

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1062

Cir. Ct. No. 2013CV2647

STATE OF WISCONSIN

IN COURT OF APPEALS

GEORGE X. ZALESKI, M.D.,

PETITIONER-APPELLANT,

V.

**STATE OF WISCONSIN DEPARTMENT OF SAFETY AND
PROFESSIONAL SERVICES, MEDICAL EXAMINING BOARD,**

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
AMY R. SMITH, Judge. *Affirmed.*

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. George Zaleski, M.D., appeals a circuit court order affirming an administrative warning issued against him by the State of Wisconsin Department of Safety and Professional Services, Medical Examining Board

(“Board”). On appeal, Zaleski challenges the Board’s issuance of the administrative warning on several grounds. He argues that no complaint was issued, that no findings of fact were made, that the assumptions behind the recommendation to impose the administrative warning are not supported by the record, and that Wisconsin law regarding the respective responsibilities of an attending physician and resident was not followed. For the reasons set forth below, we affirm the order of the circuit court.

BACKGROUND

¶2 Zaleski received an administrative warning issued by the Board pursuant to WIS. STAT. § 448.02(8) (2013-14).¹ The warning stemmed from an incident that occurred on February 20, 2006, when Zaleski had been the attending physician for a procedure called a baclofen challenge that was performed incorrectly on a patient by a first-year resident, Graham Case. Zaleski requested review of the administrative warning, and the Board affirmed the administrative warning. Zaleski sought judicial review pursuant to WIS. STAT. § 448.02(8)(a). The circuit court affirmed the administrative warning, and Zaleski now appeals.

STANDARD OF REVIEW

¶3 Zaleski argues that the circuit court attributed an incorrect level of deference to the Board’s decision in reaching its ruling. This argument fails to recognize that, on appeal, we review the decision of the Board, not the decision of the circuit court. *Milwaukee Cty. v. LIRC*, 2014 WI App 55, ¶13, 354 Wis. 2d

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

162, 847 N.W.2d 874. In reviewing an administrative agency's exercise of discretion, we may not substitute our judgment for that of the agency, and we may reverse only if one of the grounds specified in WIS. STAT. § 227.57 is established. *See Galang v. State Med. Examining Bd.*, 168 Wis. 2d 695, 699-700, 484 N.W.2d 375 (Ct. App. 1992). Zaleski contends that such grounds exist because the agency failed to exercise its discretion or it exercised its discretion in violation of the law or agency policy or practice. *See id.*

DISCUSSION

¶4 Zaleski argues that there was no complaint or formal allegation of unprofessional conduct or negligence against him and that, therefore, the Board acted outside of its jurisdiction in issuing the administrative warning. The Board responds by arguing that it not only has jurisdiction to issue administrative warnings, but that it has a statutory obligation to investigate allegations of misconduct.

¶5 We agree with the Board's position. Subchapter II of WIS. STAT. ch. 448 governs the Medical Examining Board. WISCONSIN STAT. § 448.02(3)(a) provides that the Board "shall investigate allegations of unprofessional conduct and negligence in treatment by persons holding a license." The statute does not require that the allegations take the form of a formal complaint. Here, the investigation was triggered by a Department of Regulation and Licensing case summary memorandum regarding resident Case, dated August 5, 2010. The memorandum stated that Zaleski was Case's attending physician for the baclofen challenge procedure during which the wrong dye was injected. The memorandum recommended that the supervising physician receive an administrative warning. In light of the allegations contained in the department's memorandum, we are

satisfied that the Board was within its jurisdiction, under § 448.02(3)(a), to follow up and investigate the allegations against Zaleski.

¶6 We turn next to Zaleski's argument that there were no findings of fact or evidence regarding Zaleski's actions or inactions. Zaleski also argues that the Board's findings were not factual findings but, rather, legal conclusions. We disagree. Whether an individual is engaged in unprofessional conduct is a question of fact. *Painter v. Dentistry Examining Bd.*, 2003 WI App 123, ¶17, 265 Wis. 2d 248, 665 N.W.2d 397.

¶7 The administrative warning issued in this case reflects that the Board made an explicit factual finding that there was evidence of professional misconduct. Specifically, the Board found that there was evidence that Zaleski had been the attending physician for the procedure performed by Case, who was in his first year of a radiology residency at the time; that Zaleski had not worked with Case before; that Zaleski did not assure himself that Case knew how to perform every step of the procedure; and that Zaleski was not present at the time Case inserted the needle into the patient. The Board further found that there was evidence that Case had used the wrong contrast agent and that the patient suffered harm as a result. Each of these findings is supported by the August 5, 2010 memorandum issued by the Department of Regulation and Licensing. Further support for these findings appears in the record of the administrative review of the Board's warning. We are satisfied, therefore, that the Board made findings and that the findings are supported by the record.

¶8 In an additional effort to attack the validity of the administrative warning, Zaleski asserts that the document bears no indication of who the author is and that the signature on the document is unrecognizable. The Board counters that

Zaleski fails to explain why this matters and, thus, his argument should be rejected. We agree. The administrative warning states on its face that it is being issued by the Medical Examining Board and that the signature is of an authorized representative of the Board. Zaleski does not allege that the signature is fraudulent or unauthorized, or that the purported failure of the document to disclose its author is of any consequence. Thus, his argument regarding the authorship and signature on the administrative warning fails.

¶9 Next, Zaleski challenges what he calls the “assumptions” behind the issuance of the administrative warning. The first such assumption he challenges is a statement in the department’s August 5, 2010 memorandum that, prior to February 20, 2006, Case had never performed a baclofen challenge procedure. However, Zaleski’s argument does not persuade us that this is an erroneous statement of fact. Zaleski asserts in his brief that Case had “independently done multiple procedures *like this* before.” (Emphasis added). Notably, Zaleski does not assert that Case had prior experience with the exact procedure at issue. Indeed, Case’s reply to the department, as summarized in the August 5, 2010 memorandum, states that he “had not performed this particular procedure previously, but had been involved in lumbar punctures and myelograms.”

¶10 Zaleski also takes issue with the Board’s emphasis on the fact that Zaleski did not have prior experience working with Case. Zaleski does not refute this fact; rather, he argues that a lack of prior contact between him and Case is irrelevant to the issue of whether there was professional misconduct. Zaleski argues that the Board misunderstood what type of supervision is required of a resident. In support of his argument, he cites *Lewis v. Physicians Ins. Co. of Wis.*, 2000 WI App 95, ¶13, 235 Wis. 2d 198, 612 N.W.2d 389, for the principle that Wisconsin does not recognize a “captain of the ship” argument with respect to

supervision and responsibility. However, as the Board points out in its brief, *Lewis* was a medical malpractice action that involved different procedural requirements and a different burden of proof than what is required in the context of an administrative warning. The plaintiff in *Lewis* was required to prove negligence by the greater weight of the credible evidence to a reasonable degree of certainty. *See* WIS JI—CIVIL 200. In contrast, an administrative warning is not “an adjudication of guilt or the imposition of discipline.” WIS. STAT. § 448.02(8)(b). The Board here was required only to find “unprofessional conduct” supported by “evidence of misconduct” by Zaleski in order to issue an administrative warning. Sections 448.02(3)(a) and (8)(b); *see also* WIS. ADMIN. CODE § MED 10.03(2) (through June 2015). The Board found that there had been unprofessional conduct on Zaleski’s part as the attending physician, based on his failure to supervise Case. As discussed above, that finding is supported by the record and, therefore, we affirm the Board’s decision.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

