hearing Examiner, upon the Respondent, by mailing same to her counsel, Jolyon W. McCamic, at his business mailing address, Post Office Box 151, Wheeling, West Virginia 26003, by placing said copies in a properly addressed and stamped envelope and depositing same in the regular United States mail, this the 6th day of January, 1993.

Edward C. Goldberg

Edward C. Goldberg
Hearing Examiner

Exhibit I

McCAMIC & McCAMIC
ATTORNEYS AT LAW
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P.O. Box 151
WHEELING WV 26003

TELEPHONE (304) 232-6750
FAX (304) 232-3548

JAY T. McCAMIC (1894-1971)
JEREMY C. McCAMIC
JOLYON W. McCAMIC
JEFFREY W. McCAMIC
JAY T. McCAMIC
LAURA HADEN WRIGHT

February 28, 1996

Ms. Deborah Lewis Rodecker
West Virginia Board of Medicine
101 Dee Drive
Charleston, West Virginia 25311

Re: West Virginia Board of Medicine v. Modi

Dear Ms. Rodecker,

The West Virginia Supreme Court of Appeals in *Modi v. West Virginia Board of Medicine,* 465 S.E.2d 230 (W.Va. 1995) said at 465 S.E.2d at 244,

> "Specifically, we have addressed the necessity that certain issues be reconsidered and have determined that at least one of the sanctions imposed on Dr. Modi is inappropriate. It may also appear upon reconsideration of the issues as directed here that one or more of the remaining sanctions are also inappropriate."

As you know, the Court considered one of the errors to be rejection of the testimony of Dr. Modi's experts who determined the therapy to be nothing more than a form of hypnosis or hypnotherapy and thus not experimental. As you also know, hypnosis has been an accepted form of treatment by the American Medical Association since 1958 and by the American Psychiatric Association since 1962.

Without conceding Dr. Modi's treatment to be experimental, I now find that Dr. Modi, on her own, has been having patients execute a written consent form since June of 1990 when she learned of the Board's apparent concern after Mr. William Abbott had filed his complaint.

Enclosed you will find a copy of the form Dr. Modi has been using. I would request that you bring to the attention of the members of the Board a copy of this consent form and a copy of

this letter if and when they take up consideration of the West Virginia Supreme Court opinion.

Very Truly Yours,

9/5/96 J. McCamic

Jolyon W. McCamic

Enclosure
cc: Shakuntala Modi, M.D.

SHAKUNTALA MODI, M.D.

INFORMED CONSENT AGREEMENT FOR HYPNOTHERAPY INCLUDING PAST LIFE THERAPY & SPIRIT RELEASEMENT THERAPY

I _____ authorize SHAKUNTALA MODI, M.D. to use Hypnotherapy including Past Life Regression Therapy and Spirit Releasement Therapy in order to help me with my problems.

Hypnosis is a state of relaxation and focused concentration. In this state we can get in touch with our subconscious mind to find the reasons for our emotional problems. In a therapeutic setting it is called hypnotherapy or hypno-analysis.

Basically, every hypnosis is a self-hypnosis. The psychiatrist or a psychotherapist merely provides an appropriate occasion and environment for the subject to explore his own trance capacity to find the reasons for his or her problems. The therapist merely acts as a facilitator during a hypnotherapy session.

The use of hypnosis in a professional setting has been officially sanctioned by the American Medical Association in 1958 and by the American Psychiatric Association in 1962. .

"Past Life Regression Therapy" and "Spirit Releasement Therapy" are forms of hypnotherapy and can help a person in exploring, understanding and releasing his or her symptoms. I understand that I do not have to believe in Past Lives or Spirits for the therapy to work.

I understand that it is not a replacement for other medical and psychiatric treatments and if needed I should continue with other medical and psychiatric treatments.

I hereby certify that I have read the above statements and agree to undergo Hypnotherapy including Past Life Therapy and/or Spirit Releasement Therapy with Dr. Modi to uncover, understand and release my symptoms. I agree to follow the treatment as advised by Dr. Modi.

_____ _____

WITNESS SIGNATURE OF PATIENT

Patient is a minor _____ years of age.

_____ _____

WITNESS CLOSEST RELATIVE

Date: _____

Address: _____

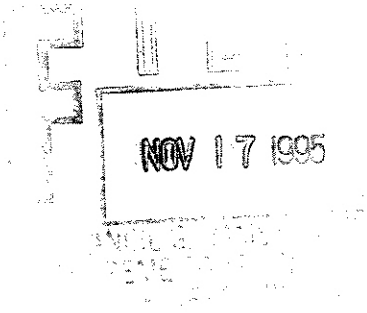
_____

Exhibit II

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1995 Term

No. 22792



SHAKUNTALA MODI, M.D.,
Respondent Below, Appellee,

v.

WEST VIRGINIA BOARD OF MEDICINE,
Petitioner Below, Appellant

Appeal from the Circuit Court of Ohio County
Honorable George L. Spillers, Judge
Civil Action No. 93-Cap-5

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: September 12, 1995
Filed: November 17, 1995

Jolyon W. McCamic
McCamic & McCamic
Wheeling, West Virginia
Attorney for the Appellee

Deborah Lewis Rodecker
Charleston, West Virginia
Attorney for the Appellant

JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICE RECHT, deeming himself disqualified, did not participate in the consideration and decision of this case.

JUSTICE WORKMAN concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "'Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions 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 (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.'" Syllabus point 2, *Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983)." Syllabus, *Berlow v. West Virginia Board of Medicine*, 193 W.Va. 666, 458 S.E.2d 469 (1995).

2. "The requirement of West Virginia Code § 29A-5-3 that an administrative agency rule on the parties' proposed findings is mandatory and will be enforced by the courts. Although the agency does not need to extensively discuss each proposed finding, such rulings must be sufficiently clear to assure a reviewing

court that all those findings have been considered and dealt with, not overlooked or concealed." Syllabus point 4, *St. Mary's Hospital v. State Health Planning and Development Agency*, 178 W.Va. 792, 364 S.E.2d 805 (1987).

3. "When *W.Va. Code*, 29A-5-3 [1964] says: 'Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. . . .' the law contemplates a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusion, along with an explanation of the methodology by which any complex, scientific, statistical, or economic evidence was evaluated. In this regard if the conclusion is predicated upon a change of agency policy from former practice, there should be an explanation of the reasons for such change." Syllabus point 2, *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions*, 160 W.Va. 220, 233 S.E.2d 719 (1977).

4. "In administrative appeals where there is a record involving complex economic or scientific data which a court cannot evaluate properly without expert knowledge in areas beyond the peculiar competence of courts, neither this Court nor the trial courts will attempt to determine whether the agency decision was contrary to the law and the evidence until such time as the agency presents a proper order making appropriate findings of fact and conclusions of law." Syllabus point 3,

Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions, 160 W.Va. 220, 233 S.E.2d 719 (1977).

5. Where an administrative agency has conducted a contested hearing through a hearing examiner and determines that it should amend the findings of fact or conclusions of law recommended by the hearing examiner, a reasoned, articulate statement of the reasons for the amended findings of fact or conclusions of law adopted by the agency is essential to the validity of those findings or conclusions and to their ready acceptance by reviewing courts. Such is particularly the case where the agency is making its decision based on economic or scientific data within the presumed expertise of the agency or where the agency has not heard or received the underlying evidence from which it is drawing conclusions different from those of the hearing examiner.

Albright, Justice:

This case is a contested administrative proceeding under W.Va. Code § 29A-5-1, *et seq.*, initiated by the West Virginia Board of Medicine (the Board) pursuant to the disciplinary authority of W.Va. Code § 30-3-14,[1] against Shakuntala

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[1]The relevant portions of the statute under which violations by Dr. Modi was charged are set forth below; the Board regulations cited in the Notice of Hearing are direct quotations of the statutory provisions recited here.

> (c) The board may deny an application for license or other authorization to practice medicine and surgery or podiatry in this state and may discipline a physician or podiatrist licensed or otherwise lawfully practicing in this state who, after a hearing, has been adjudged by the board as unqualified due to any of the following reasons:
>
> * * *
>
> (5) Making or filing a report that the person knows to be false; intentionally or negligently failing to file a report or record required by state or federal law; willfully impeding or obstructing the filing of a report or record required by state or federal law; or inducing another person to do any of the foregoing. Such reports and records as are herein covered mean only those that are signed in the capacity as a licensed physician or podiatrist.
>
> * * *
>
> (14) Performing any procedure or prescribing any therapy that, by the accepted standards of medical practice in the community, would constitute experimentation on human subjects without first obtaining full, informed and written consent.

(continued...)

Modi, M.D., a psychiatrist. Dr. Modi is a physician licensed in West Virginia and is engaged in a solo practice in Wheeling. The disciplinary proceeding grows out of Dr. Modi's care and treatment of William Abbott by use of a technique known as depossession therapy. The Notice of Hearing prepared by the Board and served on Dr. Modi charged:

> 6. Depossession therapy is not care and treatment recognized by a reasonable, prudent physician engaged in the same specialty as being acceptable under similar conditions and circumstances, and accordingly, Dr. Modi has violated West Virginia Code § 30-3-14(c)(17), and Board regulation 11 CSR 1A 12.1(x), in her care and treatment of the complainant [Mr. Abbott] on June 1, 1990.
>
> 7. Dr. Modi's use of depossession therapy in her care and treatment of the complainant on June 1, 1990, and in her medical practice generally, constitutes performing procedures or prescribing a therapy that by the accepted standards of medical practice in the community constitutes experimentation on human subjects without first obtaining full, informed and written consent, and accordingly, Dr. Modi has violated West Virginia Code § 30-3-14(c)(14), (17), and Board regulations 11 CSR 1A 12.1(y).
>
> 8. Dr. Modi's billing to the complainant's insurer, Blue Cross Blue Shield of West Central West Virginia in

---

[1](...continued)

* * *

> (17) Violating any provision of this article or a rule or order of the board, or failing to comply with a subpoena or subpoena duces tecum issued by the board.

> Parkersburg, for the care and treatment rendered to the complainant on June 1, 1990, by her, was a falsely filed report which Dr. Modi knew was false, because depossession therapy is not a form of psychotherapy recognized as acceptable under similar conditions and circumstances by a reasonable, prudent physician, engaged in the same specialty, and accordingly, Dr. Modi has violated West Virginia Code § 30-3-14(c)(5), (17), and Board regulations 11 CSR 1A 12.1(p).
>
> 9. Dr. Modi's use of depossession therapy, as set forth in paragraph 4, and her billing to the insurer, as set forth in paragraph 5, constitutes unprofessional conduct, and accordingly, Dr. Modi has violated West Virginia Code § 30-3-14(c)(17) and Board regulation 11 CSR 1A 12.1(j).

Dr. Modi filed an answer admitting the use of depossession therapy and denying any conduct justifying disciplinary action. After lengthy procedural manuevers and extensive hearings, the hearing examiner, Edward C. Goldberg, prepared a thirty-six page report of "Recommended Findings of Fact and Conclusions of Law" which rather fully discussed the issues of procedure, law and facts in the case.

UNDERLYING FACTS

From the hearing examiner's report it may be ascertained that on June 1, 1990, the appellee here, Dr. Shakuntala Modi, undertook to treat Mr. William Abbott in her office by use of depossession therapy. According to Dr. Modi,

depossession therapy involves the use of hypnosis or hypnotherapy to relieve individuals of fears arising from such individuals' beliefs or feelings that they are or may be possessed by spirits. Dr. Modi also testified that the use of depossession therapy does not imply that the practitioner believes his or her patient is possessed by such spirits, but requires only that the practitioner conclude that the patient being treated believes himself or herself to be so possessed.

It appears that preparatory to this session, Dr. Modi discussed the proposed use of the therapy with a hypnotist who had previously treated Mr. Abbott and who had accompanied Mr. Abbott to Dr. Modi's office and took a rather complete history from Mr. Abbott. It further appears that Dr. Modi did not thoroughly discuss the intended therapy with Mr. Abbott or obtain a written consent for the therapy from him. After commencing the depossession therapy session with Mr. Abbott, it appears that Dr. Modi worked with the patient for about four hours, utilizing what Dr. Modi described as hypnotherapy. According to Mr. Abbott, Dr. Modi engaged in various incantations and called upon angels to lift dead souls out of his body in the course of the extended therapy session.

Mr. Abbott filed a complaint against Dr. Modi with the West Virginia Board of Medicine regarding his depossession treatment. Based on the complaint the Board then instituted the present proceeding, setting forth the charges quoted above,

including the charge that Dr. Modi had improperly billed an insurance company $480.00 for psychotherapy when, in fact, she had engaged in depossession therapy.

During the proceedings before the hearing examiner extensive evidence was developed regarding the circumstances surrounding Dr. Modi's treatment of Mr. Abbott and, of particular importance here, on the question of whether depossession therapy was an accepted form of medical treatment which would not require a written informed consent or whether it was an experimental treatment which would require such a consent.

THE DECISIONS BELOW

The hearing examiner's report described five ultimate issues, which may be summarized as follows:

> 1. Did the Board establish that by using depossession therapy on Mr. Abbott, Dr. Modi violated Code § 30-3-14(c)(17) and Board Reg. 12.1(x) [2] because a reasonable, prudent physician in the same specialty would not recognize depossession therapy as being acceptable under similar conditions and circumstances?

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[2]See note 1 for the relevant statutory provisions referred to by the hearing examiner; the board regulations cited are direct quotes of the statutory provisions.

2. Did Dr. Modi violate Code § 30-3-14(c)(14) and (17) and Board Reg. 12.1(y) by using an experimental therapy without first obtaining a full, informed and written consent from Mr. Abbott?

3. Did Dr. Modi violate Code § 30-3-14(c)(5)(17) and Board Reg. 12.1(p) by filing a false report with the patient's insurance carrier when she described her use of depossession therapy as psychotherapy when depossession therapy is not recognized by reasonable, prudent physicians in the same specialty as being acceptable under similar conditions and circumstances?

4. Did Dr. Modi engage in unprofessional conduct in violation of Code § 30-3-14(c)(17) and Board Reg. 12.1(j) by using depossession therapy and billing the patient's insurer for the service?

5. If it is found that Dr. Modi violated the cited sections in one or more particulars, what is the appropriate sanction to be imposed?

In his report, the hearing examiner concluded that the Board of Medicine had the burden of proof to establish its charges by "full, preponderating and clear evidence". He further concluded that Dr. Modi was entitled to adduce evidence from experts who were not licensed to practice medicine in any of the United States on the issues of whether depossession therapy is a legitimate form of care and treatment and whether such therapy is experimental.

Based on the evidence before him, the hearing examiner stated that the Board had proved that depossession therapy is indeed experimental and that Dr.

Modi had obtained neither written nor informed consent from the patient. He further concluded that Dr. Modi's use of depossession therapy was legitimate care and treatment for which Dr. Modi is entitled to bill patients and their insurers and that, consequently, the billing to the insurance carrier was not false billing and was not unprofessional conduct. Lastly, the hearing examiner rejected the parties' proposed findings of fact that were inconsistent with these conclusions after a lengthy discussion of the evidentiary bases for his various conclusions.

Having found that Dr. Modi violated W.Va. Code § 30-3-14(c)(14) and (17) by the use of an experimental therapy without first obtaining a full, informed and written consent, the hearing examiner recommended to the Board that Dr. Modi be sanctioned by: (1) a public reprimand (2) being required to undergo additional education on the subject of informed consent and (3) a civil fine of $1,000.[3]

---

[3]Specifically, the hearing examiner recommended:

> Dr. Modi's license should not be revoked, nor suspended. Her therapy with Mr. Abbott did not effectively preclude him from obtaining alternative assistance from other health providers, including psychiatrists and/or hypnotherapists, after they terminated their professional relationship, which began and ended on June 1, 1990. The record clearly indicates that she is effective with many of her patients. . . .
>
> A public reprimand is, however, warranted for her failure to secure the informed consent of Mr. Abbott prior

(continued...)

Upon submission of the hearing examiner's report to the Board, a twelve page order was issued by the Board which incorporated the hearing examiner's report with extensive changes. The Board order offers no explanation for those changes. The changes were accomplished by references in the Board order to pages in the examiner's report, excising certain material by such references and adding other

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[3](...continued)
to the commencement of therapy. There is little question that she should have directly explained to Mr. Abbott the benefits, as well as the risks, incident to her therapy. She should also have clearly indicated to him that her form of psychotherapy is considered controversial, by many. Even though this failure to obtain the informed consent of Mr. Abbott on June 1, 1990, occurred in the course of a practitioner's unblemished practice, it should not be overlooked and condoned.

I would further recommend that Dr. Modi be required to participate in some form of education prescribed by the Board which emphasizes the need for informed consent, especially when one is practicing as a pioneer in a controversial area. It is my opinion that Dr. Modi did not understand, and may still not fully understand, the need to inform her patients of the risks incident to psychotherapy, hypnotherapy and especially that which is termed "depossession therapy". It is not enough to inform patients of the anticipated benefits of treatment. It is also important to explain the risks incident thereto. Even though Dr. Modi appears to sincerely believe in the benefits of depossession therapy, she must provide her patients with an opportunity to make a meaningful decision whether or not to undergo such therapy.

Further, it is the recommendation of the undersigned that a civil fine of $1,000.00 be assessed. . . .

material. The Board excised over twenty-one pages of the hearing examiner's report and added perhaps a page or two of material.[4]

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[4]As examples of the structure of the Board's order we quote the following excerpts:

> [T]he Board adopts the Findings of Fact and Conclusions of Law recommended by the Hearing Examiner beginning at page 9 at section V. and continuing through page 33 at the end of D. Informed Consent, with the following modifications:
>
> The Board strikes and does not adopt the language beginning at B. Standard of Care and Treatment on page 13 through the paragraph ending . . . "time was a factor.", on page 25.
>
> The Board strikes and does not adopt at D. Informed Consent, on page 30, the following sentences, "On the other hand, Dr. Tinnin is incorrect in his insistence upon written documented informed consent, under the West Virginia law. There is simply no such legal requirement for written informed consent in West Virginia which this Hearing Examiner is aware of at this time". Further, the Board strikes and does not adopt the language on page 30, "except the testimony regarding the written documentation portion of informed consent". In the first full paragraph on page 32, the Board strikes and does not adopt the words "form consent", and inserts in lieu thereof the words "informed consent".
>
> The Board adds at D. Informed Consent, on page 32, after the paragraph ending "the thrust of informed consent.", the following:
>
> "Further, the Code of Medical Ethics, Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association specifically states:

(continued...)

[4](...continued)

> 8.08 INFORMED CONSENT. The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The patient should make his or her own determination on treatment. The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for the patient's care and to make recommendations for management in accordance with good medical practice. The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice. Informed consent is a basic social policy for which exceptions are permitted (1) where the patient is unconscious or otherwise incapable of consenting and harm from failure to treat is imminent; or (2) when risk-disclosure poses such a serious psychological threat of detriment to the patient as to be medically contraindicated. Social policy does not accept the paternalistic view that the physician may remain silent because divulgence might prompt the patient to forego needed therapy. Rational, informed patients should not be expected to act uniformly, even under similar circumstances in agreeing to or refusing treatment. (I, II, III, IV, V)

* * *

The Hearing Examiner's Recommendation is attached hereto and only to the extent specified, and consistent with the findings and conclusions set forth in this Order, is incorporated by reference herein...

(continued...)

In the conclusionary portion of the order, the Board found that Dr. Modi is unqualified to practice medicine without certain limitations. With respect to sanctions, the Board order adopted the hearing examiner's recommendation for a public reprimand and a fine of $1,000. It also adopted and expanded upon the education recommendation.[5] Finally, the Board order required that Dr. Modi

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[4](...continued)

Further, to the extent that the Findings and Conclusions found in this Order are generally consistent with any proposed Findings of Fact and Conclusions of Law submitted by the parties, the same are adopted by the West Virginia Board of Medicine, and conversely, to the extent that the same are inconsistent with these findings and conclusions, the same are rejected.

[5]The Board's order regarding education reads as follows:

As a program of education, the Respondent shall review and study The Belmont Report, Ethical Principles and Guidelines for the Protection of Human Subjects of Research of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, and then the Respondent shall develop and utilize an informed consent form in her practice of depossession or spirit releasement therapy, which all patients undergoing hypnotherapy will review and sign prior to undergoing hypnotherapy. Such consent form shall include provisions clearly enunciating the fact that the hypnotherapy may include depossession or spirit releasement therapy, which is experimental, and that all the risks associated with it are not known because of the lack of scientific basis for such therapy. Such consent form shall clearly enunciate that any patient undergoing such therapy will be responsible for the payment of any bill from the Respondent for the Respondent's care and treatment in this regard, that if an insurer is billed, a copy

(continued...)

develop and obtain Board approval of a particular form of "informed" written consent for the use of depossession therapy and that a copy of the approved form, signed by any patient undergoing depossession therapy, be submitted by Dr. Modi with any bill sent an insurance company for such therapy.

Dr. Modi appealed the Board order to the Circuit Court of Ohio County. The circuit court reversed and vacated the Board order upon a finding that it was arbitrary and an abuse of discretion. The court found that the Board had failed to give a concise and explicit statement of the facts upon which the Board based its decision. The court also found that the Board failed to supply reasons for rejecting Dr. Modi's proposed findings of fact and for rejecting the hearing examiner's determination that expert testimony offered on behalf of Dr. Modi from persons other than physicians licensed to practice in the United States should be considered by the Board. Further, the court concluded that the Board acted

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[5](...continued)
of the signed consent form shall be submitted to the insurer with any request for payment by the physician, and that any hypnotherapy which includes the use of depossession or spirit releasement therapy, if billed to an insurer, will be billed accurately to the insurer as depossession therapy or spirit releasement therapy, not as psychotherapy. Within thirty (30) days of the date of this Order, such consent form shall be submitted to the Board for its review and approval.

arbitrarily in imposing on Dr. Modi the requirements regarding consent forms and billing practices with respect to depossession therapy.[6]

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[6]The court said:

> The Board may adopt, modify or reject the findings and conclusions of the Hearing Examiner, 11 CSR 3 13.2. Limitations on those actions are made in an important West Virginia case, St. Mary's Hospital v. State Health Planning and Development Agency, 178 W.Va. 792, 364 SE2nd [sic] 805 (1987). This case states that a concise and explicit statement of the facts upon which the Board reached its decision should be given. Also any proposed findings of the Petitioner should be ruled upon and a reason for their rejection should be given. The Code requires a reasoned, articulate decision that contains the evidentiary facts that allowed the Board to reach its decision, W.Va. Code 29A-5-3.
>
> In this case the Board failed to enumerate its reasons for rejecting the Petitioner's findings and the Board does not supply reasoning for rejecting the Hearing Examiner's acceptance of the testimony of Dr. Modi's expert witnesses. Nor is reasoning supplied by the Board for rejecting the Hearing Examiners finding that Dr. Modi did not file a false report.
>
> In holding that depossession therapy was not experimental, the circuit court stated:
>
> The Petitioner [Dr. Modi] furnished expert testimony from practitioners who stated that depossession therapy is a recognized form of treatment and that it is a method of hypnotherapy . . . Nevertheless, the Board accepted the Hearing Examiner's finding that Petitioner's therapy was experimental and therefore it required the patient's informed consent.

(continued...)

The Board of Medicine appealed the circuit court's order to this Court.

Five errors are assigned, as follows:

> 1. The Circuit Court erred, was clearly wrong, and violated applicable law, in deciding that the Board's requirement was in error that Dr. Modi utilize a written consent form when engaging in depossession or spirit releasement therapy with patients.
>
> 2. The Circuit Court erred, was clearly wrong, and violated applicable law, in directing that the Board's January 14, 1993, Order be reversed and vacated, in the absence of any evidence and determination by the Circuit Court that the evidentiary findings made by the Board were wrong.
>
> 3. The Circuit Court made no determination that the substantial rights of Dr. Modi had been prejudiced by the Board's findings, inferences, conclusions decision or order, and in the absence of such a determination, erred, was clearly wrong, and in violation of applicable law, in directing that the Board's January 14, 1993, Order be reversed and vacated.
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> 4. The Circuit Court erred, was clearly wrong, and violated applicable law, in directing that the Board's

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[6](...continued)

On the arbitrariness of requiring Dr. Modi to submit a written form to insurers, the court stated:

> It is arbitrary for the Board to dictate that the Petitioner [Dr. Modi] develop and use a written consent form to be supplied to insurers for payment which sets forth the use of depossession therapy, not as psychotherapy. First, no written consent form is necessary and second the Board is attempting to define how claims should be filed. This is matter between the Board and the insurance provider.

January 14, 1993, Order be reversed and vacated, as such a direction is not in the public interest which the Board by law is required to protect.

5. The Circuit Court erred, was clearly wrong, and violated applicable law, by issuing an ex parte stay without an opportunity for the Board to be heard before granting the stay.

In support of those assignments of errors, the Board of Medicine essentially claims that the basis of its finding was adequately articulated, that there was adequate evidence to support its findings, and that the sanctions which it imposed were appropriate.

After reviewing the record, this Court concludes that the circuit court was correct in finding that the Board made inadequate findings of fact and incorrect conclusions of law. The court below properly concluded that the billing requirement imposed upon Dr. Modi was arbitrary and capricious and was done without legal authority. We note here that a "cut and paste" version of the hearing examiner's report, as amended by the Board order, has been carefully and repeatedly studied in an effort to discern "a reasoned, articulate decision which sets forth the underlying evidentiary facts which" led the Board to its conclusions. The exercise has not been successful. We agree with the court below "that, based on the complete record of these proceedings, the order of the Board . . . is arbitrary and an abuse of discretion."

However, given the finding by the hearing examiner and the Board that Dr. Modi used an experimental therapy without obtaining a signed, written and informed consent, we conclude that the court below, in addition to reversing the Board order should have also remanded the cause to the Board for reconsideration of the issues and an appropriate, reviewable order. Therefore, the judgment of the circuit court must be reversed and this cause remanded for further proceedings consistent with this opinion.

THE STANDARDS FOR REVIEW

In approaching the issues raised in the present appeal, the Court notes that in *Berlow v. West Virginia Board of Medicine*, 193 W.Va. 666, 458 S.E.2d 469 (1995), we recently held that the West Virginia Administrative Procedure Act, W.Va. Code § 29A-5-1, *et seq.*, establishes the guidelines to be followed by circuit courts in reviewing decisions of the West Virginia Board of Medicine. We said:

> "Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions 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

> (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.'" Syllabus point 2, *Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983).

We have previously concluded that findings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of law. In other words, the findings must be clearly wrong to warrant judicial interference. *Billings v. Civil Service Commission*, 154 W.Va. 688, 178 S.E.2d 801 (1971). Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal. *West Virginia Human Rights Commission v. United Transportation Union*, 167 W.Va. 282, 280 S.E.2d 653 (1981); *Bloss & Dillard, Inc. v. West Virginia Human Rights Commission*, 183 W.Va. 702, 398 S.E.2d 528 (1990).

We have also given consideration to W.Va. Code § 29A-5-3 and prior interpretations of that section by this Court. West Virginia Code § 29A-5-3 requires that:

> Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and

> conclusions of law. Prior to the rendering of any final order or decision, any party may propose findings of fact and conclusions of law. If proposed, all other parties shall be given an opportunity to except to such proposed findings and conclusions, and the final order or decision shall include a ruling on each proposed finding. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. . . .

After examining this statutory enactment, this Court concluded, in syllabus point 4 of *St. Mary's Hospital v. State Health Planning and Development Agency*, 178 W.Va. 792, 364 S.E.2d 805 (1987):

> The requirement of West Virginia Code § 29A-5-3 that an administrative agency rule on the parties' proposed findings is mandatory and will be enforced by the courts. Although the agency does not need to extensively discuss each proposed finding, such rulings must be sufficiently clear to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed.

Finally, we note that this Court has construed W.Va. Code § 29A-5-3 to require fully articulated bases for agency determinations, particularly where economic or scientific matters are at issue:

> 2. When *W.Va. Code*, 29A-5-3 [1964] says: "Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. . . ." the law contemplates a reasoned, articulate decision which sets forth the underlying

> evidentiary facts which lead the agency to its conclusion, along with an explanation of the methodology by which any complex, scientific, statistical, or economic evidence was evaluated. In this regard if the conclusion is predicated upon a change of agency policy from former practice, there should be an explanation of the reasons for such change.
>
> 3. In administrative appeals where there is a record involving complex economic or scientific data which a court cannot evaluate properly without expert knowledge in areas beyond the peculiar competence of courts, neither this Court nor the trial courts will attempt to determine whether the agency decision was contrary to the law and the evidence until such time as the agency presents a proper order making appropriate findings of fact and conclusions of law.

Syllabus points 2 and 3, *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions*, 160 W.Va. 220, 233 S.E.2d 719 (1977).

ERRORS OF LAW BELOW

Appellants complain that the circuit court was clearly wrong in reversing the Board of Medicine in the absence of any evidence and determination that the evidentiary findings made by the Board were wrong. We disagree. As previously indicated, the Board order, cobbled together by the expedient of additions to and excisions from the hearing examiners report, is barely intelligible, if at all. The Board order utterly fails to address the findings of fact and conclusions of law proposed by the parties or the reasons for rejecting such findings. As is noted in *St. Mary's*

Hospital v. State Health Planning and Development Agency, supra, the requirement that the agency rule on such proposed findings and conclusions is mandatory and will be enforced by the courts.

Likewise, we are unable to discern from the Board order "a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusion", as is required by syllabus point 2 of *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions, supra*. It appears that the lack of such a reasoned, articulate decision flows, at least in part, from the rejection by the Board of Medicine of the hearing examiner's recommended conclusion of law allowing the admission and consideration of the testimony of Dr. Modi's experts who were not physicians currently licensed to practice medicine in one of the United States. The Board argued below and argues here that W.Va. Code § 55-7B-7[7] is

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[7]West Virginia Code § 55-7B-7 reads as follows:

> The applicable standard of care and a defendant's failure to meet said standard, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court. Such expert testimony may only be admitted in evidence if the foundation, therefor, is first laid establishing that: (a) The opinion is actually held by the expert witness; (b) the opinion can be testified to with reasonable medical probability; (c) such expert witness possesses professional knowledge and expertise coupled with knowledge of the

(continued...)

applicable to disciplinary proceedings for physicians and, therefore, testimony offered in Dr. Modi's behalf by experts not licensed to practice medicine in one of the United States could not be considered by the hearing examiner or the Board. The hearing examiner disagreed, and so do we.

West Virginia Code § 55-7B-1, *et seq.*, relates to tort actions against health care providers, including physicians, not to disciplinary proceedings before the Board of Medicine.[8] West Virginia Code § 55-7B-7 requires, among other limiting factors, that expert testimony in "medical professional liability cases by the plaintiff" be elicited only from experts with a "current license to practice medicine in one of

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[7](...continued)
applicable standard of care to which his or her expert opinion testimony is addressed; (d) such expert maintains a current license to practice medicine in one of the states of the United States; and (e) such expert is engaged or qualified in the same or substantially similar medical field as the defendant health care provider.

[8]A single reference to the regulation and discipline of health care providers, including physicians, is found in the introductory section of Article 7B, (W.Va. Code § 55-7B-1), a statement of legislative findings and purpose. It is noted that a partial revision of the "West Virginia Medical Practice Act" (W.Va. Code § 30-3-1, *et seq.*) was accomplished in the same act of the Legislature by which W.Va. Code § 55-7B-1, *et seq.*, was enacted. (1986 Acts, ch. 106). However, no legislative intent can be discerned from the entirety of Chapter 106 to effect any limitation on the nature of expert testimony in physician discipline cases other than that provided by general law and the rules of evidence to the extent applicable to such proceedings.

the states of the United States". A medical professional liability action is defined as an action for damages in tort or contract. W.Va. Code § 55-7B-2(d). It is clear that a disciplinary proceeding by the Board of Medicine is not such an action. Moreover, the continued vitality of W.Va. Code § 55-7B-7 even in tort or contract actions is doubtful in light of this Court's holding in *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994), that Rule 702 of the *West Virginia Rules of Evidence*, rather than W.Va. Code § 55-7B-7, is the paramount authority for determining whether or not an expert is qualified to give an opinion. Accordingly, the Board of Medicine erroneously refused to consider, for whatever its probative value,[9] the otherwise admissible testimony of experts supportive of Dr. Modi's assertion that depossession therapy is a recognized form of treatment and is not experimental. That error of law subjects the Board's findings on those two issues to scrutiny by this Court and the circuit court and requires that the conclusions of the Board based on

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[9]Rule 702 of the *West Virginia Rules of Evidence* provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The report of the hearing examiner adequately demonstrates the admissibility of the subject testimony under this standard, subject, as noted above, to the reasonable discretion of the hearing examiner and the Board to accord to it such weight as may be deemed appropriate.

those findings be set aside and that the sanctions imposed by reason of those conclusions be vacated.

We do not conclude that depossession therapy is or is not an acceptable form of care that would be employed by a reasonable, prudent physician in the same circumstances as those faced by Dr. Modi. We conclude only that the Board's findings in that regard are flawed by the mistake of law just described. We conclude also that we are confronted with the kind of agency ruling involving scientific data which the courts should not attempt to evaluate until such time as the agency presents a proper order making appropriate findings of fact and conclusions of law as is required by syllabus point 2 of *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions, supra*. On the present record, it appears that an adequate *prima facie* case that Dr. Modi experimented on a human subject without obtaining the written informed consent required by W.Va. Code § 30-3-14(c)(14) was established by the evidence.[10] However, the decision on that issue is

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[10]There was conflicting evidence on whether depossession therapy is experimental by the accepted medical standards in the community. Dr. Modi adduced evidence suggesting that it was not. On the other hand, the Board adduced the testimony of Dr. Louis W. Tinnin, a psychiatrist and associate professor of psychiatry at West Virginia University School of Medicine, which proceeded as follows:

> Q: Let me ask you this, Dr. Tinnin, if you have formed an opinion regarding whether the use of
>
> (continued...)

also flawed by the failure of the Board to give any consideration to the evidence adduced from Dr. Modi's experts and the failure of the Board to make appropriate findings of fact and conclusions of law; in addition, as discussed later in this opinion, the Board's determination of what may constitute compliance with the informed consent requirement deserves further careful review. Under the circumstances, the circuit court was correct in reversing the decision of the Board. However, this Court believes that the circuit court should have remanded the case to the Board for further consideration and for the making of appropriate findings of fact and conclusions of law.

The principles enunciated in syllabus points 2 and 3 of *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions*, *supra*, quoted above, are especially applicable to cases where the administrative agency has utilized the services of a hearing examiner and determines that it should amend the findings

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[10](...continued)

> depossession therapy by the accepted standards of medical practice in the community constitutes experimentation on human subjects?
>
> A: I believe that it does constitute experimentation.

Additionally, the evidence indisputably shows that Dr. Modi failed to obtain the *written* consent of Mr. Abbott before engaging in dispossession therapy, even though she did orally discuss the therapy with him and even though he did apparently orally consent to it.

the services of a hearing examiner and determines that it should amend the findings or conclusions recommended by the examiner. Where an administrative agency has conducted a contested hearing through a hearing examiner and determines that it should amend the findings of fact or conclusions of law recommended by the hearing examiner, a reasoned, articulate statement of the reasons for the amended findings of fact or conclusions of law adopted by the agency is essential to the validity of those findings or conclusions and to their ready acceptance by reviewing courts. Such is particularly the case where the agency is making its decision based on economic or scientific data within the presumed expertise of the agency or where the agency has not heard or received the underlying evidence from which it is drawing conclusions different from those of the hearing examiner.

Appellants complain further that the circuit court made no determination that the substantial rights of Dr. Modi have been prejudiced by the Board order in this proceeding, relying on the requirement contained in W.Va. Code § 29A-5-4 that a circuit court reviewing an administrative order may act to reverse or modify an administrative agency only if the substantial rights of a party are prejudiced. In this case the contention is without merit. It is self-evident that the determinations by the Board that Dr. Modi is unqualified to practice medicine without certain limitations and that Dr. Modi should be publicly reprimanded, fined, required to undergo certain education not required of all physicians in her field and

subjected to other special requirements, substantially affect her rights. We have previously determined that a license to practice a recognized profession is a valuable property right. *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953). Limitations on the enjoyment of that property right, coupled with a public reprimand and fine, imposed by a disciplinary body as in this case, clearly prejudice substantial rights of the holder of that property right and justify careful scrutiny by reviewing courts of the proceedings resulting in such action.

We now address the requirement of the Board order that Dr. Modi prepare and have approved by the Board of Medicine a form of written consent to be signed by patients undergoing depossession therapy. As we understand the record, it is contemplated that the form to be prepared and approved will include both the statement of consent to be signed by the patient and a full description of the potential "risks" and benefits envisioned by the practitioner as a result of the use of depossession therapy. We also have reviewed carefully the discussions contained in the report of the hearing examiner and in the circuit court order concluding that "no written consent form is necessary". We can not discern from the proceedings below exactly what the hearing examiner and the circuit court intended by these comments, especially in light of the express requirement of W.Va. Code § 30-3-14(c)(14) that any therapy constituting experimentation on human subjects must be preceded by "full, informed and written consent". Both the hearing examiner and the circuit court

against his license with or without any hearing provided by the Board pursuant to applicable law.

15. If such further action is imposed due to non-compliance, Dr. Iyer shall not request reinstatement of his medical license for a period of five (5) years, and any such request shall be denied without a hearing.

16. Upon the Board's determination that Dr. Iyer has satisfactorily complied with all terms and conditions of this and any subsequent Consent Order, the Consent Order then in effect shall **EXPIRE**.

Entered this _____ day of July, 2002.

WEST VIRGINIA BOARD OF MEDICINE

_____
Sarjit Singh, M.D.
President

_____
Board Designee

_____
Shivkumar L. Iyer, M.D.

fair attention given to the previously excluded expert testimony. Upon such reconsideration, if it is found that depossession therapy is experimental, not withstanding its non-invasive nature, then careful consideration must be given to whether the writing signed by the patient about to undergo depossession therapy must contain on its face a written description of the potential risks and benefits of such therapy. We do not now express an opinion on that question, deferring, as we should, to the expertise presumed to be inherent in an administrative agency created to deal with such complex issues.

It does appear that the Board of Medicine failed to consider fully the implications of a requirement that the written consent form contain the panoply of information that might be considered to be necessary to a full, informed consent and perhaps failed to consider fully how the wide variety of patients likely to undergo an "experimental" procedure in the future might be best be brought to a suitable appreciation of the anticipated risks and benefits of a particular experimental procedure. Mindful that the resolution of such difficult questions involves complex issues of patient care and treatment which go far beyond the question of "depossession therapy", we leave the proper determination of the contents of the *written* consent form for consideration on remand. Having in mind the rapid advances that have been made in medical science in recent years, we caution that the determination could have a significant impact on what might be considered

"experimental" procedures in the future and, absent careful consideration, may markedly expand the legal requirements for "informed consent". At this time, we defer to the administrative agency created to consider those issues on behalf of the medical profession. Given the wide ranging implications of such a determination, it may be appropriate for the Board of Medicine to address this matter by issuance of a regulation rather than by dealing with it in the confined circumstances of a contested administrative proceeding.

Next, we address the requirement of the Board that Dr. Modi submit to any insurance carrier for a patient undergoing depossession therapy a copy of the previously approved informed consent form signed by the subject patient. From the record, we glean that the Board of Medicine, having disapproved of the therapy as an acceptable form of treatment, having rejected Dr. Modi's experts contrary to the hearing examiner's advice and contrary to law, and having declared depossession therapy experimental, wished to prevent practitioners of the therapy from being paid by insurance carriers for the therapy. However, we also note from the record that the Board of Medicine did not undertake to prohibit Dr. Modi from using the therapy; rather the Board specified certain education and the preparation of the consent forms just discussed, thereby at least implicitly acknowledging the right of Dr. Modi to utilize the procedure in her practice. The court below found the Board's requirement that the consent form be submitted to an insurance carrier arbitrary.

We agree. West Virginia Code § 30-3-4(i) sets forth the sanctions which may be imposed by the Board of Medicine upon a physician. After reviewing the statutory language, this Court cannot conclude that the Legislature has in any manner authorized the Board of Medicine to regulate or intervene in the manner directed by the Board order in the process by which physicians bill insurers for treatment.[11]

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[11]West Virginia Code § 30-3-14(i) provides:

> (i) Whenever it finds any person unqualified because of any of the grounds set forth in subsection (c) of this section, the board may enter an order imposing one or more of the following:
>
> (1) Deny his application for a license or other authorization to practice medicine and surgery or podiatry;
>
> (2) Administer a public reprimand;
>
> (3) Suspend, limit or restrict his license or other authorization to practice medicine and surgery or podiatry for not more than five years, including limiting the practice of such person to, or by the exclusion of, one or more areas of practice, including limitations on practice privileges;
>
> (4) Revoke his license or other authorization to practice medicine and surgery or podiatry or to prescribe or dispense controlled substances;
>
> (5) Require him to submit to care, counseling or treatment designated by the board as a condition for initial or continued licensure or renewal of licensure or other authorization to practice medicine and surgery or podiatry;
>
> (6) Require him to participate in a program of

(continued...)

Finally, the appellants complain that the reversal and vacation of the order of the Board of Medicine was clearly wrong as not in the public interest.[12] As we have noted in this opinion, the court below had ample reason to reverse the Board of Medicine. However, we have disapproved the vacation of the Board order in this case without further proceedings. Specifically, we have addressed the necessity that certain issues be reconsidered and have determined that at least one of the sanctions imposed on Dr. Modi is inappropriate. It may also appear upon reconsideration of the issues as directed here that one or more of the remaining sanctions are also inappropriate.

For the reasons stated, the judgment of the Circuit Court of Ohio County is reversed. This case is remanded for further proceedings consistent with this opinion. Upon remand, the West Virginia Board of Medicine shall undertake

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[11](...continued)
education prescribed by the board;

(7) Require him to practice under the direction of a physician or podiatrist designated by the board for a specified period of time; and

(8) Assess a civil fine of not less than one thousand dollars nor more than ten thousand dollars.

[12]Appellants assign as error the grant by the Court below of a preliminary injunction or stay, *ex parte*. We do not address that assignment of error. We consider it moot.

such reconsideration of the issues as may be appropriate and render in any subsequent order a reasoned, articulate decision, accompanied by appropriate findings of fact and conclusions of law.

Reversed and remanded with directions.

No. 22792: Shakuntala Modi, M.D. v. West Virginia Board of Medicine

Workman, J., concurring:

Justice Albright has written what is in many respects an excellent opinion. Perhaps the most important contribution the opinion makes to the law is its clear enunciation that when the Board of Medicine departs from its hearing examiner's findings of fact and conclusions of law, it must craft an order that gives a reasoned, articulate statement of its reasons.[1]

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[1]Syllabus point five of the majority opinion gives the Board a broader scope of review with regard to findings of fact than has been accorded other administrative agencies. Generally, "[e]videntiary findings made [by a hearing examiner] at an administrative hearing should not be reversed unless they are clearly wrong." Randolph County Bd. of Educ. v. Scalia, 182 W. Va. 289, 292, 387 S.E.2d 524, 527 (1989); see generally Syl. Pt. 5, Frymier-Halloran v. Paige, 193 W. Va. 687, 458 S.E.2d 780 (1995); Syl. Pt. 3, Butcher v. Gilmer County Bd. of Educ., 189 W. Va. 253, 429 S.E.2d 903 (1993); Syl., West Virginia Dep't of Health v. West Virginia Civil Serv. Comm'n, 178 W. Va. 237, 358 S.E.2d 798 (1987); Syl. Pt. 2, Vosberg v. Civil Serv. Comm'n, 166 W. Va. 488, 275 S.E.2d 640 (1981). However, 11 West Virginia Code of State Rules § 11-3-13.2 (1994) apparently confers more latitude to the Board in its review of a hearing examiner's findings of fact. That rule provides, in pertinent part, that "[t]he hearing examiner shall submit written findings of fact and conclusions of law to the Board pursuant to West Virginia code section three, article five, chapter twenty-nine-a, and the Board may adopt, modify or reject such findings of fact and conclusions of law." Id.; see Berlow v. West Virginia Bd. of Medicine, 193 W. Va. 666, 458 S.E.2d 469 (1995).

It is inarguable that the manner in which the Board's order was fashioned made it almost impossible to discern their reasoning. As a result, I am unable to conclude from that order, as did the majority, that the Board was arbitrary and capricious on the merits; but I agree with the majority that the matter should be remanded so the Board might have an opportunity to craft a reasoned, articulate order for us to review.

However, several points of clarification need to be made.

First, it should be emphasized that the majority opinion in no way ratified depossession therapy as a valid treatment recognized by reasonable, prudent physicians in the same specialty as being an accepted treatment.

Second, the majority concludes that the Board of Medicine "erroneously refused to consider, for whatever its probative value, the otherwise admissible testimony of experts supportive of Dr. Modi's assertion that depossession therapy is a recognized form of treatment and is not experimental." (Footnote omitted). In arriving at this conclusion, the majority correctly states that we have recently declared that Rule 702 of the West Virginia Rules of Evidence is the paramount authority governing the issue of the admissibility of expert testimony. See Mayhorn v. Logan Medical Found., 193 W. Va. 42, 454 S.E.2d 87 (1994). However, the Board's order

is silent on whether they reversed the hearing examiner on the issue of the admissibility of the questionable experts, or whether they simply chose not to give any credence to their "expert" opinions. On remand, this should be clarified. The Board should at least have an opportunity to make a clear conclusion on this issue before this Court rules as a matter of law (as the majority has) that the testimony in question was admissible under Rule 702.

Third, the majority finds the reasoning of the Board in determining the treatment in question to be experimental "flawed by the failure of the Board to give any consideration to the evidence adduced from Dr. Modi's experts and the failure of the Board to make appropriate findings of fact and conclusions of law[.]" Here, however, the Board did not reverse the hearing examiner. The hearing examiner did admit and consider the testimony of Dr. Modi's experts, yet concluded that the treatment at issue constituted experimental therapy. The Board agreed.

Thus, it is difficult to see why the majority reversed on this segment of the Board's order, and even more difficult to understand why the majority directs that the entire issue of whether the treatment is experimental be re-opened and re-determined. Rather the majority should have been guided by the following well-established principle which we have consistently used in the context of other administrative appeals:

> '[A] reviewing court must evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same facts. (Citation omitted.)'

CDS, Inc. v. Camper, 190 W. Va. 390, 392, 438 S.E.2d 570, 572 (quoting Frank's Shoe Store v. West Virginia Human Rights Comm'n, 179 W. Va. 53, 56, 365 S.E.2d 251, 254 (1986)) (alteration not in original); accord Syl. Pt. 1, Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Comm'n, 189 W. Va. 314, 431 S.E.2d 353 (1993) (quoting Syl. Pt. 1, West Virginia Human Rights Comm'n v. United Transp. Union, Local No. 655, 167 W. Va. 282, 280 S.E.2d 653 (1981)) ("'West Virginia Human Rights Commission's findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties.'").

Applying the above-mentioned concept to the present case, it becomes apparent that the hearing examiner listened to witnesses' testimony on both sides of the issue concerning whether depossession therapy is experimental in nature before evaluating that evidence and finding that the treatment was experimental. Moreover, the Board had the opportunity to review the substantial evidence presented to the hearing examiner in upholding the hearing examiner's finding. Consequently, said findings should be sustained by this Court, since the findings are

supported by substantial evidence. By directing the Board to re-examine this issue, the majority fails to uphold the precise principle it has established for reviewing courts to utilize in cases where the findings are unquestionably supported by substantial evidence. See id. This clearly does not constitute the kind of deference we previously said should be shown under the law to the expertise of both the hearing examiner and the Board below. See Syl. Pt. 3, Citizens Bank of Weirton v. West Virginia Bd. of Banking and Fin. Insts., 160 W. Va. 220, 233 S.E.2d 719 (1977).

Fourth, the majority itself expresses lack of understanding as to why the hearing examiner and the circuit court concluded that no written consent was necessary, in light of W. Va. Code 30-3-14(c)(14), which expressly requires "full, informed and written consent." Id. (emphasis added). Yet the majority goes on to criticize the Board for offering no explanation for its action "by which we might be enlightened." Here it seems rather obvious that the Board looked at the statute and followed it.

Fifth, I must respond to the gratuitous "guidance" offered by the majority with respect to the proper contents and form of a full, informed and written consent. The majority acknowledges that resolution of the issue of the content of such a consent involves complex issues of patient care and treatment, yet suggests that the Board might better deal with this matter by the issuance of a regulation rather than in a

contested administrative proceeding. The majority's own reasoning seems, however, to bode against such an approach. Given the rapid advances in medicine in recent years, the complexity of individual medical questions, and the obvious tenor of the majority (with which I concur) that medicine must be at least willing to consider alternative, even experimental, therapeutic approaches in determining what is and is not acceptable treatment, the creation of a regulation that would effectively resolve the issue of what constitutes a full informed consent in every context would be an almost impossible task.

Lastly, I address the majority's conclusion that the Board arbitrarily imposed the requirement that Dr. Modi submit to any insurance carrier for a patient undergoing depossession therapy a copy of the previously approved informed consent form signed by the subject patient. While I agree with the majority's conclusion, I want to clarify that, on remand, if it once again is determined that Dr. Modi's treatment is experimental, and not one recognized by reasonable, responsible physicians in the same specialty, then the Board might be well within its authority to determine that billing an insurance company for psychotherapy could constitute a violation West Virginia Code § 30-3-14(c)(5), for which Dr. Modi could be disciplined. Specifically, West Virginia Code § 30-3-14(c)(5) provides, in pertinent part, that "[t]he board . . . may discipline a physician . . . licensed or otherwise lawfully practicing in this state who, after a hearing, has been adjudged by the board

as unqualified due to any of the following reasons: . . . (5) Making or filing a report that the person knows to be false [(i.e. filing a claim for psychotherapy after a legal determination has been made that depossession therapy is experimental and does not fall within the accepted definition of psychotherapy)] . . . . Id. Thus, the Board could discipline Dr. Modi for such conduct; however, the sanction for such discipline must fall within the provisions of West Virginia Code § 30-3-14(i). See supra note 11 of majority opinion. Simply stated, directing the method in which a physician must bill an insurance carrier is not an available sanction under West Virginia Code § 30-3-14(i), where the Board determines that a violation of West Virginia Code § 30-3-14(c)(5) occurred.

Consequently, while I disagree with some of the majority's reasoning and at least one of their primary bases for reversal (relating to the issue of experimental treatment and written consent), I concur in the opinion because I believe the Board failed to give a reasoned, articulate statement of the reasons for its amended findings and conclusions, and it should be required to do so.

CERTIFICATE OF SERVICE

I, ANNE WERUM LAMBRIGHT, post-hearing legal advisor to the West Virginia Board of Medicine in this matter, do hereby certify that service of the foregoing ORDER has been made upon the parties and counsel of record herein by hand delivery or by forwarding a true copy thereof in an envelope deposited in the regular course of the United States mail, certified with postage prepaid, on this the 30th day of May, 1996, addressed as follows:

Hand Delivery to:

WV Board of Medicine
101 Dee Drive
Charleston WV 25311

Deborah Lewis Rodecker, Esquire
WV Board of Medicine
101 Dee Street
Charleston WV 25311

Certified Mail to:

Shakuntala Modi, M.D.
R.D. 1
Cadiz OH 43907

Jolyon McCamic, Esquire
P.O. Box 151
56 Fourteenth Street
Wheeling WV 26003

ANNE WERUM LAMBRIGHT
Attorney at Law
P. O. Box 6023
Charleston WV 25362

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

SHAKUNTALA MODI, M.D.,

'97 FEB 25 AM 9 50

Petitioner,

vs. CIVIL ACTION NO. 93-CAP-5

WEST VIRGINIA BOARD
OF MEDICINE,

Respondent.

ORDER

The first issue this Court must address is whether or not the West Virginia Board of Medicine (hereinafter "Board") has met the requirement set forth in Syllabus point 2 in the case of Shakuntala Modi, M.D. v. West Virginia Board of Medicine, Ohio County Civil Action No. 93-CAP-5, and West Virginia Code 29A-5-3 that it rule on the parties' proposed findings so that the reviewing Court can determine if the proposed findings have actually been considered or merely overlooked.

The Board has attempted to comply by utilizing the following language in its Order dated May 30, 1996:

> Dr. Modi, by counsel, submitted two hundred and eighty-four (284) findings of fact and twelve (12) conclusions of law in its post-hearing submission to the Hearing Examiner dated December 7, 1992. Dr. Modi, by counsel, submitted to the Board, by letter dated February 28, 1996, her patient consent form. This letter and the patient consent form are attached to this Order as Exhibit 1. The Board, by counsel, submitted a Memorandum of Law dated December 7, 1992, and did not submit any additional evidence on remand. The Board hereby adopts those proposed findings of fact,

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> conclusions of law, and arguments advanced by the parties that were expressly adopted in the Hearing Examiner's Recommendations of January 6, 1993, and, in addition, makes the following findings of facts and conclusions of law. To the extent that the following findings or conclusions are consistent with those proposed findings of fact, conclusions of law and arguments advanced by the parties that were expressly adopted in the Hearing Examiner's Recommendations of January 6, 1993, the same are adopted, and conversely, to the extent that the same are inconsistent with these findings and conclusions, they are rejected. To the extent that these findings or conclusions are consistent with any other proposed findings of fact and conclusions of law submitted by the parties, the same are hereby adopted, and conversely, to the extent that the same are inconsistent with these findings and conclusions, they are rejected. To the extent that the testimony of any witness is not in accord with these findings and conclusions, such testimony is not credited. Any proposed finding of fact, conclusion of law, or argument proposed and submitted by a party but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

While this approach is not the most succinct way of ruling on the proposed findings, it will suffice since the Board is not required to extensively discuss each proposed finding of fact which it considers to be determinative or at a variance with the recommended findings of its hearing examiner. After reviewing all 284 proposed findings of fact offered by petitioner, the Court finds that the Board did rule on substantially all of Dr. Modi's proposed findings of fact and that those findings not specifically mentioned were found to be unacceptable or not germane to its decision.

Next, the Court must address the specific findings of fact challenged by Dr. Modi in section (5) subsection (a) through (e) of her petition. Dr. Modi objects to the rulings that:

(a) rejected the testimony of experts supportive of her position.

The Board clearly addresses this issue in paragraphs 8 through 11 of its findings. These findings are supported by reliable, probative and substantial evidence and are not clearly wrong. The Board did not refuse to accept the evidence offered by Dr. Modi but rather found it unsatisfactory. Accordingly, said findings are affirmed.

(b) spirit releasement, depossession therapy, and or past-life therapy is not care and treatment recognized by a reasonable, prudent physician engaged in the same specialty as being acceptable under similar conditions.

It is clear that the Hearing Examiner determined that the Board had failed to prove by "the full, clear and preponderating evidence . . . to demonstrate that Dr. Modi's level of care, skill and treatment fell below that which is acceptable under the law" (Findings, pgs. 17-18). In reaching this conclusion, the Hearing Examiner considered the testimony of Dr. Tinnin who admitted that he knew nothing about depossession therapy except that it was not recognized in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)* or the *International*

Statistical Classification of Diseases and Related Health Problems.

Other than a slight difference in the wording, it is clear that the Hearing Examiner did make a finding that depossession therapy was an accepted form of treatment under applicable law, and that finding is dispositive of this issue unless the Board's findings show a reasoned, articulate statement of its reasons for amending this finding of fact.

Not only does the Board fail to set forth reasoned and articulate findings under its finding titled "Recognition Of These Therapies As Accepted Treatment" but, in fact, the Board does not find that depossession therapy is not recognized and accepted as a form of treatment of a patient in similar condition and circumstances as Mr. Abbott. For this reason the Court must affirm the Hearing Examiner's findings.

(c) Dr. Modi was required to obtain the written informed consent of a patient prior to her treatment of the patient.

This objection to the Board's findings is really an objection to the Board's conclusion of law that a doctor must obtain informed written consent before performing an experimental procedure on a human being. The Board relies on W.Va. Code 30-3-14(c)14 which authorizes the Board to sanction a Doctor who fails to obtain a full, informed,

written consent prior to performing an experimental procedure. Said statute does not require, nor does any other statute or case law in West Virginia, such a release. For this reason, the proposed findings of the Hearing Examiner must be affirmed.

(d) spirit releasement, depossession therapy and or past-life therapy is experimental.

There is no finding that past-life therapy is experimental. However, both the Hearing Examiner and Board found that depossession therapy was experimental, and the record contains reliable, probative and substantial evidence supporting this finding. Therefore, it must be affirmed.

(e) Dr. Modi did not obtain the consent of the patient before treatment.

The real question here is, "Did the Doctor obtain a fully informed consent from Mr. Abbott before treating him?"

Both the Hearing Examiner and the Board found that the treatment was rendered without the Doctor obtaining a fully informed consent. This finding is supported by reliable, probative and substantial evidence and must be affirmed.

Next, the Board's conclusions of law must be addressed. Conclusions of law numbered 1, 2, 3, 6, 7, and 8 are all affirmed. Conclusion number 4 is rejected because the Board has failed to give a reasoned, articulate explanation of why it rejected the conclusion of the Hearing Examiner on this

issue. The finding of the Hearing Examiner was based on reliable, probative and substantial evidence. Conclusion of law number 5 is affirmed except for the inclusion of the requirement for a written consent. Dr. Modi is subject to discipline under this conclusion.

The Court now must consider the discipline proposed by the Board. Disciplines 1, 2 and 3 are not arbitrary or capricious and are within the sanctions approved by the statute. They bear a reasonable relationship to the offense for which the Doctor is to be disciplined. However, this Court finds that proposed discipline number 4, "Within sixty (60) days of the date of this Order, Dr. Modi will develop and submit to the Board for review and approval a patient informed consent form incorporating the legal requirements as outlined in Findings of Fact 19 through 21 and more fully in Cross v. Trapp, 294 S.E. 2d446 (W.Va.1982) and Adams v. El-Bash, 338 S.E. 2d 381 (W.Va. 1985)," is indeed arbitrary and capricious. It is reasonable to require Dr. Modi to use a written informed consent form whenever she does, or believes she might use, depossession therapy on a patient. However, it is arbitrary and capricious to order her to prepare a written consent form which would include disclosure of risks inherent in the procedure when she does not believe in the existence of said risks to the patient. The Board's expert did not give a clear, detailed description of the risks of using depossession therapy nor did any other expert give the Court

or Dr. Modi guidance on this issue. The Board is to prepare a written consent form which meets the criteria set forth in the decision.

WHEREFORE, it is ORDERED, ADJUDGED and DECREED that the Order of the West Virginia Board of Medicine in this matter dated the 30th day of May, 1996 is hereby modified as set forth hereinabove and is affirmed in all other respects. The sanctions contained in said Order are affirmed except for sanction number 4 which is modified as set forth hereinabove. This Court's previous Order entered on July 5, 1996 staying the implementation of said sanctions is hereby set aside. The parties' objections to all adverse rulings are noted for the record. The Circuit Clerk of Ohio County is hereby directed to forward an attested copy of this Order to counsel for the West Virginia Board of Medicine, Deborah Lewis Rodecker, Esq., 101 Dee Street, Charleston, WV 25311; and to counsel for Dr. Modi, Jolyon McCamic, Esq., P. O. Box 151, Wheeling, WV 26003.

ENTERED this 24th day of February, 1997.

MARTIN J. GAUGHAN, JUDGE
First Judicial Circuit

A copy, Teste:

Circuit Clerk