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8 **BEFORE THE ARIZONA BOARD OF MASSAGE THERAPY**

9 In the Matter of

10 **JESSE FERRELL, LMT,**

11 Holder of License No. MT-04127P
12 As a Massage Therapist
13 In the State of Arizona

Board Case No. 15-128

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER**

14 Pursuant to Notice of Hearing Number 15-128, this matter came before the Arizona Board of
15 Massage Therapy (Board) on November 16, 2015.

16 Victoria Bowman, Chair, presided at the meeting with Board members Dennis Beye, John Ortega,
17 Earl Duskey, and Diane Pruetz in attendance.

18 The state was represented by the Office of the Attorney General, Elizabeth Campbell, Assistant
19 Attorney General, Licensing and Enforcement Section. Chris Munns, of the Solicitor General's
20 Section of the Attorney General's Office was present and available to provide independent legal
21 advice to the Board. Jesse Ferrell (Respondent) was present and was represented by counsel, Mr.
22 Williams. The Board, after considering the testimony and evidence presented, hereby issues the
23 following Findings of Fact, Conclusions of Law, and Order.

24 **FINDINGS OF FACT**

25
26

1 1. On December 23, 2014, massage therapy client AP went to Respondent for a deep
2 tissue massage. Respondent performed cupping. The cupping procedure caused pain to AP and
3 left severe bruising on AP's back, the sides of her torso, and her neck. Respondent's treatment of
4 AP fell below the standards of care.

5 **CONCLUSIONS OF LAW**

6 1. The Board possess jurisdiction over the subject matter and over Respondent
7 pursuant to A.R.S. § 32-4201 *et seq.*

8 2. The Board may discipline a massage therapist who has engaged in conduct that
9 could result in harm or injury to the public.

10 3. The Board may discipline a massage therapist who engages in substandard care
11 due to a deliberate or negligent act or failure to act, regardless of whether actual injury to the
12 person cared for is established. A.R.S. § 32-4253(A)(10)

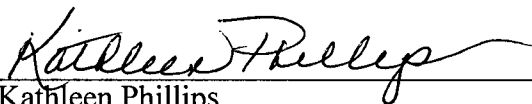
13 **ORDER**

14 IT IS HEREBY ORDERED THAT by July 1, 2016 Respondent complete classes in a
15 classroom setting for a minimum of 20 hours in boundaries and ethics and that are preapproved by
16 staff and are in addition to the 24 hours required for continuing education.

17 DATED and effective this 16th day of November, 2015.

18 ARIZONA BOARD OF MASSAGE THERAPY

19 SEAL

20 
21 Kathleen Phillips
22 Executive Director

23 **RIGHT TO PETITION FOR REHEARING OR REVIEW**

24 Respondent has the right to petition for a rehearing or review of this Order. Pursuant to A.R.S. §
25 41-1092.09 and A.A.C. R4-15-401(A), the petition must be filed with the Board within thirty-
26 five (35) days from the date of mailing if the Order was served by certified mail. The petition
must set forth legally sufficient reasons for granting the rehearing or review pursuant to A.A.C.

1 R4-15-401(C). The timely filing of a petition for rehearing or review shall stay the enforcement
2 of the Board's Order. If a petition for rehearing or review is not filed, the Board's Order becomes
3 effective thirty-five (35) days after it is mailed, unless pursuant to A.A.C. R4-15-401(F), the
4 Board has expressly found good cause to believe the Order shall be effective immediately upon
5 the issuance and has so stated in the Order. The failure to file a petition for rehearing or review
6 within thirty-five (35) days after mailing has the effect of prohibiting the parties from seeking
7 judicial review of the Board's decision.

8
9
10 ORIGINAL OF THE FOREGOING FILED
this 16th day of November, 2015, with:

11 Arizona Board of Massage Therapy
12 1400 West Washington, Suite 300
Phoenix, Arizona 85007

13 EXECUTED COPY OF THE FOREGOING MAILED
14 BY CERTIFIED MAIL
this 16th day of November, 2015, to:

15 Jesse Ferrell
16 Address of Record
Respondent

17 EXECUTED COPY OF THE FOREGOING MAILED
18 this 16th day of November, 2015, to:

19 Christopher Munns
20 Assistant Attorney
12745 W. Washington, CIV/SGO
Phoenix, Arizona 85007
21 Attorney for the Board

22 Elizabeth A. Campbell
23 Assistant Attorney General
1275 W. Washington Street, CIV/LES
Phoenix, Arizona 85007
24 Attorney for the Board

Slanger

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BEFORE THE ARIZONA BOARD OF MASSAGE THERAPY

In the Matter of:

)	Case No. 15-128
Jesse Ferrell)	
)	ORDER DENYING RESPONDENT'S
License No. MT-04127P)	REQUEST FOR REHEARING OR
As a Massage Therapist)	REVIEW
In the State of Arizona)	

On March 25, 2016, the Arizona State Board of Massage Therapy met to consider Jesse Ferrell's request for rehearing or review of the Board's Order of November 16, 2015.

The Board was represented by Assistant Attorney General, Elizabeth Campbell. Respondent was not present but appeared telephonically on behalf of Respondent. After full consideration of the record in this matter and the arguments of the parties, the Board voted to **DENY** Respondent's request for rehearing or review. Respondent has set forth no grounds upon which a rehearing or review should be granted.

ORDER

Respondent's Motion for Rehearing is **DENIED**. The Board's Order dated November 16, 2015 remains in effect.

NOTICE

Respondent is notified that this Order is the final administrative decision of the Board and that Respondent has exhausted his administrative remedies. Respondent is advised that an appeal to superior court may be taken from this decision pursuant to A.R.S. §§ 12-901, *et. seq.* within thirty-five (35) days from the date this decision is served.

Dated and signed this 27th day of January, 2016.

ARIZONA BOARD OF MASSAGE THERAPY

By: Kathleen Phillips

Kathleen Phillips
Executive Director

ORIGINAL OF THE FOREGOING FILED
this 27th day of March, 2016 with the:

Arizona State Board of Massage Therapy
1400 West Washington, Suite 300
Phoenix, AZ 85007

EXECUTED COPY OF THE FOREGOING MAILED
BY CERTIFIED & REGULAR FIRST-CLASS MAIL
this 27th day of January, 2016, to:

Jesse Ferrell
44 West Monroe Street #1401
Phoenix, AZ 85003

COPY OF THE FOREGOING MAILED
this 27th day of January, 2016, to:

David Williams
David Miles McGuire Gardner
40 E. Rio Salado Parkway, Suite 425
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dwilliams@davismiles.com
Attorney for Respondent

Chris Munns
Assistant Attorney General
1275 W. Washington Street, CIV/SGO
Phoenix, Arizona 85007

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Notifications/Mailings completed by _____

1 Mark Brnovich
2 Attorney General
3 Firm State Bar No. 14000

3 Elizabeth Campbell
4 Assistant Attorney General
5 State Bar No. 018311
6 1275 W. Washington
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8 Telephone: (602) 542-7681
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10 Attorneys for State of Arizona

8 **BEFORE THE ARIZONA STATE**
9 **BOARD OF MASSAGE THERAPY**

10 In the Matter of

11 **JESSE L. FERREL, LMT,**

12 Holder of License No. MT-04127P
13 As a Massage Therapist
14 In the State of Arizona

Case No. 15-128

**RESPONSE TO MOTION
FOR REHEARING**

15 The State of Arizona, through the undersigned Assistant Attorney General, files its
16 Response to Jesse Ferrel's ("Respondent") Motion for Rehearing ("Motion") filed in this
17 matter. For the reasons more fully explained in the following Motion, the State
18 respectfully requests that the Arizona State Board of Massage Therapy ("Board") deny
19 Respondent's Motion.

20 Rehearing or review of a decision may be granted for any of the following
21 causes materially affecting a party's rights:

- 22 1. Irregularity in the administrative proceedings of the Board,
23 administrative law judge, or the Administrative Law Judge, or any
24 abuse of discretion that deprived the party of a fair hearing;
- 25 2. Misconduct of the Board or administrative law judge;
- 26 3. Accident or surprise which could not have been prevented by
ordinary prudence;

- 1 4. Newly discovered material evidence that could not with
2 reasonable diligence have been discovered and produced at the hearing;
- 3 5. Excessive or insufficient penalties;
- 4 6. Error in the admission or rejection of evidence or other errors of
5 law occurring at the hearing; or
- 6 7. The findings of fact or decision are not supported by the
7 evidence or are contrary to law.

8 A.A.C. R4-15-401(C).

9 Respondent argues that he is entitled to a rehearing on the following grounds: (1)
10 the Board failed to set forth the applicable standard of care with regard to cupping; and
11 (2) there was insufficient evidence that AP was harmed or bruised by Respondent's
12 treatment.

13 Based upon a review of the arguments presented, Respondent not entitled to a
14 rehearing or review in this case.

15
16 **1. Respondent Received Appropriate Notice of the Standard of Care.**

17 Respondent complains that there was no evidence presented at the hearing
18 establishing what the applicable standard of care was in regard to the cupping
19 technique. (Motion at 2.)

20 A Board may rely upon its own expertise for the standard of care it applies in
21 adjudicating an allegation. *Gaveck v. Ariz. Bd. of Podiatry Exam'rs*, 222 Ariz. 433,
22 438, 215 P.3d 1114, 1119 (App. 2009). Consequently, expert testimony is not required
23 at administrative proceedings. *Id.* However, the Board is required to identify the
24 applicable standard of care and to articulate the alleged deviation by Respondent. *Id.*
25 Respondent was provided notice as follows in the Board's Complaint and Notice of
26 Hearing:

1 1. On December 23, 2014, massage therapy client AP went to
2 Respondent for a deep issue massage. Respondent performed cupping.
3 The cupping procedure caused pain to AP and left severe bruising on AP's
 back, the sides of her torso, and her neck. Respondent's treatment of AP
 fell below the standard of care.

4 Based upon this factual allegation, Respondent was on notice that his treatment of AP
5 fell below the standard of care because it caused **pain** to AP and left **severe bruising** on
6 AP's body.

7 **2. Substantial Evidence Supports the Board's Decision.**

8 Respondent argues that there was insufficient evidence in the record that AP was
9 harmed or bruised by his treatment. (Motion at 2.) Respondent is incorrect.

10 AP testified that Respondent's cupping treatment was painful. Respondent
11 testified that she told Respondent that the cupping hurt and she asked him to stop, but
12 he did not stop. Respondent testified that the cupping hurt so badly that she took a cup
13 off, but Respondent put it back on and applied even more suction. The photos
14 introduced as State's Exhibit 3 and taken the day of the incident show severe bruising
15 of AP's back, the sides of her torso, and her neck after the cupping as done by
16 Respondent. AP testified that it took over a month for the bruising and broken blood
17 vessels caused by Respondent's cupping to fade.

18 Respondent may not agree with the Board's Order. However, that does not mean
19 that the Board's Order is not supported by substantial evidence. Substantial evidence is
20 any relevant evidence from which a reasonable mind might draw a conclusion.

21 *Troutman v. Valley Nat'l Bank of Ariz.*, 170 Ariz. 513, 518, 826 P.2d 810, 815 (App.
22 1992). Even if the record supports inconsistent factual conclusions, there is substantial
23 evidence to support an administrative decision that elects either conclusion. *Shaffer v.*
24 *Arizona State Liquor Board*, 197 Ariz. 405, 409, 4 P.3d 460, 464 (App. 2000); *Williams*
25
26

1 v. *Pima County*, 164 Ariz. 170, 172, 791 P.2d 1053, 1055 (App. 1990). Here, based
2 upon the testimony of AP and the photos in State's Exhibit 3, there is substantial
3 evidence that Respondent caused pain and severe bruising to AP.

4 Respectfully submitted this 23rd day of December, 2015.

6 Mark Brnovich
Attorney General

7 

9 Elizabeth Campbell
Assistant Attorney General

11 **FILED** this 23rd day of December 2015, with:

12 The Arizona State Board of Massage Therapy
13 kathleen.phillips@massageboard.az.gov
14 1400 West Washington, Suite 300
Phoenix, AZ 85007

15 **COPY** of the foregoing mailed/e-mailed this
23rd day of December, 2015 to:

16 David Williams, Esq.
17 David Miles McGuire Gardner
40 E. Rio Salado Parkway, Suite 425
18 Tempe, AZ 85281
dwilliams@davismiles.com
19 Attorney for Respondent

20 Christopher Munns
Assistant Attorney General
1275 West Washington
21 Phoenix, AZ 85007
Christopher.munns@azag.gov
22 Attorney for the Board

24 By: Linda Cooper
25 #4827241