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**STATE OF WISCONSIN
BEFORE THE PHYSICAL THERAPY EXAMINING BOARD**

**IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST**

**FINAL DECISION AND ORDER
WITH VARIANCE**

**LUKE W. HAYES, P.T.,
RESPONDENT.**

DHA Case No. SPS-12-0055
DSLCase No. 10 PHT 019

0002658

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

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PROCEDURAL HISTORY

This proceeding was initiated on July 10, 2012, when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division),¹ served a formal Complaint against Respondent Luke Hayes alleging that Mr. Hayes committed two counts of sexual misconduct with a patient, in violation of Wis. Stat. § 448.57(2)(fm), and

¹ At the time the Complaint was filed in this matter, the Division of Legal Services and Compliance was known as the Division of Enforcement.

two counts of unprofessional conduct as defined by Wis. Admin. Code § PT 7.02(19), in violation of Wis. Stat. § 448.57(2)(f). The counts stemmed from conduct alleged to have occurred during Patient A's physical therapy appointments with Mr. Hayes in 2006 and during Patient B's physical therapy appointment with Mr. Hayes in 2010. Counsel for Mr. Hayes filed an Answer to the Complaint on July 31, 2012.

Following a telephone prehearing conference, on August 9, 2012, the administrative law judge (ALJ) issued a Prehearing Conference Report and Scheduling Order, scheduling the case for hearing on December 5-6, 2012. The Scheduling Order was later amended to schedule the hearing for December 4 and 6, 2012, with the December 4 hearing date to take place in Baldwin, Wisconsin, and the December 6 hearing date to take place in Madison, Wisconsin. The first two days of the hearing were held as scheduled on December 4 and 6, 2012. Due to a discovery dispute regarding Patient B's testimony which required briefing, the testimony of Patient B and Mr. Hayes was scheduled to be heard on March 25, 2013. That testimony was heard on March 25, 2013, as scheduled.

Following receipt of the hearing transcript, the ALJ issued a Briefing Order on April 5, 2013. Briefing was completed by the parties on June 7, 2013. On June 10, 2013, Mr. Hayes filed a request to re-open the record to admit a redacted version of a Notice of Claim and Settlement Proposal dated March 26, 2013 which was sent to Mr. Hayes' employer, Baldwin Area Medical Center (BAMC) and its insurer from Attorney Michael Hall, III, who represents Patients A and B. The Division filed a response on June 17, 2013 and Mr. Hayes filed a reply on June 19, 2013. By Order dated June 21, 2013, the ALJ granted the motion to re-open the record, and the Notice of Claim and Settlement Proposal was admitted as Respondent's Exhibit 106. The Order also permitted the parties to supplement their previously filed briefs by July 2, 2013 to

address the newly admitted evidence. Additional submissions from the parties were received by the ALJ, with the last submission received on July 2, 2013.²

FINDINGS OF FACT

1. Luke W. Hayes, D.O.B. December 15, 1967, is licensed by the Physical Therapy Examining Board to practice physical therapy in the State of Wisconsin pursuant to license number 6016-24, which was first granted on August 28, 1998. (Complaint, ¶ 1; Answer, ¶ 1)

2. At all times relevant to the incidents at issue, Mr. Hayes was employed as a physical therapist at BAMC in Baldwin, Wisconsin. (Complaint, ¶3; Answer ¶3)

Facts Related to Patient A

3. Patient A testified at the hearing on December 4, 2012. On or about February 9, 2006, Patient A presented to Mr. Hayes at BAMC with low back pain. Patient A had been diagnosed by a physician with degenerative disc disease, which affected her daily living activities, such as her ability to sleep, stand and lift things. Mr. Hayes' physical therapy treatment of Patient A on this date included trigger point release on the bilateral piriformis and bilateral iliopsoas, right soft tissue mobilization on the right adductor, muscle energy technique to correct pelvic asymmetries, abdominal stabilization with single leg lift and supine ball squeezes. (Complaint, ¶ 4; Answer, ¶ 4; Exh. 2; Hrg. Trans. Vol. I, pp. 35-36, lines 20-12)

4. At Patient A's February 9, 2006 appointment, Mr. Hayes gave her shorts to change into for the therapy, which was conducted within an area screened off by curtains in the physical therapy department. He began treatment, which involved pushing on pressure points in Patient A's lower back and buttocks area. (Hrg. Trans., Vol. I, p. 39-40, lines 18-4, p. 60-61, lines 6-17; Exh. 2).

²A sworn affidavit signed by Patient A was received by the ALJ on July 10, 2013. The affidavit was inadvertently omitted from the Division's July 1, 2013 filing. It has been marked as Complainant's Exhibit 13.

5. At this therapy session, Mr. Hayes then had Patient A turn over to lie on her back and pushed pressure points on her lower abdomen area. He worked his way toward her groin area along her “underwear line.” Mr. Hayes moved Patient A’s underwear to the side and pressed on pressure points along her underwear line alongside her vaginal area. Mr. Hayes moved Patient A’s underwear far enough over that Patient A’s vagina was fully exposed. As Mr. Hayes worked on those pressure points, he also touched her labia. To Patient A, the touching felt like it lasted 20-30 seconds. (Hrg. Trans. Vol. I, pp. 39-43, lines 18-13, pp. 67-70, lines 14-16)

6. Patient A returned for her second physical therapy visit on February 13, 2006. At hearing, the second visit was more vivid in Patient A’s memory than the first visit. On that date, Mr. Hayes again gave Patient A shorts to change into and had her take off her shirt and put on a gown. Patient A testified that Mr. Hayes then turned the lights down in the treatment area. He performed ultrasound on Patient A’s lower back as she was lying on her stomach on the treatment table. Mr. Hayes then had Patient A turn over so that she was lying on her back and he began working on pressure points along the side of her underwear line. (Hrg. Trans. Vol. I, pp. 45-50, lines 9-4, pp. 78-81, lines 17-14; Vol. III, p. 348, lines 23-25; Exh. 2)

7. After Mr. Hayes began working on the area along Patient A’s underwear line, he moved her underwear to the side, again fully exposing Patient A’s vagina. Mr. Hayes pressed one finger against pressure points in her groin and rested his other fingers on her labia. Mr. Hayes moved the bottoms of his fingers in a slight circular motion over Patient A’s genitalia and asked her how it felt. Patient A responded that it did not hurt there and rolled over onto her side. (Hrg. Trans. Vol. I, pp. 45-50, lines 23-4, pp. 81-84, lines 7-25, pp. 91-92, lines 21-6)

8. At either Patient A’s first or second appointment with Mr. Hayes, or at both of them, Mr. Hayes explained that he was going to be working in a sensitive area and that if there was

anything that made Patient A uncomfortable, she should let him know. At no time during the appointments did Patient A directly inform Mr. Hayes she was uncomfortable with him working too close to her private parts, although Patient A believed it was clear that she was uncomfortable with his conduct at the second appointment when she turned away from Mr. Hayes and told him that it did not hurt there. (Hrg. Trans. Vol. I, pp. 77-78, lines 14-16, pp. 83-84, lines 9-22)

9. Patient A never again returned to Hayes for physical therapy after the second appointment. Patient A did not return for additional physical therapy even though Mr. Hayes' treatment plan was for her to continue treatment after February 13, 2006 and an appointment had been set for February 20, 2006, which was later marked as a no-show. (Hrg. Trans. Vol. I, p. 86, lines 6-18; Vol. III, pp. 347-348, lines 18-5; Exh. 2, p. 8)

10. Patient A was not sure what to do about Mr. Hayes touching her. On February 15, 2006, two days following her last appointment with Mr. Hayes, Patient A went to the St. Croix County Sheriff's Department to report what had occurred. Investigator Mike Wakeling conducted an interview of Patient A which was recorded. In that interview, Patient A described what Mr. Hayes did to her during her two physical therapy visits with him in February of 2006. (Hrg. Trans. Vol. I, pp. 50-51, lines 13-21; Vol. III, pp. 347-348, lines 18-5; Exh. 6)

11. Patient A informed the sheriff's department that during her first visit on February 9, 2006, she was given a pair of shorts to put on. Mr. Hayes pushed on some pressure points in her lower back as she was lying on her stomach. He then had her roll over on the table and pushed pressure points on her stomach. He told her that he would be working close to her private areas and that if she felt uncomfortable, she should let him know. As she was lying on her back, he pulled her panties all the way over to the side. Mr. Hayes then worked near her groin area and

placed his fingers on her labia, or “lips,” as he rubbed the groin. Mr. Hayes did not put his fingers inside her vagina but had his fingers on her. As he rubbed the pressure point with one finger, Patient A could feel his other fingers on her labia. (Exh. 6, pp. 6-8, 14)

12. Patient A further informed the sheriff’s department that on her second appointment on February 13, 2006, Mr. Hayes gave her a pair of shorts for the appointment. He then performed ultrasound on her buttock. He again worked on pressure points on her stomach. Mr. Hayes then proceeded to work in Patient A’s groin area and pulled her panties all the way over to one side, fully exposing her. Mr. Hayes again placed his fingers on her labia as he worked on pressure points and rubbed her labia with his fingers. Patient A told officers that Mr. Hayes was “definitely” rubbing her, though she did not know if it was up and down or circular. Patient A told him that she did not have any pain there and rolled her legs to one side which made Mr. Hayes stop touching her. Patient A told police that the first appointment was “not as bad” as the second but that she was “kicking herself for going back.” She further stated, “The first time, I just thought, well, he’s doing his job, you know? Because, people aren’t like that. But I . . . felt very violated the second time.” She stated, “I was just laying there going oh my god.” Patient A did not know Mr. Hayes’ name at the time she spoke with law enforcement. She stated, “Now I wasn’t there to meet friends, I was there to make my back better.” (Exh. 6, pp. 5, 7, 9-10, 12-13)

13. Patient A’s recollection of the events on February 2006 was much better when she gave her statement to the sheriff’s office in 2006 than on the date of her deposition approximately one week prior to the December 2012 hearing. Patient A’s trial testimony varied from her deposition testimony regarding the issue of whether Mr. Hayes moved her underwear during the first visit and whether he placed his fingers on her labia during that visit. At her

deposition, she stated that she did not believe Mr. Hayes moved her underwear or touched her inappropriately during the first appointment, whereas she told the sheriff's department and testified at hearing that he did. The deposition occurred nearly 7 years after the statements to the sheriff's office, whereas the statements to the sheriff's office occurred two days after Patient A's last appointment with Mr. Hayes. Patient A had not reviewed her statement to the sheriff's department prior to her deposition testimony, but did review it prior to her hearing testimony. Moreover, there was little or no variation in her recollection regarding what occurred during her second (and final) appointment with Mr. Hayes. Patient A testified that the second visit stood out in her mind after seven years. (Hrg. Trans. Vol. I, pp. 70-75, lines 11-12, pp. 94-96, lines 1-6; Exh. 6; Exh. 100)

14. After Patient A gave her statement to the St. Croix County Sheriff's Department, her case was referred to the Baldwin Police Department. Patient A testified that lawyers for BAMC met with her at the Baldwin Police Department. She stated that the attorneys presented diagrams to justify Mr. Hayes' treatment of her and that she was told he had a wife and three kids and was questioned whether she wanted to destroy those children and Mr. Hayes' wife. As a result, Patient A was convinced not to pursue charges against Mr. Hayes. Patient A testified at hearing, "The only reason I came forward was so that we wouldn't be here today." (Hrg. Trans. Vol. I, pp. 51-55, lines 22-2)

15. Patient A has not received any further physical therapy since her last appointment on February 13, 2006 because she now has a "trust issue" and because her options are limited: she can go to Menomonie which is far away, or to Baldwin, which she will not do. (Hrg. Trans. Vol. I, pp. 53-54, lines 21-2)

16. Alison Page testified at the hearing. She is the Chief Executive Officer at BAMC and has been since January of 2009. Her duties include overseeing operation of the organization. During discussions with the BAMC human resources department and the head of physical therapy regarding Hayes' conduct with respect to Patient B, Ms. Page learned that there had been a previous incident involving inappropriate conduct by Mr. Hayes with respect to Patient A. She contacted Patient A by telephone, leaving a voicemail indicating who she was and asking if Patient A would speak with her about something. Patient A called Ms. Page back and left a message which sounded somewhat angry, indicating that she would speak with Ms. Page and that she hoped it was not about Luke Hayes. The two met on November 19, 2010. Patient A brought her mother with her to the meeting. (Hrg. Trans. Vol. I, p. 115, lines 3-13, pp. 118-120, lines 18-11)

17. On November 19, 2010, Patient A advised Ms. Page that she believed she had three appointments with Mr. Hayes for physical therapy. The first visit was uneventful, but the second visit made Patient A uncomfortable because Mr. Hayes was touching her too close to her crotch. Patient A told her that on the third visit, Mr. Hayes dimmed the lights and had music playing. During the appointment, he put his fingers inside her underwear and was directly rubbing her pubic area. As he was rubbing her crotch, he asked, "How does that feel?" or "Does that feel good?" (Hrg. Trans. Vol. I, pp. 120-121, lines 12-18, pp. 124-125, lines 9-10)

18. At the time that Patient A was deposed in 2012 and at the time that she spoke with Ms. Page in November of 2010, she believed that there were three appointments with Mr. Hayes instead of two. She stated that her confusion was due to the passage of years and because she thought the evaluation which occurred at the first visit was a separate appointment. (Hrg. Trans. Vol. I, pp. 54-55, line 21-10)

19. Mr. Hayes testified that he worked in Patient A's groin area because he was conducting trigger point release therapy, applying pressure to the adductor muscles near the groin area. The Division's physical therapy expert, Jill Boissonnault, testified at the hearing that she could not think of a connection between low back pain and trigger points in the adductor muscles. Mr. Hayes' expert, Paul Reutemann, testified at the hearing that it would not be his first choice to go to the adductor muscles to look for trigger points in a patient who was complaining of low back pain. Both experts agreed that intentionally touching or rubbing Patient A's labia would not have a legitimate physical therapy purpose and would constitute sexual misconduct. Ms. Boissonnault also testified that pulling Patient A's underwear all the way over to the side, fully exposing Patient A's genitalia, would not serve any legitimate physical therapy purpose and would constitute sexual misconduct. Mr. Reutemann testified that a physical therapist who engaged in sexual misconduct with a patient should not practice as a physical therapist. (Hrg. Trans. Vol. II, pp. 178-179, lines 9-14, pp. 181-183, lines 12-24, p. 221, lines 10-17, p. 223, lines 11-16; Vol. III, pp. 323-324, lines 15-2, p. 326, lines 8-25)

20. Mr. Hayes denied "dimming" the lights and claimed that they could not be dimmed. However, the lights within the curtained treatment area behind the bed could be turned off by using a switch on the wall even if the overhead lights remained on. When asked if he turned off the lights in the room on February 13, 2006, he responded, "I don't recall, but I don't know why I would turn the lights off. You have to see what you're doing. The only time you turn the lights off is if you have somebody that had headaches and was light sensitive. Then you'd probably turn it off, but that would be the only reason I would see for it." He also stated that there was no "music player" in the physical therapy room and that he did not provide a "private source of music" for Patient A. However, he acknowledged that CDs may be played at Christmas time for

patients. (Hrg. Trans. Vol. III, p. 329-330, lines 4-23, p. 348-349, lines 20-5)

21. Mr. Hayes testified that while working on the adductor muscles near Patient A's vaginal area, he never intentionally moved her underwear and never intentionally touched her private parts. (Hrg. Trans. Vol. II, pp. 324, 328, 353)

22. On March 26, 2013, Attorney L. Michael Hall of Hall Law, representing Patients A and B, sent a Notice of Claim and Settlement Proposal to Ms. Page as CEO of BAMC and to MHA Insurance Company regarding the incidents alleged in this disciplinary proceeding. On page 4 of that Notice, under the caption, "Settlement Proposal," it states, "I am authorized to settle the claims of Patient B and Patient A in exchange for a single payment of \$2,500,000.00." (Exh. 106)

23. In a sworn affidavit dated June 26, 2013, Patient A stated, "Prior to giving my hearing testimony in this matter on December 4, 2012, I had not met with or communicated with any attorneys about filing a claim for money damages regarding the acts of sexual misconduct perpetrated by Luke Hayes against me during physical therapy appointments on February 9, 2006 and February 13, 2006." (Exh. 13)

Facts Related to Patient B

25. Patient B testified at hearing. At times during her testimony, Patient B's voice was tremulous and her eyes were teary.

26. Patient B was referred to physical therapy in 2010 for treatment for longstanding low back pain. She had previously had physical therapy treatment in 2008, 2009 and 2010 for her low back pain at BAMC and had been treated by Mr. Hayes. At no time during those previous appointments did she feel uncomfortable with Mr. Hayes. (Hrg. Trans. Vol. III, pp. 234-237, lines 14-10; Exh. 4)

27. On November 10, 2010, Patient B presented to BAMC for physical therapy. Mr. Hayes gave her a pair of shorts and a gown to wear during treatment. Mr. Hayes performed trigger point release therapy and massage of Patient B's lower back while she was lying on the treatment table. After those treatments, Mr. Hayes had her walk forward and back and had her bend over so he could check her alignment. As Patient B was standing in front of Mr. Hayes facing away from him, Mr. Hayes grabbed Patient A and pulled her toward him. He then reached into her shorts, underneath her underwear, and stuck his fingers up into her vagina. Mr. Hayes then grabbed patient B's breast with his other hand. Patient B turned around and Mr. Hayes kissed her on the mouth. As Mr. Hayes did these things to Patient B, she was in disbelief and felt violated. (Hrg. Trans. Vol. III, pp. 237-241, lines 25-6, p. 242, lines 13-23; Exh. 4)

28. Patient B testified that she did not scream or yell when Mr. Hayes touched her inappropriately because she could not believe that he had just done that. After Mr. Hayes touched Patient B's vagina and breast and kissed her on the mouth, he told her to get dressed and that he was going to get her some exercises. Patient B got dressed behind the curtain and Mr. Hayes returned to give her copies of the exercises. She left the curtained area and made another appointment without having any further conversation with Mr. Hayes. (Hrg. Trans. Vol. III, p. 242, lines 2-23)

29. After making the appointment, Patient B left the BAMC facility and walked down to her car in the parking lot. When she arrived at her car a few minutes after leaving the physical therapy department, she became very emotional because of Mr. Hayes' conduct and started crying. She felt disgusted and in disbelief because she had felt Mr. Hayes was someone she could trust. Once in her car and while still crying and upset, she called her friend, Darlene Krueger. (Hrg. Trans. Vol. III, pp. 242-245, lines 24-15)

30. Ms. Krueger testified at the hearing. Patient B called Ms. Krueger on her cell phone from her car. When Ms. Krueger answered the phone, Patient B was crying hysterically. When she first answered the phone call, Ms. Krueger did not know who was calling her because she could not understand what Patient B was saying. Ms. Krueger thought that Patient B must have been in a car accident and she advised Patient B that if she was driving, she should pull over. She tried to get Patient B to calm down so she could understand her. (Hrg. Trans. Vol. I, pp. 17-19, lines 10-23, p. 28, lines 4-5; Vol. III, pp. 243-245, lines 1-15)

31. Patient B specifically told Ms. Krueger that her therapist's name was Luke. She told Ms. Krueger that Mr. Hayes had been behind her and had reached into her pants. Ms. Krueger asked her if she was wearing pants and Patient B clarified that she was wearing shorts. Patient B told her that after Mr. Hayes reached into her shorts, he inserted his fingers into her vagina and that he tried to turn her around and kiss her. Patient B was crying as she told her friend what had happened. At one point in the conversation, Ms. Krueger told Patient B to stop talking about it because it was making her sick. (Hrg. Trans. Vol. I, pp. 19-26, lines 24-19)

32. Patient B told her that she was stunned by what Mr. Hayes had done and that she kind of froze. Patient B stated, "I couldn't believe it was happening." Ms. Krueger told her to go to the police station, at which point Patient B started bawling. Ms. Krueger told Patient B that she had to go through with it because if Mr. Hayes got away with it, he would do it to somebody else. She also told Patient B to call Patient B's brother, Pete. (*Id.*)

33. In all the years she has known Patient B, Ms. Krueger has never received a call from Patient B like she did that day. Referring to her 24 years as a certified nursing assistant, Ms. Krueger testified that "just by what she told me and the way she was acting . . . and the way she called me right when she left her appointment, someone can't make that up." (Hrg. Trans. Vol I,

p. 19, lines 11-23, p. 28, lines 10-12)

34. After Patient B spoke with Ms. Krueger, she telephoned her brother, Pete B, who testified at hearing. When he answered the phone, Patient B was still crying and in a state of disbelief over what had happened. Pete B has never heard Patient B that upset as an adult. She conveyed the same information to Pete B that she had conveyed to Ms. Krueger. Pete B told her that she needed to go to the police station and write out a report. Referring to Patient B's two daughters, Pete B asked her, "What if he would have done that to them?" Patient B went to the Baldwin Police Department that day. Patient B had been traveling toward St. Paul, Minnesota, where her friend lives, but then turned around and went to the police station where she sat in the parking lot, continuing to speak to her brother. Her brother said to her something to the effect of, "You need to get in there and talk to the police. Don't wait." A time period of approximately 45 minutes to an hour elapsed between the time Patient B left BAMC until the time she entered the police station. (Hrg. Trans. Vol. I, pp. 110-114, lines 15-3; Vol. III, pp. 245-247, lines 16-25)

35. After speaking with her brother, Patient B entered the Baldwin Police Department and reported what Mr. Hayes had done to her. Patient B prepared a written statement to the police the same day. (Hrg. Trans. Vol. III, p. 247, lines 21-25)

36. In her written statement to the Baldwin Police Department, Patient B stated the following:

At the end of my PT session, Luke had me stand in front of him (m[y] back towards him). He had me bend in front of him checking my back. After several times of doing this he pressed me against him – his hand on my stomach[,] brings his hand under my underwear and sticks finger(s) in and out of my v[a]gina, puts his left hand on my breast. He says ok? I turn around [and] he pecks me on the lips. Tells me to get dressed. Goes to copy off exercises. Comes back in [and] hugs my neck. Tells me to make appointment for Wed. of next week.

(Exh. 5)

37. When Patient B went to the Baldwin Police Department in November of 2010, she had never heard of Patient A. (Exh. 7, p. 31)

38. Approximately one week later, Patient B provided a recorded statement to the Baldwin Police Department about what Mr. Hayes had done. In that statement, she again reported that, as Mr. Hayes was checking her back, he had her bend forward. He then moved his hand to the front of her abdomen, reached into her panties and stuck his fingers in her vagina. He then grabbed her breast and when Patient B turned around, he kissed her on the mouth. After doing this, Mr. Hayes told her to get dressed and that he was going to get her some exercises for her back. (Hrg. Trans. Vol. III, p. 249, lines 1-10; Exh. 7, p. 3, lines 13-17, p. 10, lines 10-16)

39. Also testifying at hearing was Shaima Sulemankhil, M.D., who is a family physician for BAMC. On November 16, 2010, Patient B presented to Dr. Sulemankhil at BAMC with a cold. She had previously treated Patient B. When Dr. Sulemankhil walked in the examination room to see Patient B, she immediately noticed that Patient B was crying and Dr. Sulemankhil asked her why she was crying. Patient B told her that she was upset because a physical therapist had sexually molested her. Dr. Sulemankhil told her that she needed to report the incident to administration at BAMC. Dr. Sulemankhil testified that her Medical Assistant, who had also been Mr. Hayes' patient, had previously complained to her that Mr. Hayes had inappropriately touched her. (Hrg. Trans. Vol. I, pp. 101-106, lines 13-3, pp. 107-108, lines 21-20)

40. Ms. Page also testified at hearing. On November 16, 2010, Ms. Page learned that Patient B wanted to speak to her. As Ms. Page was walking to the lobby to meet Patient B, she encountered Dr. Sulemankhil. Dr. Sulemankhil advised Ms. Page that Ms. Page needed to speak to Patient B immediately. (Hrg. Trans. Vol. I, pp. 115-116, lines 25-14)

41. Ms. Page met with Patient B and they spoke in Ms. Page's office that same day. Ms.

Page observed that Patient B had a horrible head cold and appeared distressed. Patient B told Ms. Page that she had had a physical therapy appointment with Mr. Hayes the previous week. She further informed Ms. Page as follows. During the appointment, she was wearing shorts. Mr. Hayes had been working on Patient B's back and then had her stand up from the table. As Patient B stood in front of him, Mr. Hayes pushed his right hand around her waist into her underwear and put his fingers in her vagina. At the same time, he grabbed her breast with his other hand. Mr. Hayes then turned Patient B around and kissed her. Patient B was stunned at what had happened. After Mr. Hayes did this, he gave Patient B some papers and she left. (Hrg. Trans. Vol. I, pp. 116-118, lines 23-5)

42. Mr. Hayes testified that at no time did he touch Patient B inappropriately, kiss her, grab her breast, put his hand inside her underwear or hug her. He testified that as Patient B left his work area on November 10, 2010 to schedule another appointment, she "was the same as she always was when she left, carrying on a conversation and laughing." (Hrg. Trans. Vol. III, pp. 337, 342).

43. Mr. Hayes testified that at the appointment, after Patient B got dressed, he spoke with her and advised her that she had the option of returning for further treatment or that she could continue on her own. However, the records reflect that Mr. Hayes' intention was for her to continue a plan of treatment which involved two physical therapy treatments per week for four weeks. After the November 10, 2010 appointment, Patient B never returned to Mr. Hayes for treatment. (Hrg. Trans. Vol. III, pp. 341-342, lines 19-7; pp. 346-348, lines 22-5)

44. Mr. Hayes testified that he did not share any personal details of his life with Patient B. However, Patient B was aware that he was married and had two sons. Mr. Hayes testified that he was married and at the time of Patient B's 2010 appointment had two sons. (Hrg. Trans.

Vol. III, p. 298, lines 7-19, p. 345, lines 23-24; Exh. 7, p. 21, lines 12-13)

45. A few days after her November 10, 2010 appointment, Patient B retained an attorney in connection with Mr. Hayes' conduct. Attorney Jeffrey Dilger, who Patient B identified as her attorney, was present at the hearing during which Patient B testified. When asked if she intended to "make a claim against Mr. Hayes," Patient B, after initially asking the ALJ if she had to answer the question and being informed by the ALJ that she did, responded, "No." When further questioned, Patient B stated, "Well, I want his license taken away for what he did. He doesn't deserve it. If that's what you're talking about." When Mr. Hayes' attorney clarified that he was talking about a personal injury claim against an individual, Patient B responded that she was "not making a personal claim against him." When asked, "So we can walk away from here today knowing that you're not going to make a personal injury claim against Mr. Hayes; is that your testimony?", Patient B responded, "Correct." (Hrg. Trans. Vol. III, p. 231, pp. 277-278, lines 11-18)

46. As indicated in Finding of Fact 20, above, on March 26, 2013, Attorney Hall, of Hall Law, representing Patients A and B, sent a Notice of Claim and Settlement Proposal to Ms. Page and MHA Insurance Company stating that Attorney Hall was authorized to settle the claims of Patients A and B for \$2,500,000.00.

ALJ'S DISCUSSION

Burden of Proof

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3). To prove by a preponderance of the evidence means that it is "more likely than not" that the examined action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18,

306 Wis. 2d. 129, 743 N.W.2d 460, citing *United States v. Saulter*, 60 F.3d 270, 280 (7th Cir. 1995).

Violations

Pursuant to Wis. Stat. § 448.57(2), if the Physical Therapy Examining Board (Board) finds that a licensee has committed a violation of that subchapter or any rule promulgated under that subchapter, it may limit, suspend or revoke the licensee's license to practice. Wisconsin Stat. § 448.57(2)(fm) provides that the Board may discipline a licensee who has engaged in "sexual misconduct with a patient," which is defined by Wis. Stat. § 448.50(5) as follows:

(a) Engaging in or soliciting a consensual or nonconsensual sexual relationship with a patient.

(b) Making sexual advances toward, requesting sexual favors from, or engaging in other verbal conduct or physical contact of a sexual nature with a patient.

(c) Intentionally viewing a completely or partially disrobed patient during the course of treatment if the viewing is not related to diagnosis or treatment.

Wisconsin Stat. § 448.57(2)(f) provides that the Board may discipline a licensee if it finds that the licensee has engaged in unprofessional conduct in violation of the code of ethics established in the rules promulgated under Wis. Stat. § 448.527.

Wisconsin Admin. Code § PT 7.02(19) defined unprofessional conduct to include engaging in "inappropriate sexual contact, exposure, gratification, or other sexual behavior with or in the presence of a patient."

At no time has Mr. Hayes argued that there was a legitimate therapy purpose for touching Patient A's or Patient B's genitals, exposing Patient A's genitals, grabbing Patient B's breast or kissing her. Rather, he denies that the events as described by Patients A and B occurred and that if any touching or exposure of Patient A's genitals occurred, it was incidental or accidental.

Allegations Related to Patient A

Based on the entire record in this case, it is more likely than not that Mr. Hayes committed the acts described by Patient A during her physical therapy appointments on February 9 and 13, 2006 and that these acts were intentional and sexual in nature, not incidental or accidental.

Patient A gave a statement to law enforcement less than two days after her second appointment with Mr. Hayes. In that statement to law enforcement, Patient A described Mr. Hayes' misconduct in detail. She clearly recalled that on February 9, 2006, Mr. Hayes moved her underwear to one side and that, as he rubbed the pressure point with one finger, he placed his other fingers on her labia. With regard to the February 13, 2006 appointment, Patient A reported to law enforcement that he moved her panties to the side, fully exposing her vaginal area, and pressed one finger against pressure points in her groin while resting his other fingers on her labia. Mr. Hayes moved his fingers in a slight circular motion over Patient A's genitalia and asked her how it felt. Patient A responded that it did not hurt there and rolled over onto her side. Patient A expressed regret to the officers about going to the second appointment after having given Mr. Hayes the benefit of the doubt at the first appointment.

She testified at the hearing that her recollection of the events of February 9 and 13, 2006 were better when she gave her recorded statement to law enforcement in February of 2006 than at the time she gave her deposition in November of 2012. Any minor inconsistencies between Patient A's original statement to law enforcement in February of 2006 and her more recent deposition and trial testimony can be attributed to the passage of time. These minor inconsistencies do not detract from her credibility and her believability as to what occurred during her physical therapy appointments.

I also note that when speaking to law enforcement and while testifying at hearing, Patient A was forthcoming in admitting that Mr. Hayes had told her prior to beginning his treatment that he would be working in private areas and that she should inform him if she felt uncomfortable. She also stated (to her potential disadvantage) that despite his invitation for her to do so, she did not say anything to him, other than that it did not hurt in her vaginal area, or do anything, except roll over onto her side.

Further bolstering Patient A's credibility is the fact that she never went to see Mr. Hayes for treatment again after the second appointment, even though she was scheduled to do so approximately one week later, and that when she met with Ms. Page over four and a half years later, she maintained that the conduct described had occurred and described it substantially similar to the way she had to police a few days after her last appointment. I also note that when Ms. Page left Patient A a voicemail and Patient A called her back, she was still upset about what had occurred over 4 years prior.

Patient A's credibility and her assertion that Mr. Hayes' touching and exposing her genitals was intentional rather than an accident is reinforced by the fact that inappropriate sexual conduct was also alleged against Mr. Hayes, and has been proven by a preponderance of the evidence, by Patient B, who did not know Patient A at the time she made her allegations.³ There was also an allegation by Dr. Sulemankhil's medical assistant that Mr. Hayes engaged in inappropriate sexual conduct, although that information is given little weight in the proceeding as there is scant information in the record pertaining to that allegation.

That Patient A may now be pursuing a civil suit against Mr. Hayes, which is her right,

³The Division asserts that the allegation related to Patient B should be considered as other act evidence under Wis. Stat. § 904.04 and *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1988), to rebut any defense that Mr. Hayes' sexual touching of Patient A was unintentional or accidental. I note, however, that pursuant to Wis. Stat. § 227.45, in administrative proceedings, "an agency or hearing examiner shall not be bound by common law or statutory rules

does not undermine her credibility, particularly given that there is no indication that she considered a lawsuit or even spoke to an attorney regarding Mr. Hayes during the approximately 7 years since the incidents in question, until after her December 4, 2012 testimony. Notably, when she met with Ms. Page nearly 5 years after Mr. Hayes' conduct, she brought her mother, not an attorney. Based on the record, it appears to be more likely that Patient A was motivated to report Mr. Hayes' conduct because she knew she did not deserve to be treated that way, and because the conduct was wrong and could be repeated (which, indeed it was). As Patient A testified at hearing, "The only reason I came forward was so that we wouldn't be here today." (Hrg. Trans. Vol. I, pp. 51-55, lines 22-2)

By exposing Patient A's genitals and touching or rubbing them for no legitimate physical therapy purpose on February 9 and 13, 2006, Mr. Hayes engaged in "sexual misconduct with a patient" as defined by Wis. Stat. § 448.50(5), in violation of Stat. § 448.57(2)(fm). He "[e]ngag[ed] in . . . a . . . nonconsensual sexual relationship with a patient," Wis. Stat. 448.50(5)(a), made "sexual advances toward . . . or engag[ed] in . . . physical contact of a sexual nature with a patient," Wis. Stat. § 448.50(b), and "[i]ntentionally view[ed] a . . . partially disrobed patient during the course of treatment" where "the viewing [was] not related to diagnosis or treatment." Wis. Stat. § 448.05(c).

By committing the acts on Patient A described above, Mr. Hayes also engaged in "unprofessional conduct" as defined by Wis. Admin. Code § PT 7.02(19), in violation of Wis. Stat. § 448.57(2)(f) as his conduct constituted "inappropriate sexual contact, exposure, gratification, or other sexual behavior with or in the presence of a patient." Wis. Admin. Code § PT 7.02(19).

of evidence" but "shall admit all testimony having reasonable probative value." Thus, an analysis under Wis. Stat. § 904.04 and *Sullivan* is not required in this proceeding.

Allegations Related to Patient B

Based on the entire record in this case, it is more likely than not that Mr. Hayes reached into Patient B's underpants and inserted his fingers into her vagina, grabbed her breast and kissed her on the mouth during a physical therapy appointment on November 10, 2010. Patient B has been entirely consistent in her description of what Mr. Hayes did to her, beginning only minutes after the sexual misconduct occurred. Patient B first telephoned her friend Ms. Krueger when she got to her car into the parking lot at BAMC to tell her what had happened. This call occurred within a few minutes of Patient B leaving her appointment with Mr. Hayes. Ms. Krueger testified that Patient B was crying hysterically when she spoke to her and told her about what her therapist Luke had done.⁴

Shortly after speaking to Ms. Krueger, Patient B telephoned her brother Pete and told him about Mr. Hayes' inappropriate sexual conduct. Patient B was still under the emotional stress of Mr. Hayes' conduct. Both Ms. Krueger and Pete B urged Patient B to go to police, despite some apparent reluctance. Patient B actually turned her car around, deciding to go the police rather than to St. Paul, Minnesota, where she had been headed. After speaking with her brother, and one hour or less from the time that Mr. Hayes committed sexual misconduct against her, Patient B reported to law enforcement what Mr. Hayes had done and gave a written statement describing Mr. Hayes' misconduct. She provided an interview with the police department approximately a week later.

Approximately a week after the November 10, 2010 incident, during a medical

⁴The Division asserts that Patient B's statements to Ms. Krueger, to her brother and to law enforcement should be deemed "excited utterance" exceptions to the hearsay rule under Wis. Stat. § 908.03(2) and therefore have added indicia of reliability. I note that there was no objection based on hearsay to these statements, that hearsay is admissible (if relevant) in administrative proceedings under Wis. Stat. § 227.45, and that although I agree that Patient B's timing and state of mind in reporting to these individuals what occurred make Patient B's account of what occurred more credible, I do not believe that an analysis based on Wis. Stat. § 904.04 is necessary or appropriate under the circumstances of this proceeding.

appointment, Patient B told Dr. Sulemankhil that she had been molested by Mr. Hayes. Dr. Sulemankhil then instructed Patient B to report the incident to the hospital administration. Patient B then told Ms. Page the same thing she told Ms. Krueger, Patient B's brother, and law enforcement.

Patient B's account of what Mr. Hayes did on November 10, 2010 has not varied in any significant way from how she recounted it numerous times from the day the conduct occurred on November 10, 2010 to the hearing on March 25, 2013. Patient B's credibility is supported by the consistency in her statements; the immediacy with which she reported what occurred to her friend, to her brother, and to law enforcement; her emotional state on November 10, 2010 when she described to others what occurred; and her demeanor at the hearing while testifying.

That Patient B may also be pursuing a civil suit against Mr. Hayes, which is her right, does not undermine her credibility, especially given that she first turned to her close friend and her brother after the incident, not to an attorney, and evidently had some reluctance to talk to police but was apparently convinced to do so by her brother and Ms. Krueger. Nor do I conclude that Patient B's account of what occurred on November 10, 2013 is undermined by the Notice of Claim and Settlement Proposal to BAMC and its insurer or by Patient B's testimony that she would not file a lawsuit against Mr. Hayes personally. Perhaps Patient B parsed her words very carefully at hearing to make sure she did not violate her oath to testify truthfully or perhaps she had second thoughts at some point about filing a lawsuit. Regardless, based on the totality of the record in this case, Patient B's believability as to what occurred on November 10, 2010 is not negated by a potential lawsuit against BAMC or by her testimony at hearing that she did not intend to sue Mr. Hayes personally. The evidence indicates that it is more likely than not that Mr. Hayes committed the acts as described by Patient B.

By putting his hands into Patient B's underwear and inserting his fingers into her vagina, grabbing her breast with his other hand and kissing her on the mouth for no legitimate physical therapy purpose, Mr. Hayes engaged in "sexual misconduct with a patient" as defined by Wis. Stat. § 448.50(5), in violation of Stat. § 448.57(2)(fm). Mr. Hayes "[e]ngag[ed] in . . . a . . . nonconsensual sexual relationship with a patient," Wis. Stat. 448.50(5)(a), and made "sexual advances toward . . . or engag[ed] in . . . physical contact of a sexual nature with a patient." Wis. Stat. § 448.50(b).

By committing the acts on Patient B described above, Mr. Hayes also engaged in "unprofessional conduct" as defined by Wis. Admin. Code § PT 7.02(19), in violation of Wis. Stat. § 448.57(2)(f) as his conduct constituted "inappropriate sexual contact, exposure, gratification, or other sexual behavior with or in the presence of a patient." Wis. Admin. Code § PT 7.02(19).

Discipline

Mr. Hayes' violations of Wis. Stat. §§ 448.57(2)(fm) and 448.57(2)(f) subject him to discipline pursuant to Wis. Stat. § 448.57(2)(f). The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Division recommends that Mr. Hayes' license to practice as a physical therapist be revoked. Under the facts of this case and considering the factors set forth in *Aldrich*, such discipline is warranted. With regard to rehabilitation, it is evident that Mr. Hayes learned nothing following the incidents with Patient A, which included police involvement. He went on to commit similar and more egregious acts of sexual misconduct against Patient B over four and

a half years later, despite the serious risk that such conduct posed to his professional license and livelihood.

The second factor, protection of the public, also weighs heavily in favor of license revocation. I note that even Mr. Hayes agreed at hearing that a physical therapist who commits sexual assault against a patient should have his license revoked. (Hrg. Trans. Vol. III, pp. 345-346, lines 25-6) Likewise, his expert testified that a physical therapist who engages in sexual misconduct or any inappropriate sexual behavior with a patient should not be practicing physical therapy. (Hrg. Trans. Vol. II, p. 223, lines 11-16).

Patients A and B sought Mr. Hayes' medical help because they were in pain. He violated their trust and caused them further pain, of an emotional nature, by committing sexual misconduct against them. Patients need to be protected from such conduct.

Finally, revocation will deter other licensees from engaging in similar conduct by demonstrating that the repercussions for such serious and violative behavior is the most serious of results, revocation.

Costs

Pursuant to Wis. Stat. § 440.22, the Board has the authority to assess respondents for costs of the disciplinary proceedings. Factors to consider include: (1) the number of counts charged, contested and proven; (2) the nature and seriousness of the misconduct; (3) the level of discipline sought by the prosecutor; (4) the cooperation of the respondent; (5) any prior discipline; and (6) the fact that the Department is a program revenue agency, funded by other licensees. *See In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz*, Case No. LS 0802183 CHI (Aug. 14, 2008).

The Division recommends that full costs be imposed on Mr. Hayes for this proceeding.

Based on the factors above and the record in this case, I agree that imposing full costs on Mr. Hayes is appropriate. The four counts charged were proven; as stated above, the misconduct is extremely serious; the Division recommended revocation and the ALJ agreed; and Mr. Hayes' fellow physical therapy licensees should not be forced to bear the costs of Mr. Hayes' misconduct. Although Mr. Hayes has no prior discipline, I note that this case involves more than one victim over the span of several years, rather than an isolated event during a discrete period of time, demonstrating that Mr. Hayes has a serious problem that puts his patients, or at least his female patients, in harm's way.

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3).

2. The Division established by a preponderance of the evidence that Mr. Hayes engaged in sexual misconduct with Patient A, as defined by Wis. Stat. § 448.50(5), in violation of Wis. Stat. § 448.57(2)(fm).

3. The Division established by a preponderance of the evidence that Mr. Hayes engaged in unprofessional conduct with Patient A as defined by Wis. Admin. Code § PT 7.02(19), in violation of Wis. Stat. § 448.57(2)(f).

4. The Division established by a preponderance of the evidence that Mr. Hayes engaged in sexual misconduct with Patient B, as defined by Wis. Stat. § 448.50(5), in violation of Wis. Stat. § 448.57(2)(fm)

5. The Division established by a preponderance of the evidence that Mr. Hayes engaged in unprofessional conduct with Patient B, as defined by Wis. Admin. Code § PT 7.02(19), in

violation of Wis. Stat. § 448.57(2)(f).

6. Mr. Hayes' violations of Wis. Stat. §§ 448.57(2)(fm) and 448.57(2)(f) subject him to discipline pursuant to Wis. Stat. § 448.57(2).

7. Revocation of Mr. Hayes' physical therapy license is warranted under Wis. Stat. 448.57(2) and the factors set forth in *Aldrich*, and he should pay the full costs of this proceeding pursuant to Wis. Stat. § 440.22 and the factors delineated in *Buenzli-Fritz*.

ORDER

For the reasons set forth above, IT IS ORDERED that:

1. Mr. Hayes' physical therapy license is REVOKED.
2. Mr. Hayes shall pay all recoverable costs in this matter in an amount to be established pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

**Department Monitor
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 8935
Madison, WI 53708-8935**

3. The terms of this Order are effective the date the Final Decision and Order is signed by the Board.

IT IS FURTHER ORDERED that the above-captioned matter be and hereby is closed as to Respondent Luke Hayes.

EXPLANATION OF VARIANCE

Pursuant to authority granted by Wis. Stats. §§ 440.035(1) and 448.57, the Physical Therapy Examining Board (PTEB) is the regulatory authority and final decision maker

governing disciplinary matters of those credentialed by the PTEB. As the regulatory authority and final decision maker in contested cases involving disciplinary matters (Class 2 proceedings), the PTEB may make modifications to a proposed decision pursuant to Wis. Stat. § 227.46(2).

In the present case, PTEB adopts the Findings of Fact, Conclusions of Law and Order as set forth by the Administrative Law Judge (ALJ), except as relates to paragraph 24 of the Findings of Fact. This variance eliminates Paragraph 24 of the Findings of Fact for the reasons set forth below.

The ALJ made the following Finding of Fact at paragraph numbered 24:

“At the hearing during which Patient A testified, Attorney Jeffrey Dilger of Hall Law was present. (Hrg. Trans. Vol. I, p. 2) At some point during the hearing, Attorney Dilger provided a business card to the ALJ indicating that he was an attorney at Hall Law. The undersigned ALJ believes she observed Attorney Dilger approach Patient A and introduce himself to her at a break following Patient A’s testimony.⁵ The ALJ left the area and did not hear any more of the discussion between Attorney Dilger and Patient A.”

Paragraph 24 can be broken down into four distinct parts. The first part relates to Attorney Dilger’s presence in the hearing at the time Patient A testified. Part two informs that Attorney Dilger identified himself to the ALJ during the hearing. The third part reflects the ALJ’s belief that she observed Attorney Dilger approach and introduce himself to Patient A following Patient A’s testimony. Part four denotes, by inference, that there was discussion between Attorney Dilger and Patient A beyond the approach and introduction. While all the information set forth in paragraph 24 may be, and is presumed by the PTEB to be factual and

⁵ The hearing transcript for that day shows that Attorney Dilger left the proceedings during a break following Patient A’s testimony. (Hrg. Trans. Vol. I, p. 100)

actual, with the exception of part 1,⁶ there is no evidence in the record on which to substantiate that Finding.

In Wisconsin, factual findings contained in administrative decisions must be supported by credible and substantial evidence. *Knight v. LIRC*, 220 Wis.2d 137, 582 N.W.2d 448 (Ct. App. 1998); *Milwaukee Bd. of Sch. Dirs. v. WERC*, 2008 WI App 125, P 7, 313 Wis.2d 525, 758 N.W.2d 814. This means that the evidence must exclude speculation or conjecture, and reasonably support the conclusions reached. *Milwaukee Bd.*, 2008 WI App 125, P 7; *Knight*, 220 Wis.2d at 149.

Case law has further established that an agency may not make any factual inferences unless there is evidence in the record on the issue. *Service Employees Intn'l Union, Local No. 150 v. WERC*, 2010 WI App 126, p. 45, 329 Wis.2d 447, 791 N.W.2d 662. There are common law and statutory provisions which require a reviewing court to set aside or remand a case if a determination is made that an agency's decision depends on any finding of fact that is not supported by substantial evidence in the record. *Williams v. Housing Authority, City of Milwaukee*, 2010 WI App 14, P 14, 323 Wis.2d 179, 779 N.W.2d 185 and Wis. Stat. § 227.57(6).

Because there is no evidence in the record to substantiate parts two, three and four of the ALJ's findings in paragraph 24, they cannot stand. However, the PTEB elects to strike paragraph 24 in its entirety as superfluous. Although the information in paragraph 24 may be used to give credence to other testimony provided by Patient A in this matter, it is not needed here to support the conclusions made by the ALJ. The ALJ has clearly substantiated all other facts and conclusions with testimony or other evidence from the record and made credibility

⁶ Attorney Dilger's presence is established in the record as referenced by the ALJ at Hearing Transcript. Vol. I, p. 2

determinations based thereon. Accordingly the ALJ's ultimate decision is not negatively impacted in any way with the removal of paragraph 24. In light of that, as well as the agreement of the parties, the PTEB elects to strike paragraph 24 in its entirety.

Dated at Madison, Wisconsin this 8th day of October, 2013.

WISCONSIN PHYSICAL THERAPY EXAMINING BOARD

By: Michele A. Thorman PT, for
Michele A. Thorman, Board Chairperson