# BEFORE THE BOARD OF PHYSICAL AND OCCUPATIONAL THERAPY OF THE STATE OF IOWA

) )	CASE NUMBER 09-011 DIA NO. 12POT003
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	DECISION AND ORDER
	) ) ) )

On March 26, 2013, the Iowa Board of Physical and Occupational Therapy (Board) filed a Notice of Hearing and Statement of Charges against Brian Gauer (Respondent) charging him with failure to comply with the terms of a settlement agreement, in violation of Iowa Code section 147.55(9) and 645 IAC 202.2(20). A hearing was initially scheduled for June 14, 2013 but was continued at Respondent's request. A telephone prehearing conference was held on September 5, 2013 at 8:00 a.m.

The hearing was held on September 13, 2013 at 10:00 a.m. in the Lucas State Office Building, fifth floor conference room, Des Moines, Iowa. The state was represented by Assistant Attorney General September Lau. Respondent appeared for the hearing by telephone and was self-represented.<sup>1</sup> The following Board members were present for the hearing: Denise Behrends, OT, Chairperson; Todd Bradley, PT; Dr. Erin Hytrek, PT; Jenifer Furness, OT; and Bradley Earp, PT. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing. The hearing was closed to the public at Respondent's request, pursuant to Iowa Code section 272C.6(1)(2013), and was recorded by a certified court reporter. After hearing all the evidence and examining the exhibits, the Board convened in closed session, pursuant to Iowa Code section 21.5(1)(f)(2013), to deliberate its decision. The administrative law judge was instructed to prepare the Board's written decision, in accordance with its deliberations.

hearing resumed without Respondent.

<sup>&</sup>lt;sup>1</sup> Approximately 18 minutes into the hearing, Respondent stated that it would "just be better if I surrender the damn license, you can have it." This occurred during the cross-examination of the state's witness, Beth Jorgenson. Respondent then said good-bye and hung up the phone. The administrative law judge called Respondent back, but he did not answer his phone. A voice mail message was left informing Respondent that the Board would wait for five minutes for him to call back to continue his participation in the hearing. Respondent did not call back. After waiting approximately 10 minutes, the

#### THE RECORD

The record includes the testimony of Beth Jorgenson and State Exhibits 1-40 (See Exhibit Index for description).

### FINDINGS OF FACT

- 1. On November 19, 1992, Respondent was issued Iowa license number 01916 to practice physical therapy in the state of Iowa. (State Exhibit 5)
- 2. On September 28, 2012, the Board approved and accepted a Settlement Agreement and Order that was signed by Respondent on August 24, 2012. (State Exhibit 3). The Settlement Agreement and Order resolved a Notice of Hearing and Statement of Charges filed against Respondent on June 15, 2012. (State Exhibit 18) By signing the Settlement Agreement, Respondent agreed to waive his right to a hearing on the Statement of Charges and all attendant rights, including the right to appeal. The Settlement Agreement and Final Order states that it shall have the force and effect of a disciplinary order entered following contested case hearing. (State Exhibit 3; Testimony of Beth Jorgenson)
- 3. The September 28, 2012 Settlement Agreement and Order placed Respondent's license on probation for a period of one (1) year and required Respondent to:
  - Pay a \$1,000 civil penalty within 30 days of the Board's acceptance of the Agreement and Order;
  - Abstain from drugs and alcohol. Respondent was prohibited from using any
    controlled or prescription drug in any form unless the controlled or prescription
    drug was prescribed for him by a licensed treating physician or other qualified
    treating health care provider. Respondent was required to provide the Board
    written notice within 72 hours of his use of any controlled prescription drug;
  - Participate in the Board's chemical screening program. Respondent was required to complete enrollment in the chemical screening program within 30 days of the effective date of the Settlement Agreement and Order, to comply with all requirements of the chemical screening program, and to be responsible for payment of all expenses he incurred through the program;
  - File sworn, quarterly reports with the Board, no later than December 1, March 1, June 1, and September 1 throughout the probationary year, attesting to his

- compliance with all of the terms and conditions of the Settlement Agreement and Order; and
- Attend at least one Board approved aftercare meeting (Alcoholics Anonymous, Narcotics Anonymous, or a similar organization) each week, provide written verification of his attendance with his quarterly reports, and obtain an AA or NA sponsor.

(Testimony of Beth Jorgenson; State Exhibit 3)

- 4. On September 28, 2012, the Board's Executive, Judy Manning, sent Respondent a signed copy of the Settlement Agreement and Order by certified mail. In a cover letter, Ms. Manning advised Respondent that the \$1,000 civil penalty was due on October 28, 2012 and that he would be on probation from September 28, 2012 through September 28, 2013. She also enclosed instructions for enrollment in the Board's chemical screening program and advised Respondent that his first quarterly report, along with his AA meeting attendance, would be due on December 1, 2012. Respondent signed for this packet of documents on October 11, 2012. (Department Exhibits 4, 6)
- 5. Beth Jorgenson is an employee of the Department of Public Health Professional Licensure Division and was responsible for monitoring Respondent's compliance with the terms of the Settlement Agreement and Order. She typically corresponds with licensees by email, and the record includes a number of emails between Ms. Jorgenson and Respondent. On October 4, 2012, Ms. Jorgenson sent Respondent a signed copy of the Settlement Agreement and Order and forms for enrolling in the Board's chemical screening program and for reporting his AA/NA attendance. (Testimony of Beth Jorgenson; State Exhibits 6-9, 13-15, 25-26)
- 6. The Board uses First Lab for its chemical screening program. Respondent enrolled in the First Lab program on or about October 25, 2012. Anne Cardinal is the First Lab account manager who was responsible for managing Respondent's participation in the program. First Lab requires participants to call in every day and to provide a random specimen of blood, urine, or other bodily substance for testing when asked to do so. (State Exhibits 9, 10; Testimony of Beth Jorgenson)
- 7. On October 31, 2012, Respondent emailed the Board's Executive, Judy Manning and asked for an extension of time to pay his \$1,000 civil penalty. Respondent also asked to be released from the requirement that he participate in the Board's chemical

screening program through First Lab. Respondent reported that the "state" already had him on random drug screens for over a year and further stated that he had a "O Tolerance" Interlock on his car for the past 18 months and would be required to keep it until 2015. Respondent questioned whether it made sense to have him go to a lab to be tested when he already had to breathe into the Interlock in order to drive to the lab. He also questioned whether he would be able to stay in compliance when he was working in a rural area and First Lab had been unable to find a "drop" location that was open seven days a week with a male staff member who could directly observe him providing the specimen. (State Exhibit 11)

Judy Manning responded to Respondent's email on November 5, 2012 and reminded him that he agreed to pay the civil penalty within 30 days and to participate in the Board's chemical screening program when he signed the Settlement Agreement. Ms. Manning further advised Respondent that if he wanted to pay the civil penalty at a later date or in installments he would have to submit a letter to the Board for their consideration at their December 21, 2012 meeting. She also advised Respondent that if he wanted to be released from the requirement that he participate in the chemical screening program he would have to submit a request to the Board for modification of the Settlement Agreement and Order. (State Exhibit 12)

Respondent did not submit any written request or letters directly to the Board for modification of the requirements of the Settlement Agreement and Order. (State Exhibits 1-40)

- 8. Respondent called in to First Lab every day as required through November 19, 2012. On November 19, 2012, Respondent was selected by First Lab for testing. At that time, Respondent was working and temporarily residing in Martin, South Dakota although his address of record with the Board was in Sioux Falls, South Dakota. Respondent was asked to go to a drop site in Sioux Falls, South Dakota, which was approximately 300 miles away from where he was working. Respondent objected to having to travel so far. The Board's staff agreed that the drop would be waived for November 19, 2012. (State Exhibit 13)
- 9. Respondent stopped participating in the First Lab program on November 20, 2012. He did not call into the program from November 20-26, 2012. On November 26, 2012, Respondent's account with First Lab became inactive. At that time he owed First Lab \$60 for his participation in the program. On January 24, 2013, First Lab sent

Respondent a final notice that the past due amount was going to collections. As of the date of the hearing, the Board had not received any verification that Respondent had paid First Lab or that he had resumed participation in the chemical screening program. (State Exhibits 16, 17; Testimony of Beth Jorgenson)

10. As of the date of hearing, Respondent had not paid the \$1000 civil penalty and had not filed any quarterly reports with the Board. (Testimony of Beth Jorgenson)

# **CONCLUSIONS OF LAW**

Iowa Code section 147.55(9)(2013) authorizes the Board to revoke, suspend, or otherwise discipline a license to practice a profession when the licensee is guilty of "any other acts or offenses as specified by board rule." 645 IAC 202.2(20) authorizes the Board to impose any of the disciplinary sanctions provided in rule 645-202.3 when the Board determines that the licensee has failed to comply with the terms of a Board Order or the terms of a settlement agreement or consent order.

The preponderance of the evidence established that Respondent violated Iowa Code section 147.55(9) and 645 IAC 202.2(20) when he failed to comply with the terms of the September 28, 2012 Settlement Agreement and Order. Respondent failed to pay the \$1,000 civil penalty, failed to file quarterly reports, and failed to participate in the Board's chemical screening program. These violations merit an indefinite suspension of Respondent's license for a minimum period of one year. Any reinstatement of Respondent's license will be subject to the requirements of the Board's reinstatement rule found at 645 IAC 11.31.

# **DECISION AND ORDER**

IT IS THEREFORE ORDERED that Iowa License Number 01916, issued to Respondent Brian Gauer to practice physical therapy, is hereby INDEFINITELY SUSPENDED, effective immediately upon service of this Decision and Order. Respondent shall immediately return his license to the Board office.

IT IS FURTHER ORDERED that Respondent shall wait a minimum period of one year before filing a reinstatement application. In addition, Respondent must pay the \$1,000 civil penalty imposed by the Settlement Agreement and Final Order, any money owed to First Lab, and all hearing fees prior to filing an application for reinstatement.

If Respondent requests reinstatement, the burden will be on him to show that the basis for the suspension no longer exists and that it is in the public interest for his license to be reinstated. 645 IAC 11.31. At a minimum, Respondent will be required to provide the Board with satisfactory verification of at least one year of continuous sobriety.

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6, that Respondent Brian Gauer shall pay \$75.00 for fees associated with the disciplinary hearing and \$55.00 for the court reporter fees. The total fees of \$130.00 shall be paid within thirty (30) days of receipt of this decision.

Dated this 4<sup>th</sup> day of October, 2013.

Denise Behrends, OT

Denisi Behrends

Chairperson

Iowa Board of Physical and Occupational Therapy

Pursuant to Iowa Code section 17A.19(2013) and 645 IAC 11.29, any appeal to the district court from a decision in a contested case shall be taken within 30 days from the issuance of the decision by the board. The appealing party shall pay the full costs for the transcript of the hearing. 645 IAC 11.23.

cc: September Lau, Assistant Attorney General