

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 18, 2014 Session

**STEVEN B. STUBBLEFIELD v. TENNESSEE DEPARTMENT OF
HEALTH, ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 120408III Ellen H. Lyle, Chancellor**

No. M2013-02239-COA-R3-CV - Filed October 6, 2014

A physician was charged with failing to report a reckless driving conviction on his medical license renewal application. Following a contested case hearing before an administrative agency, the physician's medical license was placed on probation for five years. The physician sought judicial review, arguing the agency's sanction was disproportionate to what he represented was merely a mistake. The trial court affirmed the agency's decision, and the physician appealed. We affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, and W. NEAL MCBRAYER, JJ., joined.

John P. Konvalinka, J. Scott McDearman, and Katherine H. Lentz, Chattanooga, Tennessee, for the appellant, Steven B. Stubblefield.

Robert E. Cooper, Jr., Attorney General and Reporter, and Sara E. Sedgwick, Senior Counsel, for the appellee, Tennessee Department of Health.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises out of disciplinary proceedings against a physician before the

Tennessee Board of Medical Examiners (the “Board”).¹ Steven B. Stubblefield is a board-certified cardiologist who has been licensed in Tennessee since 1980.

On October 13, 2011, the Division of Health Related Boards of the Tennessee Department of Health (the “Division”) filed a Notice of Charges (the “Notice”) against Dr. Stubblefield alleging that he was arrested and pled guilty to reckless driving on June 30, 2008, and that he was arrested and pled guilty to driving under the influence on two different occasions in 2009. The Division asserted that Dr. Stubblefield failed to report these criminal convictions to the Board on his 2009 or 2011 medical license renewal applications, and this failure constituted grounds for discipline pursuant to the Tennessee Medical Practice Act, codified at Tenn. Code Ann. § 63-6-101 *et seq.* The Notice alleged that Dr. Stubblefield had violated Tenn. Code Ann. §§ 63-6-214(b)(1) and (3)² as well as TENN. COMP. R. & REGS. 0880-2-.14(8).³

The Board conducted a hearing on January 25, 2012, over which an administrative law judge (“ALJ”) presided. The Board’s administrative director, the administrator for the Tennessee Medical Foundation (“TMF”), and Dr. Stubblefield testified. The Division introduced two exhibits during the hearing. The first exhibit (“Exhibit 1”) contained copies of Dr. Stubblefield’s renewal applications for his medical license dated March 6, 2009, and March 18, 2011. Each application required Dr. Stubblefield to indicate whether he had been convicted of a crime of which he had not previously notified the Board. Dr. Stubblefield did not circle “YES” on either application. By not circling “YES,” Dr. Stubblefield represented that he had not been convicted of a crime that he had not informed the Board of in writing. Dr. Stubblefield signed each application, certifying that the statements given in the applications were true and correct. The Board’s administrative director testified that she maintained a database of licensure information for medical doctors in Tennessee and that Dr. Stubblefield’s licensure file did not contain a letter from Dr. Stubblefield notifying the Board that he was convicted of reckless driving on June 30, 2008.

¹ The Board licenses and regulates all Tennessee physicians and has the duty to conduct disciplinary hearings. Tenn. Code Ann. § 63-6-101(a)(3).

² Tennessee Code Annotated sections 63-6-214(b)(1) and (3) authorize the Board to discipline an applicant for a medical license if the applicant engages in the following:

- (1) Unprofessional, dishonorable or unethical conduct; [or]
- ...
- (3) Making false statements or representations, being guilty of fraud or deceit in obtaining admission to practice or being guilty of fraud or deceit in the practice of medicine[.]

³ This section of the Board’s rules refer to its Code of Ethics, which are identical to the American Medical Association’s Code of Medical Ethics.

The second exhibit the Division introduced into evidence (“Exhibit 2”) was a copy of a judgment from the Criminal Court of Hamilton County dated June 30, 2008. This judgment indicated that Dr. Stubblefield pled guilty to a charge of reckless driving, which the judgment identified as a misdemeanor. Dr. Stubblefield was sentenced to six months in the workhouse, but he was given an alternative sentence of probation for six months, beginning June 30, 2008. The judgment specified the following special conditions: six months of SCRAM;⁴ no alcohol; no BAC⁵ refusal; three public work days; \$500 fine; and DUI⁶ school.

Dr. Stubblefield began questioning the administrator for TMF for the purpose of providing information about Dr. Stubblefield’s relationship with TMF. The Division objected to the administrator’s testimony on the basis of relevance, and this witness was excused. Once the TMF administrator was excused, Dr. Stubblefield rested his case.

Dr. Stubblefield then moved for a directed verdict. The ALJ granted the motion with respect to two of the three counts in the Notice.⁷ The reckless driving count was not dismissed.

The ALJ then asked for any further statements by either of the parties, and the Division stated that it would like to call Dr. Stubblefield as a rebuttal witness. Counsel for Dr. Stubblefield did not object to putting his client on the stand as a rebuttal witness. Dr. Stubblefield’s attorney objected to certain questions, but he did not object to the testimony overall. As a result, Dr. Stubblefield answered questions about Exhibits 1 and 2.

When asked whether he circled “YES” on his 2009 or 2011 renewal applications, Dr. Stubblefield responded as follows:

No, I did not. I thought that it was a traffic violation and did not realize that it would be considered as a criminal offense.

Dr. Stubblefield’s attorney then asked Dr. Stubblefield to clarify his testimony:

⁴SCRAM is an acronym for secure continuous remote alcohol monitor.

⁵BAC is an acronym for blood alcohol content.

⁶DUI is an acronym for driving under the influence.

⁷ These counts were based on allegations that Dr. Stubblefield pled guilty to driving under the influence on two different occasions in late 2009. The Division was unable to prove these allegations at the hearing.

Q: Did you do anything intentionally, willfully to not disclose [the reckless driving conviction]?

A: No, sir.

Dr. Stubblefield testified that he thought he appeared in sessions court rather than in criminal court to plead guilty to the reckless driving charge. Dr. Stubblefield acknowledged that, as part of his sentence for reckless driving, he was required to pick up trash for three days, he was required to attend DUI school, and he submitted to wearing a continuous monitoring device for alcohol around his ankle for six months to prove he was not drinking.

The Board issued a ruling dated February 6, 2012. The Board made the following findings of fact:

1. Respondent has been at all times pertinent hereto licensed by the Board as a medical doctor in the State of Tennessee
2. Respondent was arrested and pled guilty to reckless driving in Hamilton County, Tennessee on June 30, 2008.
3. Respondent did not report his conviction to the Tennessee Board of Medical Examiners on his 2009 renewal application.
4. Respondent entered treatment for alcohol abuse in February 2010.
5. After completing treatment, Respondent signed a five year contract with the Tennessee Medical Foundation (TMF) on April 28, 2010.
6. Respondent maintains TMF advocacy.

The Board set forth the following conclusions of law:

The facts as found in the Findings of Fact are sufficient to establish that the Respondent has violated the following statutes or rules which are part of the Medical Examiners Practice Act, (TENN. CODE ANN. § 63-6-101, *et seq.*) for which disciplinary action before and by the Board of Medical Examiners is authorized:

7. The findings of fact in Section I, paragraphs 1 through 6, *supra*, constitute grounds for disciplinary action against Respondent's license

to practice as a medical doctor in the State of Tennessee pursuant to TENN. CODE ANN. § 63-6-214(b)(1) which authorizes disciplinary action against a Respondent who has engaged in unprofessional, dishonorable or unethical conduct.

8. The findings of fact in Section I, paragraphs 1 through 6, *supra*, constitute grounds for disciplinary action against Respondent's license to practice as a medical doctor in the State of Tennessee pursuant to TENN. CODE ANN. § 63-6-214(b)(3) which authorizes disciplinary action against a Respondent for making false statements or representations, being guilty of fraud or deceit in obtaining admission to practice or being guilty of fraud or deceit in the practice of medicine.
9. The findings of fact in Section I, paragraphs 1 through 6, *supra*, constitute grounds for disciplinary action against Respondent's license to practice as a medical doctor in the State of Tennessee pursuant to TENN. COMP. R. & REGS. 0880-2-.14(8), entitled *Code of Ethics*, which states:

The Board adopts, as if fully set out herein and to the extent that it does not conflict with state law, rules or Board Position Statements, as its code of medical ethics the "Code of Medical Ethics" published by the A.M.A. Council on Ethical and Judicial Affairs as it may, from time to time, be amended.

The Board then ordered, adjudged, and decreed that Dr. Stubblefield's medical license "is hereby placed on **PROBATION** . . . for a period of five (5) years." In addition, Dr. Stubblefield was ordered to pay a civil penalty in the amount of \$1,000 and the costs of prosecuting the case against him, such costs not to exceed \$5,000. The Board's order also included a section entitled "Policy Decision" in which it stated that its actions "are taken in the best interests and best safety for the welfare of the citizens of the State of Tennessee."

Dr. Stubblefield filed a petition for reconsideration on February 20, 2012, which the Board denied on February 29. Dr. Stubblefield then filed a petition for judicial review on March 19, 2012, pursuant to Tenn. Code Ann. § 4-5-322. On July 22, 2013, shortly before the date when his petition was scheduled to be heard, Dr. Stubblefield moved to supplement the administrative record to include consent orders between the Board and other physicians. Dr. Stubblefield wanted the court to see these consent orders to show that other physicians, who had been charged with more serious offenses than Dr. Stubblefield, were punished less

stringently than Dr. Stubblefield. The trial court filed an order on July 24 stating that it was going to wait to rule on Dr. Stubblefield's motion to supplement the record until after it heard oral argument and was able to review the administrative record.

II. TRIAL COURT'S RULING

The parties presented oral argument on Dr. Stubblefield's petition for judicial review on July 25, 2013. Dr. Stubblefield made two arguments before the trial court: (1) the Board's conclusions and discipline were unsupported by substantial and material evidence and were arbitrary and capricious; and (2) the Board's decision was based upon unlawful procedure. On September 3, 2013, the trial court filed a memorandum and final order denying Dr. Stubblefield's motion to supplement the record and dismissing his petition with prejudice. The trial court based its judgment on the following facts from the record:

- At the close of the Division's case in chief, proof of the reckless driving conviction had been admitted.
- After the directed verdict, the Division presented as "rebuttal" proof the testimony of the petitioner. He was questioned variously by the Division's counsel and the Board. In particular, the facts of his SCRAM reporting device and his community service work were established. These show that the petitioner could not have simply "forgotten" to report the reckless driving conviction on his physician renewal form.

The trial court rejected Dr. Stubblefield's contention that the only conclusion a rational mind could reach from the record was that Dr. Stubblefield's failure to report the reckless driving conviction on his renewal form was "merely a mistake." The court wrote:

. . . From th[e] proof [of Exhibits 1 and 2] alone, the Court concludes, the Board could and did reasonably draw an inference of false statements or representations, deceit, unethical and unprofessional conduct. Petitioner's defense that he merely forgot about the conviction is not believable on the face of Exhibits 1 and 2.

In particular, the imposition of six months of SCRAM, a punishment whose nature and six-month duration would not be forgotten, amply supports the Board's decision. No other evidence was needed. Exhibits 1 and 2 were sufficient to carry the Division's burden of proof. It was then incumbent on the petitioner to present proof of mistake, and he did not do so during his case.

The trial court also rejected Dr. Stubblefield's argument that the Board's discipline was arbitrary and capricious:

First, from the standpoint of reasonableness and logic, the 5-year probation has a sensible and practical basis. The petitioner admitted in his Answer to the charges that he has a 5-year contract with TMF. The licensure probation, then, assessed by the Board tracks the TMF monitoring. Thus, by tracking for the licensure probation the time of the TMF contract, the Board can review the petitioner's status with TMF upon conclusion of the 5 year probation.

An additional reason the Court dismisses the petitioner's challenge to the sanctions imposed is the deference to the Board's penalty assessment. . . . The Court further determines that the petitioner's reference to the Consent Decrees of other physicians, does not establish a disproportionate penalty.

The trial court denied Dr. Stubblefield's motion to supplement the administrative record to add the consent decrees to the administrative record. The court explained:

Adding to the record at the time of judicial review is governed by Tennessee Code Annotated sections 4-5-322(e) and (g). Subsection (e) requires the evidence to be material. . . . [T]he Court finds the Consent Decrees are not material. Subsection (g) requires a showing of "alleged irregularities in procedure before the agency that are not shown in the record." This circumstance is not present with respect to the Consent Decrees.

The trial court next turned to Dr. Stubblefield's argument that the Board's decision was based upon unlawful procedure. Dr. Stubblefield argued that the Division's use of him as a rebuttal witness was improper because the Division failed to carry its burden of proof during its case in chief, before Dr. Stubblefield moved for a directed verdict. The trial court disagreed and responded to this argument as follows:

[T]he Division carried its burden with admission, in its case in chief, of Exhibits 1 and 2. The petitioner failed to offer in his case evidence of his defense of mistake. Accordingly, the decision below is sustainable without the "rebuttal" proof consisting of petitioner's testimony.

For completeness, the Court shall address whether the "rebuttal" proof constituted unlawful procedure. It did not, the Court concludes, for several reasons. First, this objection was waived. Although petitioner's counsel

objected to certain questions asked during rebuttal, he did not object to the procedure of allowing the petitioner to testify in rebuttal. In fact, petitioner's counsel used the rebuttal to present evidence of mistake.

Secondly, although called "rebuttal," it appears that in substance, the proof was reopened, and the petitioner testified not only as an adverse witness for the Division, but also in support of his defense of mistake.

Lastly, even though the "rebuttal" proof is not needed to affirm the decision below, if it is considered, it is clear the Board did not believe the petitioner's testimony that he made a mistake. That credibility determination by the Board is supported by the record and, thus, cannot be overturned by this Court.

Dr. Stubblefield appeals from the trial court's judgment and argues that (1) the Board's findings, conclusions, and decisions were unsupported by substantial and material evidence; (2) the Board's decision and discipline were arbitrary and capricious; (3) the Board's decision was based on unlawful procedure; and (4) the trial court erred in denying Dr. Stubblefield's motion to supplement the record to include the consent decrees.

III. ANALYSIS

A. Substantial and Material Evidence

Disciplinary proceedings against medical licensees are conducted in accordance with the Uniform Administrative Procedures Act ("UAPA"). Tenn. Code Ann. § 63-6-216. The UAPA, which is codified at Tenn. Code Ann. § 4-5-101 *et seq.*, limits judicial review of an agency's decision to a "narrow and statutorily prescribed review of the record made before the administrative agency." *Crawford v. Dep't of Fin. & Admin.*, No. M2011-01467-COA-R3-CV, 2012 WL 219327, at *5 (Tenn. Ct. App. Jan. 24, 2012) (quoting *Metro. Gov't v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977)); *see* Tenn. Code Ann. § 4-5-322(g). The standard of review by an appellate court is the same as that of the trial court. *Crawford*, 2012 WL 219327, at *5.

This Court may modify or reverse the administrative agency's decision if the petitioner's rights have been prejudiced by the agency's findings, inferences, conclusions or decisions that are:

- (1) In violation of constitutional or statutory provisions;

- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.
- (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

Courts defer to an administrative agency's decision when the agency is "acting within their area of specialized knowledge, experience, and expertise." *Willamette Indus., Inc. v. Tenn. Assessment Appeals Comm'n*, 11 S.W.3d 142, 147 (Tenn. Ct. App. 1999) (quoting *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988)). The reviewing court's "narrower scope of review used to review an agency's factual determinations suggests that, unlike other civil appeals, the courts should be less confident that their judgment is preferable to that of the agency." *Wayne Cnty.*, 756 S.W.2d at 279. Reviewing courts are careful not to substitute their judgment for that of the agency on questions of fact by re-weighing the evidence, even if the evidence could support a different result. *Davis v. Shelby Cnty. Sheriff's Dep't*, 278 S.W.3d 256, 265 (Tenn. 2009); *City of Memphis v. Civil Serv. Comm'n*, 239 S.W.3d 202, 208 (Tenn. Ct. App. 2007); *Willamette Indus., Inc.*, 11 S.W.3d at 147.

Evidence that an agency relies on to support a decision must be "substantial and material in light of the entire record." Tenn. Code Ann. § 4-5-322(h)(5)(A); *City of Memphis*, 239 S.W.3d at 207. Substantial and material evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." *City of Memphis*, 239 S.W.3d at 207 (quoting *Dickson v. City of Memphis Civil Serv. Comm'n*, 194 S.W.3d 457, 464 (Tenn. Ct. App. 2005) (further citations omitted)); accord *McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684, 691 (Tenn. 1996). Substantial evidence requires "something less than a preponderance of the evidence but more than a scintilla or a glimmer." *Ware v. Greene*, 984 S.W.2d 610, 614 (Tenn. Ct. App. 1998);

see Wayne Cnty., 756 S.W.2d at 280; *McEwen v. Tenn. Dep't of Safety*, 173 S.W.3d 815, 821 n.10 (Tenn. Ct. App. 2005) (noting that “preponderance of the evidence” standard is harder to satisfy than “substantial and material evidence” standard). We may overturn an administrative agency’s factual findings “only if a reasonable person would necessarily reach a different conclusion based on the evidence.” *Davis*, 278 S.W.3d at 265; *Martin v. Sizemore*, 78 S.W.3d 249, 276 (Tenn. Ct. App. 2001).

Dr. Stubblefield contends the Board’s conclusions and discipline were not supported by substantial and material evidence and should be overturned by this Court. Dr. Stubblefield bases this argument on his testimony that (1) he believed his reckless driving conviction was merely a traffic violation; (2) he was not aware reckless driving constituted a criminal offense; and (3) he thought he had appeared in general sessions court rather than in criminal court.

At the conclusion of the contested hearing on January 25, 2012, the Board determined that Dr. Stubblefield engaged in unprofessional, dishonorable or unethical conduct, as described in Tenn. Code Ann. § 63-6-214(b)(1); that he made false statements or representations through fraud or deceit in obtaining admission to practice or in the practice of medicine, as described in Tenn. Code Ann. § 63-6-214(b)(3); and that he had violated the Board’s code of medical ethics, as set forth in TENN. COMP. R. & REGS. 0880-2-.14(8). The Board heard Dr. Stubblefield testify that he did not realize his reckless driving conviction was a criminal offense and that he did not willfully fail to disclose his reckless driving conviction on his medical license renewal applications in 2009 and 2011.

As the entity conducting the hearing, the Board was in the best position to evaluate Dr. Stubblefield’s credibility as he testified. We give the Board’s credibility determinations great weight and will not overturn its decision because we might have evaluated Dr. Stubblefield’s credibility differently. *City of Memphis v. Civil Serv. Comm’n of the City of Memphis*, 238 S.W.3d 238, 243 (Tenn. Ct. App. 2007).

As the trial court wrote:

[T]he Board could and did reasonably draw an inference of false statements or representations, deceit, unethical and unprofessional conduct. Petitioner’s defense that he merely forgot about the conviction is not believable on the face of Exhibits 1 and 2. . . . [T]he imposition of six months of SCRAM, a punishment whose nature and six-month duration would not be forgotten, amply supports the Board’s decision. No other evidence was needed. Exhibits 1 and 2 were sufficient to carry the Division’s burden of proof. It was then incumbent on the petitioner to present proof of mistake, and he did not do so

during his case.

Dr. Stubblefield has not shown that a reasonable person would necessarily have reached a different conclusion than the Board based on the evidence presented at the contested case hearing. Dr. Stubblefield contends the Board impermissibly considered irrelevant evidence and matters outside the scope of Dr. Stubblefield's hearing and implies the Board would not have reached the conclusions it reached without consideration of this additional evidence. We find, however, that putting any allegedly irrelevant evidence aside, Exhibits 1 and 2 are sufficient to support the Board's ultimate decision. Accordingly, we affirm the trial court's judgment that Exhibits 1 and 2 constituted substantial and material evidence to support the Board's decision that Dr. Stubblefield violated Tenn. Code Ann. §§ 63-6-214(b)(1) and (3).

B. Board's Choice of Discipline

Dr. Stubblefield next argues that the Board's decision to place his medical license on probation for five years was arbitrary and capricious because the discipline imposed is disproportionate to the charge brought against him. Dr. Stubblefield bases this argument on consent orders from other cases in which, according to Dr. Stubblefield, the Board imposed less stringent punishments for more serious offenses. Dr. Stubblefield asserts that the consent orders involved conduct affecting patient health, safety, and welfare, whereas his conduct was simply "a matter of negligence which neither directly nor indirectly affected patient care."

The Supreme Court of the United States has declared that judicial review of sanctions imposed by an administrative agency is limited and should not be disturbed unless the penalty is "unwarranted in law" or "without justification in fact." *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86 (1973) (quoting *Am. Power Co. v. SEC*, 329 U.S. 90, 112-13 (1946)). The Tennessee Supreme Court reiterated this standard of review in *McClellan v. Bd. of Regents*, when it wrote that an administrative agency has discretion to determine the appropriate remedy for a violation of a statute or regulation. *McClellan*, 921 S.W.2d at 693. The *McClellan* Court explained that once it found grounds to affirm the procedures employed, the facts found, and the conclusions reached, it would not interfere with the penalties the agency imposed on the defendant. *Id.* This principle was again affirmed in *Robertson v. Tenn. Bd. of Soc. Worker Certification and Licensure*, 227 S.W.3d 7 (Tenn. 2007):

When we review only an agency-imposed remedy, we have noted that "[t]he appropriate remedy is peculiarly within the discretion of the [agency]." *McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684, 693 (Tenn. 1996).

As a result, we will only review whether the remedy is “unwarranted in law” or “without justification in fact.” *Mosley v. Tenn. Dep’t. of Commerce & Ins.*, 167 S.W.3d 308, 321 (Tenn. Ct. App. 2004) (quoting *Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182, 185-86, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973)).

Id. at 13-14; *see Mosley v. Tenn. Dep’t of Commerce & Ins.*, 167 S.W.3d 308, 320-21 (Tenn. Ct. App. 2004) (holding that after defendant is found to have violated statutes and regulations, court’s only task is to determine whether sanction is warranted by law and justified in fact).

Dr. Stubblefield’s argument that the penalty imposed on him was unwarranted because other physicians have been given lighter penalties for more severe violations is unconvincing. As the United States Supreme Court has explained:

The employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.

Butz, 411 U.S. at 187. Moreover, the lighter penalties Dr. Stubblefield refers to in the consent decrees involving other physicians are distinguishable because the outcomes in those cases were not reached as a result of a contested hearing, as here, but were negotiated between the parties.

In this case, the Board determined that the appropriate sanction to impose on Dr. Stubblefield for his violation of sections 63-6-214(b)(1) and (3) and his violation of the Tennessee code of medical ethics was to place his medical license on probation for five years, to impose a civil penalty of \$1,000, and to charge him with the costs of the action. The Board is authorized by statute to sanction a physician the Board determines has engaged in “unprofessional, dishonorable or unethical conduct,” Tenn. Code Ann. § 63-6-214(b)(1), or has made “false statements or representations, being guilty of fraud or deceit in obtaining admission to practice or being guilty of fraud or deceit in the practice of medicine.” Tenn. Code Ann. § 63-6-214(b)(3). The sanctions the Board is authorized to impose for this conduct includes the power to “[s]uspend, or limit or restrict a previously issued license for such time and in such manner as the board may determine” Tenn. Code Ann. § 63-6-214(a)(3).⁸

⁸The Board’s assessment of the civil penalty is authorized by Tenn. Code Ann. § 63-1-134(a) and TENN. COMP. R. & REGS. 0880-02-.12(1)(h). The Board’s assessment of the cost of the proceedings is authorized by Tenn. Code Ann. § 63-6-214(k) and TENN. COMP. R. & REGS. 0880-02-.12(1)(j).

The Board's regulations identify "probation" as an appropriate sanction upon a finding that a licensee has violated any provision of the Tennessee Medical Practice Act. TENN. COMP. R. & REGS. 0880-02-.12(1)(c). "Probation" is described as follows:

Probation - This is a formal disciplinary action which places a licensee on close scrutiny for a period of time.

1. This action may be combined with any other formal disciplinary action and include conditions which must be met before probation can be lifted and/or which restrict or condition the licensee's activities during the probationary period.

2. Once ordered, probation may not be lifted unless and until the licensee petitions and appears, pursuant to paragraph (2) of this rule, before the Board after the period of initial probation has run and all conditions placed on the probation have been met and the Board is satisfied that a further probationary period is not warranted.

TENN. COMP. R. & REGS. 0880-02-.12(1)(c).

The Board was authorized to place Dr. Stubblefield's medical license on probation "for such time and in such manner" as the Board determined. In response to questions by the Board members, Dr. Stubblefield testified that he had a five-year contract with TMF because of alcohol-related problems he had experienced. As the trial court found,

The licensure probation, then, assessed by the Board tracks the TMF monitoring. Thus, by tracking for the licensure probation the time of the TMF contract, the Board can review the petitioner's status with TMF upon conclusion of the 5 year probation.

We conclude that the penalty the Board imposed on Dr. Stubblefield was warranted by law and justified in fact; therefore, it was not arbitrary or capricious. Giving deference to the Board's decision of the appropriate penalty to impose, as we are required to do, we affirm the Board's choice of penalty in all respects.

C. Procedure of the Contested Hearing

Dr. Stubblefield contends the trial court erred in affirming the Board's decision because the decision was based on unlawful procedure. Dr. Stubblefield takes issue with the ALJ's decision to allow the Division to call Dr. Stubblefield as a "rebuttal witness" after he

had moved for a directed verdict. The trial court found, however, that Dr. Stubblefield waived any objection he may have had to testifying at that point in time because his attorney did not make an objection to his being called as a rebuttal witness. “[A] defendant’s failure to timely object to the introduction of evidence constitutes a waiver of appellate review of the issue.” *State v. Walker*, 910 S.W.2d 381, 399 (Tenn. 1995).

A review of the transcript reveals that Dr. Stubblefield’s attorney did not object when the Division called Dr. Stubblefield as a rebuttal witness. Dr. Stubblefield’s attorney objected to particular questions posed to Dr. Stubblefield, but he did not object to his testifying in general. In fact, as the trial court noted, Dr. Stubblefield used the opportunity to testify as a rebuttal witness to present his understanding of the reckless driving conviction and to explain that he believed it was not a criminal offense but simply a traffic violation.

For the reasons set forth by the trial court in its memorandum and final order, which are set forth above, we conclude the Board’s decision was not based on unlawful procedure, as Dr. Stubblefield contends. In any event, Exhibits 1 and 2 provide a sufficient basis to support the Board’s decision separate and apart from any testimony elicited after Dr. Stubblefield moved for a directed verdict.

D. Consent Orders

Dr. Stubblefield’s final argument is that the trial court erred by denying his motion to supplement the administrative record to add consent orders from other cases. Dr. Stubblefield claims these consent orders support his argument that the Board’s decision to place his medical license on probation was arbitrary and capricious. A trial court’s decision to allow a party to add evidence to an administrative record that was not presented to the agency during the administrative proceeding is governed by Tenn. Code Ann. § 4-5-322(e), which is part of the UAPA:

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is *material* and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decisions with the reviewing court.

(Emphasis added.)

As the statute indicates, the evidence must be material to warrant being added to the administrative record after the agency has rendered its opinion. The trial court found the consent decrees were not material because sanctions imposed on other physicians for other infractions have no bearing on the appropriate sanction to impose on Dr. Stubblefield for his misconduct. This is especially the case here, where the Board took disciplinary action after a contested case hearing. The physicians at issue in the consent decrees, by contrast, avoided the contested case hearings and chose to negotiate the terms of their sanctions. Moreover, as discussed earlier, a sanction an agency imposes on an individual is not rendered invalid merely because it is more severe than that which was imposed in another case. *Butz*, 411 U.S. at 187.

We agree with the trial court that the consent orders Dr. Stubblefield sought to add to the administrative record were not material, as they must be to satisfy the requirements of Tenn. Code Ann. § 4-5-322(e). Accordingly, we affirm the trial court's judgment denying Dr. Stubblefield's motion to supplement the record.

IV. CONCLUSION

For the foregoing reasons, we affirm the trial court's dismissal of Dr. Stubblefield's petition and denial of Dr. Stubblefield's motion to supplement the record. Costs of appeal are assessed against the appellant, Steven B. Stubblefield, for which execution may issue, if necessary.

ANDY D. BENNETT, JUDGE