BEFORE THE
PHYSICAL THERAPIST LICENSING BOARD
STATE OF OREGON

In the Matter of the License to Practice as a Physical Therapist of:	)	Case No: PT-246-7/07
THOMAS WATSON, PT LICENSE NO. 04941 Licensee.	)	FINAL ORDER

HISTORY OF THE CASE

On August 8, 2008, the Physical Therapist Licensing Board (Board) issued a Notice of Proposed Disciplinary Action (Civil Penalty) (Notice) to Thomas Watson, PT (Licensee), alleging a violation of ORS 688.140(2)(a) and OAR 848-045-0020(2)(q)(D). On August 21, 2008, Licensee requested an administrative hearing.

On September 24, 2008, the Board referred the matter to the Office of Administrative Hearings (OAH), and the OAH assigned the matter to Senior Administrative Law Judge Jennifer H. Rackstraw (ALJ Rackstraw). On November 12, 2008, a prehearing conference was held via telephone, with ALJ Rackstraw presiding. Attorney Diana E. Godwin represented Licensee, and Senior Assistant Attorney General Carol A. Parks represented the Board.

On January 22, 2009, the Board filed a Statement of Stipulated Facts, Exhibits A1 through A5, and Pleadings 1 through 5. On February 18, 2009, Licensee filed a Motion for Summary Determination (Licensee's Motion), a Declaration of Diana E. Godwin, and Exhibits 1 through 7 (which the ALJ renamed R1 through R7). On February 26, 2009, the Board filed a Motion for Summary Determination and Response to Licensee's Motion for Summary Determination (Board's Motion and Response). On March 23, 2009, Licensee filed Licensee Thomas Watson's Response to the Board's Motion for Summary Determination (Licensee's Response) and Exhibit 8 (which the ALJ renamed R8).

On June 5, 2009, ALJ Rackshaw issued a Ruling on Motions for Summary Determination and Proposed Order (Ruling). Through the Ruling, ALJ Rackshaw did the following:

1. Denied Licensee's Motion for Summary Determination;

2. Granted the Board's Motion for Summary Determination and found that Licensee was subject to discipline because he violated ORS 688.140(2)(a) (violation of Board rule), specifically OAR 848-045-0020(2)(q)(D) (using the term doctor in a practice setting);

3. Found OAR 848-045-0020(2)(q)(D) to be a valid administrative rule; and

4. Recommended imposition of a $1,000 civil sanction against Licensee.

The Board hereby issues this order after considering the Ruling and the record.

ISSUES

1. Whether OAR 848-045-0020(2)(q)(D) is a valid administrative rule.

2. Did Licensee violate ORS 688.140(2)(a) and OAR 848-045-0020(2)(q)(D)?

3. Does the Board have jurisdiction to sanction Licensee for a violation of OAR 848-045-0020(2)(q)(D)?

4. Is $1,000 a reasonable civil penalty for the violation?

EVIDENTIARY RULINGS

ALJ Rackshaw admitted Exhibits A1 through A5, offered by the Board, and Exhibits R1 through R8, offered by Licensee into the record. In addition, she admitted into the record the parties' Statement of Stipulated Facts.

STIPULATED FINDINGS OF FACT

1. Licensee is a physical therapist who received a Doctorate of Physical Therapy (DPT) on August 28, 2004. He has been licensed by the Board since April 1, 2005. He is currently employed as a physical therapist by Peak Performance Physical Therapy Clinic of Redmond (Peak Performance).

2. Between May 2006 and June 2007, Licensee worked at Living Well Clinic. On January 9, 2007, Licensee received a Confidential Advisory Letter (advisory letter) from the Board, advising him to cease using the term "doctor." The advisory letter cited Licensee's use of the term "doctor" on his business card, on Living Well Clinic's website, and in a newsletter. The

1 advisory letter also cited the practice of staff and other medical professionals referring to
2 Licensee as "doctor." The advisory letter warned Licensee that failure to cease using the term
3 "doctor" would subject him to disciplinary action.

4 3. In the spring of 2008, Peak Performance engaged Licensee to teach a continuing
5 education course. To help advertise the course, Licensee submitted a biographical statement to
6 Peak Performance that referred to himself as "Dr." Peak Performance used the statement,
7 including the reference to "Dr." for an advertisement in its Spring 2008 newsletter.

8 4. In the fall of 2008, Willamette Falls Hospital engaged Licensee to teach a continuing
9 education course that was similar to the course he previously taught for Peak Performance. To
10 help advertise the course at Willamette Falls Hospital, Licensee submitted the same biographical
11 statement he had previously submitted to Peak Performance. Willamette Falls Hospital printed
12 and disseminated a brochure for the continuing education course that included Licensee's
13 biographical statement that referred to Licensee as "Dr."

14 5. On August 8, 2008, after learning that Licensee was referred to as "Dr." in the Peak
15 Performance newsletter and the Willamette Falls Hospital brochure, the Board issued the Notice
16 to Licensee, alleging that Licensee violated ORS 688.140(2)(a) and OAR 848-045-
17 0020(2)(q)(D).

18 **ADDITIONAL FINDINGS OF FACTS**

19 ALJ Rackshaw made the following additional Findings of Fact, which are hereby adopted
20 by the Board:

21 1. Peak Performance's quarterly newsletter is titled "The Peak Performance Post." (Ex.
22 R5.) The newsletter is distributed to affiliates and clients of Peak Performance. (*Id.* at 2.) The
23 Spring 2008 newsletter contained, among other things, an article on balance that closed with the
24 following advice, "If you have any concerns about your balance ask your doctor for a
25 prescription to have your balance screened by a physical therapist…it may just save your life!"
26 (*Id.* at 1.) The newsletter also contained, among other things, an invitation to all "patients,

1 referrals and friends" to stop by Peak Performance's open house for a free physical therapy
2 screening. (*Id.* at 2.)
3 2. The continuing education course taught by Licensee at Willamette Falls Hospital was
4 titled "Pain Management & Treatment for the 21st Century Physical Therapist." (Ex. R6 at 1.)
5 **DISCUSSION**
6 In the Notice, the Board alleged that Licensee violated ORS 688.140(2)(a) (rule of the
7 Board), specifically OAR 848-045-0020(2)(q)(D) by referring to himself as, or allowing himself
8 to be referred to as, "doctor"[1] in two professional advertisements. Based on the alleged
9 violations, the Board proposed a $1,000 civil penalty. The Board has the burden of establishing
10 by a preponderance of the evidence that the violations occurred and that the proposed penalty is
11 reasonable. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in
12 a contested case rests on the proponent of the fact or position"); *see also Harris v. SAIF*, 292 Or
13 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the
14 proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence
15 of legislation specifying a different standard, the standard of proof in an administrative hearing is
16 preponderance of the evidence). Proof by a preponderance of the evidence means that the fact
17 finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General*
18 *Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).
19 The material facts in this case are not in dispute. To summarize, Licensee is a physical
20 therapist who is licensed by the Board. In January 2007, he received an advisory letter from the
21 Board, advising him to cease using the term "doctor" on his business card, on his then-
22 employer's website, and in a newsletter. In the spring of 2008, Licensee submitted a
23 biographical statement to his employer, Peak Performance, that referred to himself as "Dr."
24 Peak Performance used the statement in a quarterly newsletter that, among other things,
25 advertised a continuing education course taught by Licensee. In the fall of 2008, Licensee
26

[1] For purposes of this Final Order, "doctor" and "Dr." are used interchangeably.

submitted the same biographical statement he had previously submitted to Peak Performance to Willamette Falls Hospital. Willamette Falls Hospital subsequently used the statement in a brochure to advertise a continuing education course taught by Licensee. After learning that Licensee was referred to as "Dr." in the Peak Performance newsletter and the Willamette Falls Hospital brochure, the Board issued a Notice of Proposed Disciplinary Action, alleging that Licensee violated ORS 688.140(2)(a) and OAR 848-045-0020(2)(q)(D).

ORS 688.140(1)(e) provides that after notice and hearing, the Board may impose a civil penalty not to exceed $5,000. Subsection (2)(a) provides that there are grounds to impose sanctions as specified in subsection (1) when the person violates "any provision of ORS 688.010 to 688.201, board rules or a written order from the board." The rule the Board alleges that Licensee violated is OAR 848-045-0020(2)(q) engages in deceptive consumer practices, which includes:

> (D) Using the title "Doctor" or "Dr." with patients in a practice setting or on business cards, letterhead or professional advertisement or signage. A physical therapist who holds a doctoral degree in physical therapy may only use the initials "DPT" or the words "doctorate in physical therapy" after the physical therapist's name.

Licensee made the following arguments: 1) OAR 848-045-0020(2)(q)(D) is an invalid administrative rule; 2) that he did not violate OAR 848-045-0020(2)(q)(D); and 3) the Board lacked jurisdiction to sanction him for a violation of OAR 848-045-0020(2)(q)(D). These arguments are addressed individually below.

1. Whether OAR 848-045-0020(2)(q)(D) is an invalid administrative rule

ORS 183.400 pertains to judicial determination of the validity of an administrative rule and provides, in relevant part:

> (3) Judicial review of a rule shall be limited to an examination of:
>
> (a) The rule under review;
> (b) The statutory provisions authorizing the rule; and
> (c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.

(4) The court shall declare the rule invalid only if it finds that the rule:

(a) Violates constitutional provisions;
(b) Exceeds the statutory authority of the agency; or
(c) Was adopted without compliance with applicable rulemaking procedures.

Licensee has not alleged that OAR 848-045-0020(2)(q)(D) is unconstitutional, or that the Board failed to comply with rulemaking procedures when it adopted the rule. Therefore, the validity of the rule hinges on whether the rule exceeds the scope of the Board's statutory authority. This analysis requires an examination of "whether the substance of the action, though within the scope of the agency's * * * general authority, departed from a legal standard expressed or implied in the particular law being administered, or contravened some other applicable statute." *Planned Parenthood Ass'n v. Dept. of Human Res.*, 297 Or 562, 565 (1984). To the extent a rule departs from statutory policy directives, the rule "exceeds the statutory authority of the agency." *Id.* at 573.

To interpret the meaning of a statute, it is necessary to discern the intent of the legislature. ORS 174.020(1)(a); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). The first level of analysis requires examination of the text and context of the statute. The text of a statute is the "best evidence of the legislature's intent." *State v. Person*, 316 Or 585, 590 (1993). The context of a statutory provision includes other provisions of the same statute and other related statutes. *Southern Pacific Trans. Co. v. Dept. of Rev.*, 316 Or 495, 498 (1993). When analyzing the text and context of a statute, it is helpful to consider statutory and judicially developed rules of construction. For example, words of common usage should be given their plain, natural, and ordinary meaning, *State v. Langley*, 314 Or 247, 256 (1992), and "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." ORS 174.010. If the legislature's intent is clear after consideration of the text and context, then further inquiry into legislative intent is unnecessary. *PGE*, 317 Or at 611.

OAR 848-045-0020 derives its statutory authority from ORS 688.140 and 688.160. As previously set forth, ORS 688.140(2)(a) authorizes the Board to sanction a person for violating "any provision of ORS 688.010 to 688.201, board rules or a written order from the board." ORS 688.160(6) authorizes the Board to, among other things:

> (a) Establish matters of policy affecting administration of ORS 688.010 to 688.201;
>
> * * * * *
>
> (c) Adopt rules necessary to carry out and enforce the provisions of ORS 688.010 to 688.201;
>
> * * * * *
>
> (h) Exercise general supervision over the practice of physical therapy within this state[.]

While ORS 688.160(6)(a) and (c) limit the Board's rulemaking authority to the execution and enforcement of the provisions of ORS 688.010 to 688.201, ORS 688.160(6)(h) provides the Board with a broad grant of authority to exercise "general supervision over the practice of physical therapy" in Oregon.

Licensee contends that the Board's general rulemaking authority is constrained by ORS 676.110 and 676.120.[2] ORS 676.110 provides:

> Any person practicing a health care profession who uses the title "doctor," or any contraction thereof, "clinic," "institute," "specialist" or any other assumed or artificial name or title, in connection with the business or profession, on any written or printed matter, or in connection with any advertising, billboards, signs or professional notices, shall add after the name of the person, or after any such assumed or artificial names, one of the following respective designations in letters or print which shall be at least one-fourth the size of the largest letters used in the title or name, and in material, color, type or illumination to give display and legibility of at least one-fourth that of the title or name:
>
> (1) In the case of a person practicing podiatry, the word "podiatrist" or the words "podiatric physician" or "podiatric physician and surgeon."
>
> (2) In the case of a person practicing chiropractic, the word "chiropractor" or the words "chiropractic physician."

[2] Watson also argues that the Board's authority is constrained by ORS 676.130. This argument is addressed in the Section (3) of this Opinion.

> (3) In the case of a person practicing dentistry, the word "dentist" or "dentistry."
>
> (4) In the case of a person practicing naturopathic medicine, the word "naturopath" or the words "naturopathic physician."
>
> (5) In the case of a person practicing optometry, the word "optometrist" or the words "doctor of optometry" or "optometric physician."
>
> (6) In the case of a person licensed to practice medicine by the Oregon Medical Board who holds the degree of Doctor of Osteopathy, or the equivalent, the word "osteopath" or the words "osteopathic physician" or "osteopathic physician and surgeon."
>
> (7) In the case of a person licensed to practice medicine by the Oregon Medical Board who holds the degree of Doctor of Medicine, or the equivalent, the word "physician" or the word "surgeon" or the words "physician and surgeon."
>
> (8) In the case of a person practicing veterinary medicine, the word "veterinarian."
>
> (9) In the case of a person practicing acupuncture, the word "acupuncturist" and in the case of a person who has completed a program that leads to a doctoral degree in Oriental Medicine and Acupuncture from a school that has federally recognized accreditation, the words "doctor of acupuncture and oriental medicine."

ORS 676.120 provides, in part:

> No person shall use any of the designations stated in ORS 676.110 (1) to (9), in connection with the name, business or profession of the person or in connection with an assumed or artificial name, or "clinic," "institute" or "specialist," unless the person is licensed under the laws of this state to practice the particular health care profession indicated by such designation, as stated in ORS 676.110[.]

Licensee contends that ORS 676.110 does not prohibit a physical therapist who holds a doctoral degree from using the title "doctor." Rather, Licensee argues that the statute simply states that if a person practices one of the professions listed in subsections (1) through (9), the person must use the applicable designation set forth in the statute if he or she uses the title "doctor." Licensee further argues that the Board cannot use the statutes under ORS Chapter 677 as authority for disciplining him for a violation of OAR 848-045-0020(2)(q)(D) because ORS 677.060 exempts the practice of physical therapy from regulation under Chapter 677.

1 Even if Licensee was correct in that ORS 676.110 does not prohibit a physical therapist
2 who holds a doctoral degree from using the title "doctor" and that he is also correct that the
3 practice of physical therapy is exempt from regulation under ORS Chapter 677, OAR 848-045-
4 0020(2)(q)(D) does not *contravene* any provisions in ORS Chapters 676 or 677. In other words,
5 there are no provisions in those chapters or any others that expressly allow a physical therapist to
6 use the title "doctor."
7 As previously discussed, ORS 688.160(6)(h) provides the Board with a broad grant of
8 authority to exercise "general supervision over the practice of physical therapy" within the state.
9 That provision alone confers on the Board sufficient authority to adopt OAR 848-045-
10 0020(2)(q)(D). Moreover, a rule prohibiting a physical therapist from using the title "doctor"
11 does not depart from any legal standard expressed or implied in ORS 688.160(6)(h), and such a
12 prohibition does not contravene any other applicable statutes. For these reasons, the Board
13 hereby finds that OAR 848-045-0020(2)(q)(D) is a valid administrative rule.
14 **2. Whether Licensee violated ORS 688.140(2)(a) and OAR 848-045-0020(2)(q)(D)**
15 Licensee contends that he did not violate OAR 848-045-0020(2)(q)(D) because his use of
16 the title "doctor" was not deceptive, he did not use the title with patients or to advertise his
17 physical therapy practice, and the biographical statements he provided to Peak Performance and
18 Willamette Falls Hospital were not "professional advertisements."
19 First, Licensee argues that he did not violate the Board's rule because a violation requires
20 deceptive use of the title "doctor" and Licensee's use of the title in his biographical statements
21 was not intended to be, nor was it actually, deceptive. The Board's interpretation of its rule is
22 that such use of the term "doctor" by a physical therapist is a *per se* deceptive practice,
23 regardless of the manner of the use.
24 The Board's interpretation of its own rule is plausible. Subsection (2)(q) provides that a
25 licensee engages in illegal, unethical or unprofessional conduct if he or she engages in a
26 deceptive consumer practice. Paragraphs (2)(q)(A) through (D) then list examples of deceptive

1 consumer practices. One such example, in paragraph (D), is using the title "doctor" with patients
2 "in a practice setting or on business cards, letterhead or professional advertisement or signage."
3 The rule does not appear to require a particular mental state (*i.e.* intent to deceive) or outcome
4 (*i.e.* actual deception achieved).

5 Deference is given to an agency's interpretation of its own rule so long as it is not
6 inconsistent with the text of the rule, the organic statute, or any other source of controlling law.
7 *See Don't Waste Oregon Com. v. Energy Facility Siting,* 320 Or 132, 142 (1994). The Oregon
8 Supreme Court has held that where "the agency's plausible interpretation of its own rule cannot
9 be shown either to be inconsistent with the wording of the rule itself, or with the rule's context,
10 or with any other source of law, there is no basis * * * [to] assert that the rule has been
11 interpreted 'erroneously.'" *Id.* The Board finds that the its interpretation of its rule is not
12 inconsistent with the text of the rule, the organic statute, or any other source of controlling law.
13 Regardless of whether Licensee intended to be deceptive in his use of the title "doctor," and
14 whether the use was actually deceptive, the evidence establishes that he used the title "with
15 patients in a practice setting or on business cards, letterhead or professional advertisement or
16 signage," he is in violation of the rule.

17 Next, Licensee argues that he did not violate the Board's rule because he did not use the
18 title "doctor" with patients in a practice setting, and he also did not use the title on business
19 cards, letterhead, or professional advertisement or signage. The evidence supports his contention
20 that he did not use the title with patients in a practice setting, and that he did not use the title on
21 business cards, letterhead, and signage. Thus, the only remaining question is whether he used
22 the title on a "professional advertisement."

23 Licensee argues that the biographical statements he provided, which contained the title
24 "doctor," were only intended for use in advertising a continuing education course to medical
25 professionals, and not to patients. Licensee further argues that the statements were not intended
26 ///

1 to advertise his physical therapy practice, and that patients were not to be the attendees for the
2 course.

3 The Board does not define the term "professional advertisement" in its rules. It interprets
4 its rule; however, to apply to the present facts—in other words, it interprets the rule to prohibit a
5 physical therapist from using the title "doctor" in any type of advertisement, regardless of the
6 intended audience.

7 As previously discussed, the Board's interpretation of its rule is entitled to deference if it
8 is plausible, and it is not inconsistent with the wording of the rule, with the context of the rule, or
9 with any other source of law. *See Don't Waste Oregon Com.*, 320 Or at 142. OAR 848-045-
10 0020(2)(q) provides that a licensee engages in illegal, unethical or unprofessional conduct if he
11 or she engages in deceptive *consumer* practices. The wording of that subsection suggests that the
12 rule is aimed at the consumption of physical therapy services, not educational services. With
13 that in mind, paragraph (2)(q)(D) can be read to prohibit the use of the title "doctor" in a
14 professional advertisement directed at consumers of physical therapy services. To interpret the
15 rule otherwise would be inconsistent with the wording and context of subsection (2)(q).

16 Licensee submitted his biographical statement to Peak Performance, and later to
17 Willamette Falls Hospital, to help advertise a continuing education course he was teaching. Peak
18 Performance, advertised the course in its Spring 2008 newsletter, which was distributed to
19 affiliates and clients of Peak Performance. The newsletter contained one or more articles
20 soliciting business for Peak Performance by suggesting that persons get screened by a physical
21 therapist and by offering free physical therapy screenings at a Peak Performance open house.
22 The newsletter itself is a professional advertisement directed, at least in part, to consumers of
23 physical therapy services.

24 Finally, Licensee argues that the biographical statements he submitted to help advertise
25 his course were not themselves "professional advertisements," that there is no evidence he
26 intended or knew that Peak Performance and Willamette Falls Hospital would print his

statements verbatim in their advertisements, and that the actions taken by Peak Performance and Willamette Falls Hospital in actually controlling and publishing the advertisements cannot be attributed to him for purposes of establishing that he violated OAR 848-045-0020(2)(q)(D).

First, the evidence establishes that Licensee submitted his biographical statement to Peak Performance for the express purpose of advertising his course. Whether Licensee intended or knew that Peak Performance would include his statement *verbatim* in its printed advertisement is immaterial; what is significant is that he provided specific language to Peak Performance and that language included a reference to himself as "doctor." To argue after the fact that he had no control over the use of "doctor" in the advertisement is disingenuous. There is no evidence that he asked Peak Performance *not* to use the word "doctor" in its advertisement. Rather, the Board finds that he implicitly authorized use of all the words in his statement. Similarly, the fact that Peak Performance may have ultimately controlled and facilitated the printing of the advertisement does not relieve Licensee of the responsibility for the statement he provided to Peak Performance for the express purpose of advertising his course.

For the reasons set forth above, the Board finds that Licensee violated OAR 848-045-0020(2)(q)(D), and consequently ORS 688.140(2)(a), by using the title "doctor" in the Peak Performance advertisement.

3. Whether the Board has jurisdiction to sanction Licensee for a violation of OAR 848-045-0020(2)(q)(D).

Licensee argues that pursuant to ORS 676.130,[3] the Board does not have jurisdiction to sanction him for any violation of ORS 676.100 to 676.120. The Board need not decide that issue

---

[3]

> Each board licensing any of the health care professions, within this state, shall notify the appropriate district attorney of any violation of ORS 676.100 to 676.120 which may be brought to the attention of such board.
>
> The district attorney of the county in which any violation of those sections takes place shall prosecute the violation upon being informed of the violation by any person or by one of such boards.

because it has not proposed to sanction Licensee for any violation of ORS 676.100 to 676.120. Rather, the Board has proposed a sanction based on violations of ORS 688.140(2)(a)—violation of a Board rule—specifically, OAR 848-045-0020(2)(q)(D). ORS 688.140(1) allows the Board to impose sanctions against a person for violations of ORS 688.140(2)(a).

SANCTION

Under ORS 688.140(1)(e), the Board may impose "a civil penalty not to exceed $5,000" for any violations set forth in section (2) of the statute. The Board hereby finds that a $1,000 civil penalty for violation of ORS 688.140(2)(a), specifically OAR 848-045-0020(2)(q)(D) is reasonable.

ORDER

IT IS HEREBY ORDERED that Licensee is assessed a civil penalty of $1,000, which must be paid within 30 days that this Final Order is issued by the Board.

DATED this 4th day of August, 2009.

PHYSICAL THERAPIST LICENSING BOARD
St: **SIGNATURE ON FILE**

By

James D. Heider
Executive Director

RIGHT TO JUDICIAL REVIEW

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals within 60 days from the date of this Final Order on Default. If you do not file a petition for judicial review within the 60 days time period, you will lose your right to appeal.