COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2010AP1071, 2010AP1462 **Cir. Ct. No. 2009CV5099**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

FRANK J. SALVI,

PETITIONER-RESPONDENT,

V.

MEDICAL EXAMINING BOARD,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Reversed*.

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 LUNDSTEN, P.J. This appeal involves the Medical Examining Board's decision to sanction Dr. Frank Salvi for the improper sexual touching of four female patients. The circuit court reversed the Board's decision and awarded attorneys' fees and costs to Dr. Salvi. The Board appeals.

¶2 The issues are as follows: (1) whether the Board relied on an incorrect legal test in determining that Dr. Salvi had "sexual contact" with the four women; (2) whether the Board's finding that Dr. Salvi touched intimate body parts of the four women with a sexual purpose is supported by substantial evidence; and (3) whether the Board improperly excluded evidence. We resolve each of these issues in favor of the Board, affirm its decision, and reverse the circuit court.

Background

¶3 In 2004 and 2005, four female patients complained that Dr. Frank Salvi, a physician and pain specialist employed by the University of Wisconsin Medical School and the University of Wisconsin Hospital and Clinics, touched them on intimate body parts during examinations under circumstances indicating that his purpose was sexual.

¶4 The complaints led to a proceeding before the UW Hospital's Corrective Action Peer Review Committee. The Committee conducted an investigation and made findings in 2006. The Committee found that, although Dr. Salvi had engaged in some "unacceptable" non-medical touching of the patients' legs that must "cease" and that he "failed to give adequate warning to the patients about what he was going to do and failed to explain the reasons for the touching," all of the non-leg touching the women complained about was medically "justified" and "was not intended for purposes other than the assessment of the patient." As further discussed below, the Peer Review Committee, in essence, accepted Dr. Salvi's version of the events and concluded that the women misinterpreted Dr. Salvi's actions because of his failure to adequately explain what he was doing.

¶5 In July 2007, the Division of Enforcement of the Department of Regulation and Licensing (DOE) brought an action against Dr. Salvi, including charges that he sexually touched the four patients in violation of WIS. ADMIN. CODE § Med 10.02(2)(z) and (zd), which prohibits "[v]iolating ... any law ... the circumstances of which substantially relate to the circumstances of the practice of medicine" and "[e]ngaging in inappropriate sexual contact, exposure, gratification, or other sexual behavior with or in the presence of a patient."

¶6 Following extensive discovery, an evidentiary hearing was held in 2008. The hearing spanned four days and is recorded in over 800 pages of transcript. Following the hearing, the DOE attorney argued that the evidence showed that Dr. Salvi violated various administrative code provisions, including the prohibition on violating "any law" by committing fourth-degree sexual assault as defined in WIS. STAT. § 940.225(3m) (2003-04).[1]

¶7 On June 1, 2009, eleven months after receiving the final post-hearing brief, the administrative law judge issued a proposed decision. Dr. Salvi filed objections to the proposed decision, and the DOE attorney responded. On September 16, 2009, two months after the DOE's response was filed, the Board adopted, without change, the findings and analysis in the proposed decision. The Board did, however, decline to adopt the administrative law judge's recommendation that Dr. Salvi's medical license be revoked. Instead, the Board suspended Dr. Salvi's license and imposed limitations.

[1] All further references to the Wisconsin Statutes are to the 2009-10 version, unless otherwise noted.

¶8 Although the Board's decision lacks clarity in several respects, it is clear that the Board primarily based its disciplinary decision on a finding that Dr. Salvi touched intimate body parts of the four women with a sexual purpose, thereby engaging in prohibited "sexual contact."

¶9 On October 8, 2009, Dr. Salvi filed a petition for judicial review in the circuit court. On December 18, 2009, the circuit court stayed the imposition of discipline and costs imposed on Dr. Salvi. On March 16, 2010, the circuit court delivered an oral ruling reversing the Board's decision. The circuit court concluded, among other things, that the Board applied an incorrect legal test when finding that Dr. Salvi had "sexual contact" with the women, that the Board erroneously excluded evidence, and that the Board's findings were not supported by substantial evidence. A written decision incorporating the court's oral ruling was issued March 25, 2010.

¶10 On May 14, 2010, the circuit court ruled orally that the Board was liable for attorneys' fees and costs under WIS. STAT. § 814.245(3). The court determined that Dr. Salvi was, in the words of the statute, a "prevailing party" and that the Board was not "substantially justified in taking its position." The court awarded $153,476 in attorneys' fees and $20,161 in costs.

¶11 The Board appeals.

Discussion

¶12 Dr. Salvi challenges the decision of a state agency, the Medical Examining Board. The parties agree that the scope of our review is the same as the circuit court's and that we review the decision of the agency, not that of the circuit court. *See* ***Zip Sort, Inc. v. DOR***, 2001 WI App 185, ¶11, 247 Wis. 2d 295,

634 N.W.2d 99. Accordingly, although Dr. Salvi is the respondent on appeal, it remains his task to persuade us that the Board erred, and we frame our discussion in terms of Dr. Salvi's challenges to the Board's decision.

¶13 Dr. Salvi argues that the Board's decision must be reversed for three reasons: (1) the Board relied on an incorrect legal test in determining that Dr. Salvi had "sexual contact" with the four women; (2) the Board's finding that Dr. Salvi touched intimate body parts of the four women with a sexual purpose is not supported by substantial evidence; and (3) the Board improperly excluded evidence, namely, findings made by a peer review committee and an expert's opinion that patients, like those here, who suffer from fibromyalgia and chronic pain are more likely than other patients to misinterpret a doctor's touch. We address and reject each argument.

I. Whether The Board Relied On An Incorrect Definition of "Sexual Contact"

¶14 DOE alleged that Dr. Salvi touched an intimate body part of each female patient for a sexual, rather than medical, purpose. A central issue for the Board to resolve was whether Dr. Salvi had "sexual contact" with the women as that term is used in the criminal sexual assault statute. "Sexual contact" includes "[i]ntentional touching by the ... defendant ... of the complainant's ... intimate parts" "for the purpose of ... sexually arousing or gratifying the defendant." WIS. STAT. § 940.225(5)(b)1. (2003-04). The term "intimate parts" includes "the breast, ... anus, groin, ... vagina or pubic mound of a human being." WIS. STAT. § 939.22(19).

¶15 We agree with Dr. Salvi that, in keeping with the above statutory definition, in determining whether he had "sexual contact" with the four patients, the applicable test was whether he touched intimate parts of his patients "for the

purpose of ... sexually arousing or gratifying" himself. Dr. Salvi complains that the Board failed to apply this test and instead used a "you know it when you see it" test that depended on the subjective beliefs of the female patients. We disagree.

¶16 We first observe that Dr. Salvi does not support his argument with an analysis of the Board's decision. Instead, Dr. Salvi points to arguments made by the DOE attorney. For example, Dr. Salvi quotes the following exchange before the administrative law judge:

> [Salvi's attorney]: What is sexual contact, just so we know what the definition is?
>
> [DOE attorney]: It's just like the Supreme Court said about pornography. You know it when you see it. You know it when you feel it.

Similarly, Dr. Salvi points to an exchange between the circuit court and the DOE attorney:

> THE COURT: ... I saw the Board decision. They certainly cite the criminal statute. Is there some different definition of sexual contact that the Board uses? And if so, what is it?
>
> [DOE attorney]: I don't believe that there is anything codified. I don't think that there's any prior decisions that specifically set out what sexual contact is. I believe they have gone by the "you know it when you see it" kind of definition.

We agree with Dr. Salvi that it would be error for the Board to apply a test that does not include a definition of what constitutes "sexual contact." If the DOE attorney meant to assert that the Board could simply apply a "you know it when

you see it" test, she was plainly wrong.[2] But the question is not whether the DOE attorney advocated for an incorrect test. Rather, the question is whether the Board applied an incorrect test. We conclude that it did not.

¶17 We have reviewed the approximately 50 pages of transcript—containing often confusing questions, answers, and arguments—leading up to the DOE attorney's "you know it when you see it" statement. In these pages, at least three topics are intermingled—the admissibility of the Peer Review Committee findings, whether DOE must prove "sexual contact" as defined in the criminal statutes, and whether touching a non-intimate body part (a leg) fits the definition of "sexual contact." Dr. Salvi's attorney argued, persuasively, that DOE must supply proof that meets the criminal law definition of "sexual contact." Toward the end of this extended exchange, Dr. Salvi's attorney contended that Dr. Salvi's habit of touching non-intimate body parts (the legs of female patients) could not "per se" constitute "sexual contact" under criminal law and that the Board could not apply a "free-floating concept" of "sexual contact." Then, the following exchange took place:

> [DOE attorney]: I'm sorry, but as long as we're going down this road, we all know what sexual contact is. Everyone sitting in this room knows what sexual contact is. We don't need to refer to a criminal statute.
>
> [Salvi's attorney]: What is sexual contact, just so we know what the definition is?

[2] We note that, when the DOE attorney was asked by the circuit court what standard she thought the Board had applied, she did not stop with her "you know it when you see it" speculation. The attorney went on to say that, "in any event, [the Board] did find that the sexual contact definition in the criminal statutes was met." Thus, even if we were to treat the DOE attorney's argument as reflecting what the Board did, that argument includes an assertion that the Board applied the correct test.

> [DOE attorney]: It's just like the Supreme Court said about pornography. You know it when you see it. You know it when you feel it.

¶18 What we have summarized above is argument—nothing more and nothing less. It provides no basis for the conclusion that the administrative law judge or the Board favored the DOE attorney's argument over the argument made by Dr. Salvi's attorney. Neither the administrative law judge orally, nor the Board's written decision, adopts the view that "sexual contact" can be satisfied with a "you know it when you see it" test. At the hearing, the administrative law judge simply noted that DOE had the burden of proof and that, "if [DOE] doesn't make its case, [DOE] doesn't make its case." Similarly, nothing in the Board's decision adopts the "you know it when you see it" test.

¶19 Moreover, we decline to infer that the Board adopted what is obviously nonsense as a stand-alone test. As Dr. Salvi's attorney aptly pointed out before the administrative law judge, this "test" provides no guidance whatsoever. Moreover, the evidentiary proceeding and the content of the Board's decision demonstrate that the Board did not ignore the requirements that the touching be of an intimate body part and be for a sexual purpose.

¶20 It is fair to say that nearly the entire focus of the evidentiary hearing, in one way or another, was on the difference between the women's and Dr. Salvi's accounts about just how or whether he touched their intimate body parts and whether his purpose was medical or sexual. We discuss the evidence in detail later in this opinion. For now, it is sufficient to say that the Board resolved the dispute over how Dr. Salvi touched the women's breasts and vaginas in favor of the women. Having credited the women's testimony and demonstrations as to the touching of their intimate body parts, the Board addressed Dr. Salvi's purpose,

concluding that he had no medical purpose for the touching. This, obviously, left only one reasonable inference—that Dr. Salvi touched the women's intimate body parts for a sexual purpose.

¶21 For example, there were only two reasonable explanations for why Dr. Salvi placed both of his open hands on A.G.'s breasts and gently massaged them: a medical purpose or a sexual purpose. It is not reasonable to read the Board's decision as deciding anything other than that Dr. Salvi touched A.G.'s breasts (an intimate body part) and did so for a sexual purpose (sexually arousing or gratifying himself).

¶22 Accordingly, we conclude that the Board applied the test for "sexual contact" contained in the criminal statutes.[3]

II. Whether The Board's Findings Are Supported By "Substantial Evidence"

A. The Substantial Evidence Standard

¶23 Dr. Salvi contends that the Board's findings are not supported by "substantial evidence" as that term is used in WIS. STAT. § 227.57(6). Dr. Salvi takes on a difficult task.

[3] Our conclusion that Dr. Salvi has failed to demonstrate that the Board applied an incorrect legal test defeats Dr. Salvi's corresponding argument that the Board's reliance on an incorrect legal test caused it to improperly disregard evidence favorable to him. Since the Board did not rely on an incorrect test, it necessarily follows that there was no misplaced reliance that could have led to other error. Still, although Dr. Salvi's appellate brief ties his ignored-the-evidence arguments to his wrong-legal-test argument, we think that Dr. Salvi might nonetheless mean to lodge an independent challenge asserting that the Board improperly applied the substantial evidence test by ignoring favorable evidence. Accordingly, in section II of this opinion, we address whether the Board erred in applying the substantial evidence standard by ignoring evidence.

¶24 Courts accord "a considerable degree of judicial deference to the primacy of the agency's role as fact finder." ***Yao v. Board of Regents of Univ. of Wis. Sys.***, 2002 WI App 175, ¶24, 256 Wis. 2d 941, 649 N.W.2d 356. By statute, a court is prohibited from substituting its judgment for that of an agency in the weighing of evidence on disputed facts. WIS. STAT. § 227.57(6); *see also* ***Yao***, 256 Wis. 2d 941, ¶24. Of particular importance here, a reviewing court may not "evaluate ... credibility." ***Bucyrus-Erie Co. v. DILHR***, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979).

¶25 The supreme court summed up the "substantial evidence" test as follows:

> The test is whether, taking into account all of the evidence in the record, "'reasonable minds could arrive at the same conclusion as the agency.'" The findings of an administrative agency do not even need to reflect a preponderance of the evidence as long as the agency's conclusions are reasonable. If the factual findings of the administrative body are reasonable, they will be upheld.

Kitten v. DWD, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649 (citations omitted); *see also* ***Milwaukee Symphony Orchestra, Inc. v. DOR***, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674.

¶26 Although courts must take into account "all of the evidence," ***Kitten***, 252 Wis. 2d 561, ¶5, when substantial evidence supports two conflicting views, it is up to the agency to decide which view to accept, ***Bucyrus-Erie Co.***, 90 Wis. 2d at 418. In ***Yao***, we explained that "the plain language of § 227.57(6) does not require a [reviewing] court to engage in extensive consideration of evidence which would support a finding other than that made by an administrative agency." ***Yao***, 256 Wis. 2d 941, ¶30 n.5.

¶27 With this highly deferential standard of review in mind, we turn to the record before us.

B. Dr. Salvi's Arguments Directed At The Four Women Individually

¶28 Under a series of headings using the language "No Reasonable Person Could Conclude That The Record Supports A Finding That Dr. Salvi Sexually Touched [patient's name]," Dr. Salvi presents arguments directed at the women individually. For example, Dr. Salvi contends that A.G.'s hearing testimony describing the breast touching "defies common sense" and that it is inconsistent with her initial report. Similarly, with respect to S.S., Dr. Salvi points to inconsistencies in S.S.'s allegations and argues that S.S.'s pre-hearing description of what he did is consistent with a proper medical purpose. We could reject all of these arguments by simply noting that they are directed at the women's credibility, an issue solely for the Board. We choose, however, to comment further on Dr. Salvi's arguments and the evidence.

1. Patient A.G.

¶29 Dr. Salvi contends that no reasonable fact finder could have believed A.G. because her account is not plausible. According to Dr. Salvi, it "defies common sense" that he would keep his hands on A.G.'s breasts for at least three minutes, and possibly five minutes or longer, in the presence of A.G.'s ten-year-old daughter, all the while saying nothing. The most straightforward response to this argument is that this scenario is extremely odd, but it is far from impossible and, therefore, it was up to the Board, acting as fact finder, to decide whether it occurred.

¶30 But there is a better explanation for why the Board could reasonably credit A.G.'s core assertion that Dr. Salvi touched her breasts without a medical purpose. Fact finders are not required to either accept or reject a witness's testimony in total. In this instance, it was reasonable to think that A.G. could clearly remember whether or not Dr. Salvi placed his hands on her breasts, but be mistaken about the length of time he did that. Common experience tells us that many people over-estimate time, especially when describing an event they experienced negatively. In such matters, we leave it to fact finders to sort out which parts of the witness's account are worthy of belief and which are not.

¶31 Here, A.G. testified that it seemed like Dr. Salvi had his hands on her breasts a "very long time" and estimated that it was about three to five minutes. At times she said it was for at least three minutes, but elsewhere she agreed that her time estimate might not be accurate. It would have been reasonable for the Board to believe that a woman in A.G.'s position could reliably perceive and remember this sort of intimate touching, but be significantly off when estimating the duration.

¶32 As to the presence of A.G.'s daughter, our review of A.G.'s testimony reveals that it is not clear just what her daughter was in a position to see. Neither A.G. nor Dr. Salvi asserted that the daughter's view was unobstructed or even that the daughter was paying attention at this point in time. And, in this context, where Dr. Salvi was already indisputably engaged in substantial touching of A.G. near intimate body parts, it is entirely plausible that Dr. Salvi believed he could touch A.G.'s breasts without alarming the daughter.

¶33 We note that certain parts of Dr. Salvi's argument suggest that there was merely a subtle difference between what A.G. alleged and what Dr. Salvi

testified he did with respect to A.G.'s breasts. This is not true—the difference was significant.

¶34 A.G. testified that, during the examination, Dr. Salvi reached under her gown and bra and lightly touched her breasts with both hands at the same time. She asserted that his whole hands were covering the "full interior aspects of [her] breasts," including her nipples. She described the action as "like a massaging type of motion."

¶35 In contrast, Dr. Salvi said he conducted various examinations near A.G.'s breasts, but he agreed that he had no medical reason to place his palms on the full anterior aspect of A.G.'s breasts. Dr. Salvi also agreed that he would have had no medical reason to massage A.G.'s breasts during a lymph node examination, and he denied doing a breast examination. When Dr. Salvi demonstrated his actions using the live model, he placed the base of the palm of his hand against the model's sternum at the upper inside of her breast and pushed. He also used his fingertips to repeatedly press directly into the model's breasts. But Dr. Salvi engaged in no action resembling the massaging of the front of the model's breasts with his whole hands.

¶36 Thus, the dispute between A.G. and Dr. Salvi over just how he touched her breasts was stark, not subtle. She describes a massaging of the front of her breasts, including the nipple, with both of Dr. Salvi's whole hands at the same time. He described and demonstrated plainly clinical probing around the breasts with his fingertips. The Board could reasonably resolve this factual dispute in favor of A.G. Having done so, the Board could reasonably conclude that Dr. Salvi had a sexual purpose for the breast touching because he admitted he had no medical purpose for the breast touching A.G. described.

¶37 Dr. Salvi also contends that the Board could not have reasonably believed A.G. because she was inconsistent. He points to a letter that A.G. wrote after the alleged assault in which she described the touching as "a full breast exam" and in which she stated that Dr. Salvi told her he was checking her lymph nodes. Dr. Salvi then argues: "Yet, at the hearing in April 2008, her story had drastically changed. She said that Dr. Salvi sat in front of her on a stool with his hands on her breasts for three to five minutes, perhaps longer, and that during that time he said nothing to her and she said nothing to him while her 10 year old daughter was in the room."[4] We reject this argument. The difference Dr. Salvi points to might be a good reason *for the fact finder* to question why, if A.G.'s later description was true, she did not put that description in her letter. That is, the inconsistency may cast doubt on A.G.'s credibility when making more damning allegations later in the process. But credibility issues are for the agency to resolve, not the reviewing court.

2. Patient S.S.

¶38 Dr. Salvi seems to suggest that no reasonable fact finder could credit S.S.'s testimony because she unreasonably took the position that one detail of her allegation did not matter. Dr. Salvi points to a part of his attorney's cross-examination of S.S. relating to the difference between S.S.'s pre-hearing assertion that Dr. Salvi swiped her vagina with *two fingers* and a thumb and her hearing

[4] Dr. Salvi omits reference to his own cross-examination of A.G. in which he pointed out that, in March 2006, A.G. made a statement to the police asserting that Dr. Salvi "touched and pushed her breasts for approximately three to five minutes" and that "this touching lasted much, much longer" than "a regular breast exam." That is two years before the April 2008 hearing. We do not regard this omission as significant. We understand Dr. Salvi's main point to be that there was a drastic difference between A.G.'s initial report and her assertion at the hearing, regardless what she may have said in between.

testimony in which she asserted that Dr. Salvi swiped her vagina with *one finger* and a thumb. Dr. Salvi finds it significant that, when he attempted to ask S.S. about this discrepancy, S.S. responded as follows:

> Oh, I don't need this. I know what I've told everybody, so I don't need a deposition to remind me of my words. If it's the one or two finger thing, it doesn't matter to me whether it was one or two fingers.
>
> The whole point of the matter is he touched me inappropriate between my legs and up through my butt, and so whether it say one or two fingers, it doesn't matter to me because I know what happened. So you can argue two or one fingers. That doesn't matter to me. I know what happened.

¶39 Our review of the deposition, hearing transcripts, and video reveals that the difference here is between the following two scenarios: (1) that Dr. Salvi was standing behind S.S. and used his index finger and middle finger of one hand, with the thumb of that hand extended out, and swiped S.S.'s vagina and (2) that he did the same thing, except without his middle finger. Viewed in its full context, S.S.'s irritation could reasonably be viewed as a reaction, within the normal range, to what she perceived as an attack on an inconsequential discrepancy. In S.S.'s view, the important thing was that she felt part of Dr. Salvi's hand swipe her vagina, not whether that sensation was caused by one finger or two fingers. The Board could reasonably agree with S.S.'s assessment.

¶40 We turn now to a different aspect of Dr. Salvi's challenge to S.S.'s allegation. Dr. Salvi points to S.S.'s deposition testimony, in which she testified: "And when I went down to touch my feet, that's when he kind of – when he asked me to come up, he had his hands in a position like this (demonstrating). And as I was coming up, he took his two fingers with his thumb just like this, and he swiped it up from between my crotch area to my behind area and just continued as

if nothing happened." Dr. Salvi combines this with S.S.'s hearing testimony that Dr. Salvi's touch was "gentler" and asserts that S.S.'s description is "absolutely consistent with Dr. Salvi's description." We agree that the isolated portions of testimony that Dr. Salvi points to can be interpreted as consistent with Dr. Salvi's testimony and recorded demonstration, but the full picture is more complicated.

¶41 S.S. testified that, during the examination, Dr. Salvi was standing behind her and had her bend down and touch her toes. She said that, as she was bent down, Dr. Salvi "came up between [her] vagina and put his finger between both of [her] buttocks cheeks." S.S. said he used his bare hand and "slid his index finger across from up under my vagina and brought his thumb and his index finger right between my cheeks up through my buttocks—my anus." She described it as a "swipe across the vagina and just like an upward motion up through my anal area." Based on this testimony, and the fact that S.S. demonstrated the touch before the administrative law judge, our standard of review requires that we assume that S.S. described Dr. Salvi swiping S.S.'s vagina, not simply swiping near it.

¶42 In contrast, Dr. Salvi's testimony and recorded demonstration show that he asserts he did not touch S.S.'s vagina or even swipe alongside it. What he does talk about and demonstrate is a motion that starts at the crease on the underside of the model's buttocks, about two inches on either side of her anus, and swipes up and away with his thumbs only. If Dr. Salvi's description and demonstration were accurate, S.S. would not have felt anything remotely like a finger swipe on or immediately next to her vagina.

¶43 Accordingly, while it may be accurate to say that the portion of S.S.'s deposition that Dr. Salvi quotes is "absolutely consistent with Dr. Salvi's

description," that assertion does not take into account all of the evidence before the Board.

3. Patient K.F.

¶44 Dr. Salvi begins his discussion of K.F. with an incorrect assertion. He states that "[K.F.] was upset that Dr. Salvi examined her axillary lymph nodes, not because he sexually touched her but because in her judgment a 'rehab' doctor should not have done such an exam." The proposition that K.F. was "not [upset] because he sexually touched her" is specious. Rather, as our discussion of the evidence below demonstrates, the plain thrust of K.F.'s testimony was that Dr. Salvi touched her breasts with a sexual purpose.

¶45 At the time of the alleged assault, K.F. was a certified nursing assistant working at UW Hospital. She went to see Dr. Salvi because she had injured her arm while lifting a patient up in a bed. K.F. testified that, during the examination, she was lying on her back and Dr. Salvi "started running his fingers down [her] neck." She said: "So then Dr. Salvi took both his hands, open hand, and he grabbed my breast, like covered my whole entire breast." While this description, by itself, supports the Board's finding that Dr. Salvi grabbed both of K.F.'s breasts at the same time with both hands and felt her entire breast area, we further note that, during K.F.'s testimony, she demonstrated how Dr. Salvi grabbed her breasts. Neither the attorneys nor the administrative law judge attempted to describe for the record what K.F. was doing during this demonstration and we must assume that her demonstration also supports the Board's finding.

¶46 Dr. Salvi's account differed sharply. He had no specific recollection of his examination of K.F. but, based on his review of the medical record, he said

that K.F.'s situation, including her family history of cancer, called for him to check the lymph nodes in K.F.'s neck, jaw, clavicle, and armpit and to conduct a partial breast examination. Dr. Salvi testified that he would have started at the upper outer aspect of the breast, using small circular motions, and worked his way closer to the nipple, doing one breast at a time. The video shows that, when Dr. Salvi demonstrated how he would have examined K.F.'s breasts, he used his fingertips (the pads of his fingertips) to press in at the edges of the model's breasts. Nothing in his description or the video matches K.F.'s assertion that Dr. Salvi placed both of his hands on the front of both of her breasts simultaneously.

¶47 When Dr. Salvi's attorney attempted to obtain an admission from K.F. that Dr. Salvi had possibly conducted a breast examination, she responded that a breast examination does not involve the doctor having "both his hands open and cuffed and squeezing your breast." Elsewhere K.F. testified that she had experienced breast examinations by other doctors and that Dr. Salvi did not "poke" as the other doctors had, but rather he "grab[bed]." And, she opined that he put his hands on her breasts, not for a medical purpose, but because he was "being a pervert."[5] K.F. testified that, after leaving Dr. Salvi's office, she immediately complained to her supervisor at UW hospital because she felt "violated."

¶48 Accordingly, it is not true, as Dr. Salvi asserts, that K.F. was "not [upset] because he sexually touched her." Instead, the only reasonable reading of K.F.'s testimony is that she was asserting that she knew what a breast examination

[5] The "pervert" comment is contained in K.F.'s deposition, and it was introduced at the hearing by Dr. Salvi's attorney.

was and that Dr. Salvi did not examine her breasts in a medical fashion, but instead touched her breasts for his own sexual gratification. To the extent K.F. complained she was not there to have Dr. Salvi check her lymph nodes, her point was that Dr. Salvi was not medically justified in touching her breasts.

¶49 We turn now to a related, but different, argument. Dr. Salvi quotes the circuit court's conclusion that "there is no evidence that [Dr. Salvi's concern about K.F.'s enlarged lymph nodes and cancer] was an unwarranted concern, that it was a spurious concern, that it was a suspect concern." This observation might be germane if the dispute was over whether Dr. Salvi was justified in conducting a medical examination of K.F.'s breasts. But this was *not* the dispute. Rather, the Board needed to decide whether to credit K.F.'s assertion that Dr. Salvi placed his hands on her breasts in a fashion that did not match Dr. Salvi's description of a breast examination. The resolution of that question involved a classic he said/she said issue of credibility and, on that topic, we may not substitute our judgment for that of the Board.[6]

4. Patient D.J.

¶50 Dr. Salvi asserts that no reasonable person could find that he touched D.J.'s vagina with a sexual purpose for two reasons. First, Dr. Salvi seems to

[6] Our review of Dr. Salvi's brief and the record reveals that K.F. asserted a sequence of events relating to her visit with Dr. Salvi and her personal physician that is at odds with the medical records. In this respect, the hearing transcript shows that Dr. Salvi's attorney was effective in highlighting the implausibility of K.F.'s assertion that her personal physician had already examined her lymph nodes and breasts before her visit to Dr. Salvi. Assuming for argument sake that K.F.'s credibility was undermined by this cross-examination, it does not follow that the Board was required to disbelieve K.F.'s description of how Dr. Salvi touched her breasts. As should be clear by now, we regard K.F.'s testimony on this topic as a piece of the larger credibility puzzle that the Board needed to resolve.

contend that there is no meaningful difference between D.J.'s assertion that he applied pressure to her vagina and his description of medically justified touching. Second, Dr. Salvi argues that, to the extent D.J.'s description is interpreted as being different and more intrusive than his description, no reasonable person could believe D.J. because the evidence conclusively demonstrates that what she described is a physical impossibility. We disagree with both contentions.

¶51 First, we do not agree with Dr. Salvi's apparent suggestion that his testimony and demonstration are consistent with D.J.'s pressure/grabbing allegation.

¶52 D.J. testified that, during the examination, she was standing with her back to Dr. Salvi who was sitting and examining her. D.J. said that, while Dr. Salvi was "checking" her back and buttocks, "he reached up [with one hand] and grabbed my vagina and asked if everything was okay down there." During cross-examination, D.J.'s attention was directed to her deposition testimony, in which she said, "Well, what I can say is I felt pressure on my whole genital area," and she was then asked, "That's what you felt, right?" D.J. answered: "But to me that would be grabbing."

¶53 Thus, whether characterized as "grabbing" or "[feeling] pressure on," D.J. asserted that Dr. Salvi touched her vagina. The problem with Dr. Salvi's argument is that neither characterization fits what he says he did.

¶54 Dr. Salvi flatly denied touching D.J.'s vagina. He testified that the closest he would have come to D.J.'s vagina was when he palpated her ischial tuberosities. He explained that this meant that the closest he would have come was the "midline of the back of the leg." The video recording shows that, when Dr. Salvi gave his corresponding demonstration using the live model, he placed his

thumbs at about the middle of the back of the model's legs at the crease under her buttocks near, but not touching, her anus. Accordingly, Dr. Salvi's testimony and demonstration show that it was his position that no part of his hands got any closer to D.J.'s vagina than the underside of her buttocks near but not touching her anus. Although Dr. Salvi accurately asserts that unrefuted evidence shows that the touching *he* described was medically justified, there is no evidence that he had a medical reason for the touching D.J. described.

¶55 Once more, the Board was not faced with a single account of touching and a dispute over whether that touching was medically necessary. Rather, here again, the Board was confronted with conflicting accounts and no medical reason for the account described by the female patient.

¶56 Dr. Salvi's second argument is that no reasonable person could believe D.J.'s account because the evidence showed that it would have been a physical impossibility for him to have "grabbed" D.J.'s vaginal area. We are not persuaded.

¶57 First, as the video shows, Dr. Salvi's impossibility argument is premised on the assumption that D.J. was asserting that Dr. Salvi took his full hand with his palm up and inserted it between D.J.'s legs, thereby allowing him to grab D.J.'s vagina with his full hand. When Dr. Salvi asserted during the video that D.J.'s allegation is "amazing," he had just attempted a palm-up insertion of his hand between the model's legs. D.J., however, did not assert that she was grabbed with a full hand. Rather, her description was that she was standing with her back to Dr. Salvi and with Salvi sitting behind her, and that "he reached up and grabbed [her] vagina and asked if everything was okay down there." Particularly in light of D.J.'s answer equating grabbing with putting pressure on her vagina, it

is reasonable to infer that Dr. Salvi could have achieved the sensation D.J. described by inserting, for example, two fingers between D.J.'s legs and pressing up on her vagina. Further, D.J. agreed with the statement that she could not see Dr. Salvi's hand, but could say only what she felt and what Dr. Salvi said.

¶58 An additional variable is the amount of space just below D.J.'s vagina between her legs. The live model demonstration does not, as Dr. Salvi suggests, show that this space was too limited for Dr. Salvi to apply pressure or create a grabbing sensation on D.J.'s vagina. The record does not disclose whether there were relevant physical differences between the model and D.J., and there was a substantial dispute about just how far apart D.J.'s legs were at the time of the alleged touching.[7]

¶59 Dr. Salvi notes that D.J. did not testify in rebuttal and, therefore, there is no evidence in the record that (1) D.J. was standing in a different position than Dr. Salvi described; (2) there was something unusual about D.J.'s body that would have allowed Dr. Salvi access to her vaginal area when she was standing normally and he was behind her; or (3) D.J. was bent over, permitting greater access to her vagina. This argument is not persuasive for essentially the same reasons we have already discussed. The Board was not required to assume that the

[7] Dr. Salvi asserts in his appellate brief that the video shows that, "even with the model having her legs spread apart somewhat, he would have [had to] put his hand vertically between the patient's thighs and then forced his hand upward to 'grab' her vaginal area, an action that [D.J.] did not claim to have happened." As explained in the text, however, D.J. did not claim that she saw Dr. Salvi's hand. For that matter, our review of the video demonstration does not disclose an attempt by Dr. Salvi to place his hand "vertically" between the model's legs. Whether Dr. Salvi would have needed to force his hand up if he had placed it between D.J.'s legs vertically is not something that can be determined by reviewing the video.

touching D.J. alleged was the sort of full-hand cupping Dr. Salvi argues was a physical impossibility.

¶60 Finally, we observe that it was reasonable for the Board to believe that D.J. would not have mistaken palpation of the region under her buttocks with contact with her vagina.

C. Whether The Board Improperly Ignored Evidence Indicating That Dr. Salvi Did Not Have A Sexual Purpose

¶61 In several places in his brief, Dr. Salvi argues that the Board improperly ignored evidence favorable to him. His reasoning seems to be twofold. First, he seems to suggest that the absence of a discussion of this evidence in the Board's decision shows that the Board did not consider it. Second, he appears to reason that, as a matter of pure logic, the Board could not have both considered this evidence and reasonably found against him. We are not persuaded.

¶62 We begin by stating the obvious: When, as here, there is voluminous evidence, the failure to discuss *all* of the evidence that both favors and disfavors a point of view does not suggest that the evidence omitted from the discussion was ignored. For example, Dr. Salvi stresses that all of the evidence must be considered, but he also omits reference to significant pieces of evidence in his own argument.[8] We do not assume that these omissions mean that Dr. Salvi ignored this evidence in preparing his brief. Rather, it reflects the reality that both

[8] Dr. Salvi does not discuss all of his own inconsistencies. For example, three days after K.F. asserted that Dr. Salvi improperly touched her breasts, Dr. Salvi denied to a supervisor that he had examined K.F.'s breasts at all. This is inconsistent with Dr. Salvi's later position that he conducted a partial breast examination on K.F. For that matter, our review of the hearing and related exhibits reveals that Dr. Salvi also does not discuss all of the evidence that favors him.

decision makers and advocates, whether issuing a decision or presenting an argument, tend to focus attention on the evidence that supports the findings or conclusions they have made or hope will be made.

¶63 Dr. Salvi's ignored-the-evidence assertions may be an allegation that the Board erred in applying the substantial evidence standard. Dr. Salvi writes: "[W]hen an agency decision ignores significant and unrebutted evidence and focuses on only one part of the testimony, that is not substantial evidence." We question whether this characterization of the law is accurate. But more to the point, the substantial evidence standard of review does not call on courts to determine whether an agency did or did not ignore particular evidence. Rather, it requires that *the reviewing court* examine all of the evidence to determine whether the agency's conclusions are reasonable. *See* ***Yao***, 256 Wis. 2d 941, ¶¶29-31.

¶64 Furthermore, we apply a presumption of regularity to the proceedings before the agency. For example, in ***Ashleson v. Labor & Indus. Review Comm'n***, 216 Wis. 2d 23, 34, 573 N.W.2d 554 (Ct. App. 1997), teachers argued that the reviewing court should assume that the Labor and Industry Review Commission did not, as required by law, consider whether each teacher was offered "reasonably similar" employment. According to the teachers, the court should have assumed that the Commission made this error because its decision did not clearly reveal the required consideration. ***Id.*** We rejected this argument, explaining that we apply "a presumption of regularity in the decisions of administrative agencies." ***Id.*** We stated: "The lack of express confirmation that [the Commission] reviewed the entire record before it is an insufficient basis upon which to rebut the presumption and conclude that [the Commission] in fact did ignore the record." ***Id.***

¶65 Similarly, in ***Yao*** we addressed an assertion that an agency ignored evidence. ***Yao*** involved a disciplinary action against a university scientist, and the disciplined scientist complained that the agency erred by ignoring his expert's testimony. ***Yao***, 256 Wis. 2d 941, ¶¶1, 15, 31, 34. Our response to this argument did not include an attempt to determine whether the agency actually ignored the expert's testimony. This would not have been practical. Agency decisions seldom comment on every piece of significant evidence presented, and courts are, therefore, seldom able to discern whether an agency in fact ignored evidence. Rather, we applied the substantial evidence test and addressed whether "reasonable minds" could have rejected the expert's exculpatory explanation. *See* ***id.***, ¶¶29-31, 34-36. That is the path we have followed here—we have reviewed the entire record to determine whether "reasonable minds" could have found that Dr. Salvi touched intimate body parts of the women with a sexual purpose, taking into account all of the evidence.

¶66 In the following paragraphs, we discuss Dr. Salvi's most prominent allegations of ignored evidence. As to other such allegations, we address the evidence elsewhere in this opinion or deem the allegations too insignificant to warrant a response.

¶67 Dr. Salvi points to the fact that all of the women acknowledged that he said nothing sexual and that none observed signs that Dr. Salvi was sexually aroused. However, common sense suggests that, if Dr. Salvi was using his examinations as a means of touching female intimate parts for sexual gratification, he would do so in a mostly innocuous way precisely so he could later contend that the woman misinterpreted his actions. Saying something sexual or positioning himself so that any arousal on his part would be noticeable would defeat his purpose of making such touchings plausibly appear to be part of his examination.

¶68 Similarly, Dr. Salvi points to the fact that there was no evidence that he maintained pornography on his computer, had prior improper sexual relationships with patients or staff, expressed a sexual interest in patients, or generally engaged in sexualized behavior in his clinic. While this was certainly an appropriate argument for the fact finder, it falls flat here. There is no inconsistency between the Board's findings and conclusions and the absence of evidence of pornography or other sexual behavior.

¶69 Dr. Salvi points to witness testimony suggesting that he is not the sort of person who would sexually assault a patient. Dr. Salvi directs our attention to the testimony of a psychologist who examined him and three persons Dr. Salvi worked with. The psychologist essentially opined, based on two interviews with Dr. Salvi and Salvi's self-reporting, that Salvi did not exhibit personality traits consistent with someone who would sexually touch a patient.[9] The three co-workers testified, in effect, that Dr. Salvi was respectful of women he encountered in the workplace.[10] Again, this is an argument properly directed at the Board

[9] Dr. John Duffin, the clinical psychologist who examined Dr. Salvi, opined, for example, that Dr. Salvi is "very sensitive to social mores," is "not prone to reckless behavior," is "quite reserved and emotionally controlled, tending toward being inhibited," and that it was "quite unlikely that [Dr. Salvi] would engage in impulsive acting out."

[10] Dr. Robert Mayer testified that Dr. Salvi never made "sexualized remarks" about patients or female staff and that he never made sexual jokes.

Dr. Robert Stern is the key physician support for discharge planners, social workers, and case managers, who are mostly women. He testified that those women find Dr. Salvi "very easy to work with" and "very respectful of the work they do."

Shelley Johnson, a nurse who worked closely with Dr. Salvi at the UW, testified that most of the non-physicians there were women, that nothing about Dr. Salvi's behavior toward those women concerned her in any way, that he was very respectful of them, and he never engaged in anything like sexual banter in the workplace. She also testified that he has "[h]igh integrity" and is "very respectful."

acting as a fact finder, not a reviewing court. Moreover, quite obviously a reasonable fact finder could believe that a high-performing, highly intelligent person like Dr. Salvi might be particularly adept at conforming his behavior to social norms most of the time, yet still take improper advantage on occasions when he believes the chances of negative consequences are low. Indeed, the testimony of the psychologist supports this view.[11]

¶70 We turn to Dr. Salvi's assertion that "[t]he patients' diagrams and statements in their medical records about the locations of their pain supported Dr. Salvi's touching them in sensitive areas in order to make a diagnosis of their chronic pain" and his assertion that it was unrebutted that he "followed a strict protocol for physical examinations of patients." This argument is vague and undeveloped. For example, it is undisputed that Dr. Salvi had medical reasons to touch "sensitive areas," but he does not explain why this fact defeats the women's assertions about the precise location and manner in which he touched them. And, he does not demonstrate that the touchings, *as described by the women*, followed "strict protocol."

[11] Dr. Duffin agreed that sex offenders fit no particular "profile." He agreed that an intelligent person could defeat tests aimed at identifying persons at risk of committing sex offenses. And, Dr. Duffin agreed in a series of questions that, because there is not "a typical character profile of a sexual offender," such offenders may be "nice guys" or "the guy down the street."

D. Whether The Board's Decision Should Be Reversed Because It Contained Findings That Were Mostly "Cut and Pasted" From the DOE Complaint

¶71 Under the heading "The Board's Findings Of Fact Were 'Cut And Pasted' From The Complaint," Dr. Salvi presents a two-paragraph argument that reads, in full:

> This case was presented to the [administrative law judge] in a three-day hearing in April 2008. The parties submitted detailed post-hearing briefs. Dr. Salvi's brief gave detailed citations to the testimony and exhibits in the record. Almost fourteen months later, the [administrative law judge] issued her Proposed Order. It contained thirty-four findings of fact almost all of which were "cut and pasted" from the DOE Complaint.
>
> Dr. Salvi then filed detailed objections with the Board, including a chart showing the Board that the [administrative law judge] had merely copied the allegations of the Complaint. The Board adopted the proposed findings without making any changes.

(Record citations omitted.) Dr. Salvi backs up his "cut and paste" assertion with appropriate citations to the record, and we agree that nearly all of the findings in the "Findings of Fact" section of the Board's decision are verbatim or near verbatim repetitions of allegations in the complaint. This, however, is not an argument that supports reversal of the Board's decision. It is not uncommon for agencies, or for courts for that matter, to adopt as their own lists of factual assertions previously provided by a party. The administrative law judge's use of this practice does not demonstrate that the findings are not supported by substantial evidence.

¶72 In a separate subsection in his brief, Dr. Salvi complains that the Board made a plainly erroneous factual finding. He points to the Board's finding that "Dr. Salvi states that he did not touch SS in the saddle region at all." We

agree with Dr. Salvi that this finding is not supported by the evidence. Dr. Salvi very plainly testified and demonstrated that he touched S.S.'s saddle region. We have no doubt that this finding is an inadvertent mistake and that it is a product of a lapse in care by the administrative law judge when she used the factual assertions contained in the complaint to create a list of proposed findings. It cannot, however, be seriously contended that this single obvious error affected the Board's overall findings and conclusions.

¶73 Elsewhere in Dr. Salvi's brief he notes delays and errors in the work of the administrative law judge and the Board. It may be that Dr. Salvi means to suggest that the quality of the work of the administrative law judge and the Board was so poor that we should not accord the Board's decision the deference we would normally accord an agency decision. Dr. Salvi does not provide authority for this proposition, and we are aware of none. The rules that govern our review do not differ if an agency acts slowly or with a lack of care. It remains our job to review the record and determine whether the agency's findings and conclusions are supported by substantial evidence.

E. Other Evidence Supporting The Board's Findings

¶74 Before leaving the topic of substantial evidence, we summarize additional evidence supporting the Board's findings.

¶75 According to Dr. Salvi, all four patients were chronic pain sufferers. Three of the four women (D.J., A.G., and S.S., ages 28, 36, and 26 respectively at the time of the alleged assaults) expressly testified that they had seen multiple doctors in the past, yet had never been concerned about inappropriate touching. K.F., the nursing assistant who was 33 years old at the time of the alleged touching, did not expressly say that she had seen many doctors, but that was a

reasonable inference based on her age and her status as a chronic pain sufferer. And, more specific to her particular allegation, she testified that she had had breast exams conducted by other doctors and that what Dr. Salvi did to her breasts was different. Thus, all had substantial experience with doctors, and none had complained about improper touching prior to being examined by Dr. Salvi.

¶76 Also, the women did not know each other and were not aware of other complaints against Dr. Salvi when they complained. None of the women had a significant history with Dr. Salvi—the alleged breast touching of A.G. occurred during her first encounter with Salvi, and the alleged breast and vagina touching of S.S., K.F., and D.J. occurred during a second visit during the same calendar year as a single prior visit. Three of the alleged assaults occurred within weeks of each other.[12] There was no evidence that any of the women had any motive, apart from what they experienced during their visits with Dr. Salvi, to accuse him.

¶77 Thus, there was no apparent reason why any of these women would *single out* Dr. Salvi from the many doctors that had examined them over the years. The Board could reasonably take into account how unlikely it was that four such women, who did not know each other, would make false factual allegations against Dr. Salvi.

¶78 Finally, we observe that Dr. Salvi speculated that the women may have "felt ... something [was] wrong with the way" he touched them on their breasts and in the "buttocks area or the groin area" because his examinations are

[12] The alleged assaults on A.G., S.S., and K.F. all occurred between mid-April 2004 and mid-June that same year. The alleged assault on D.J. occurred on July 26, 2005.

"very invasive" with a lot of physical contact. He stated that his demonstration with the live model revealed a "brief version" of that. However, our review of Dr. Salvi's demonstration with the live model reveals that he did nothing to her that could be perceived by a reasonable person as improper sexual touching. In this demonstration, Dr. Salvi does not place an open hand on a breast or touch close enough to the model's vagina that it could be perceived as vaginal touching.[13]

III. Exclusion Of Evidence

A. Exclusion Of Peer Review Committee Findings

¶79 Dr. Salvi contends that the Board erred when it excluded from evidence the factual findings of the UW Hospital's Corrective Action Peer Review Committee. We first summarize and quote those findings, and then discuss Dr. Salvi's arguments.

¶80 The Peer Review Committee made several findings. Many are either noncontroversial or they favor the Board's findings and conclusions. For example, the Peer Review Committee found that, in certain respects:

> Dr. Salvi ... did not meet the standards of the medical staff in his interactions with these patients. This is true for the following reasons. He failed to give adequate warning to the patients about what he was going to do and failed to explain the reasons for the touching.... This failure to warn patients and provide explanations is not acceptable conduct for a member of the medical staff. In order for Dr. Salvi to continue to practice as a member of the medical staff, he

[13] The exception to this is when Dr. Salvi is demonstrating his belief that it would have been impossible for him to grab D.J.'s vagina. But, of course, that was a demonstration of what Dr. Salvi contends did not happen.

> must demonstrate that he understands the deficiencies with his approach and that he has corrected this approach.

While Dr. Salvi sought admission of all of the findings, both favorable and unfavorable, his argument for reversal hinges on the excluded findings that support his position. Thus, we focus our attention on those findings.[14]

¶81 The Peer Review Committee findings favoring Dr. Salvi are as follows:

- The patients "honestly felt violated by their physical examinations [by Dr. Salvi] and that creating these patient reactions is below the standards of the UWHC Medical Staff." But it was Dr. Salvi's failure to properly communicate with his patients that "led to them to misinterpret his actions and to feel violated."

- The "touchings [by Dr. Salvi] that were reported, other than the touchings of the leg or knee, were justified as part of the examination of the physical conditions reported by the patients."

- "The Committee was troubled by the report of the cupping of the vaginal area which, as reported, would not have been ordinarily justified, but determined that more likely than not, what the [patient] experienced as cupping of the vaginal area, was an examination of trigger points with extended fingers and thumbs which was justifiable on clinical grounds."

- "The Committee was also troubled by the report of the breast examination by one of the patients. The patient stated that she had told Dr. Salvi that he did not need to do a breast exam and that he continued. Dr. Salvi stated that he only palpated lateral breast after telling her he was concerned about lymph nodes that were enlarged. The Committee felt that it may have been that what the patient

[14] Dr. Salvi's appellate brief's record cite to these findings is to the hearing transcript where the parties are discussing the Peer Review Committee report. We do not find a copy of the report in the record. Rather, we find quoting from the report in pleadings filed by Dr. Salvi. Dr. Salvi's brief repeats these quotes and treats them as the full Committee findings. We follow his lead.

experienced as a breast examination, was an examination of lymph nodes and parasternal area."

- The "conduct complained of was not intended for purposes other than the assessment of the patient."

- The "reported and confirmed touchings of the legs or knees is an unacceptable habit of Dr. Salvi. It caused patients to feel violated and is below the standards of the medical staff. The Committee finds that this type of touching was not intended as sexual in nature, but that it must cease if he is to continue practicing as part of this medical staff. The Committee was also concerned that Dr. Salvi was counseled to stop this habit in 2004, yet the behavior recurred in 2005."

¶82 Dr. Salvi first argues that the findings are admissible as a hearsay exception under WIS. STAT. § 908.03(8) because, under that hearsay exception, they are qualifying public records or reports. We need not concern ourselves with this hearsay issue because hearsay is admissible in an administrative proceeding under chapter 227. *See* ***Northwestern Insulation v. Labor & Indus. Review Comm'n***, 147 Wis. 2d 72, 75-76 n.3, 432 N.W.2d 620 (Ct. App. 1988).

¶83 Further, we have no doubt that the Peer Review Committee findings were of a type that would normally be admissible in an agency proceeding like this. The question remains whether the exclusion of this particular evidence is cause to reverse the Board's decision.

¶84 Dr. Salvi asks us to agree with the circuit court that the findings are "highly relevant" because they are the "conclusions of the peer reviewers" regarding the accuracy of "the patient's subjective apprehension of what is happening." We understand this to be an argument that the peer reviewers are experts in this area and that their opinions would provide assistance to the Board in assessing whether the female patients misinterpreted Dr. Salvi's actions.

¶85 This reasoning might have merit if both the Board and the Peer Review Committee had the same factual starting point. But the findings do not state with any meaningful detail the touching the Committee assumed took place. And, to the extent the Committee generally concluded that the touchings were "justified" and for no "purposes other than the assessment of the patient," it appears the Committee accepted Dr. Salvi's accounts of the touchings.

¶86 To the extent the Committee is more specific, it is clear that the Committee credited Dr. Salvi's accounts over the accounts of the women. The Committee findings state:

> The Committee was troubled by the report of the cupping of the vaginal area which, as reported [by D.J.], would not have been ordinarily justified, but determined that more likely than not, what the [patient] experienced as cupping of the vaginal area, was an examination of trigger points with extended fingers and thumbs which was justifiable on clinical grounds.

Elsewhere the Committee states:

> The Committee was also troubled by the report of the breast examination by one of the patients [K.F.]. The patient stated that she had told Dr. Salvi that he did not need to do a breast exam and that he continued. Dr. Salvi stated that he only palpated lateral breast after telling her he was concerned about lymph nodes that were enlarged. The Committee felt that it may have been that what the patient experienced as a breast examination, was an examination of lymph nodes and parasternal area.

Thus, as to D.J. and K.F., the Committee expressly found Dr. Salvi more credible as to the details of the touching.

¶87 Accordingly, the Committee's expert opinion about the propriety of the touching has little or no value because the Committee is working off of factual assumptions that differ from the Board's findings.[15]

¶88 Our analysis tracks that of the administrative law judge. In the following part of her oral ruling excluding the Committee's findings, she explains that the findings as to Dr. Salvi's purpose appear to assume underlying facts that may be at odds with findings that may be made by the Board:

> In my opinion, ... the findings that are stated leads me to believe that there [were] some inconsistencies with what may turn out to be the witness testimony here today and the conclusion reached by the committee in terms of the credibility of the witnesses, and I think the board has the right to determine that issue itself.

Although it might have been prudent to reserve a decision on admission of the findings until credibility issues were resolved, in the end it really did not matter. By the end of the hearing, it was apparent that, *if* Dr. Salvi's version of the events was accepted, then there were medical reasons for touching on or near the intimate body parts of the patients. In this event, the Peer Review Committee findings would have been relevant, but relevant on an issue that was not seriously in dispute. That is to say, if the Board had resolved credibility issues in the same manner as the Committee, then the Board would not have found against Dr. Salvi (or if it had, Dr. Salvi *would* have a valid substantial evidence challenge).

[15] Although it would not affect our decision, we note that the record indicates that the Peer Review Committee did not meet with and question the female patients. We glean this from a statement made by the DOE attorney at the hearing (that the Committee did not "bring the victims in to testify"), which was not contradicted by Dr. Salvi's attorney.

¶89 We agree with Dr. Salvi and the circuit court that the findings carried with them no danger for unfair prejudice because the administrative law judge and the Board presumably understood the limitations of the findings. But it does not follow that it was error to exclude the findings. When evidence has no or scant relevance, it is not error to exclude it, if for no other reason than it is not worth the time it takes to present the evidence and further argue the significance of it.

¶90 In sum, without a common factual starting point, the Committee's findings supporting Dr. Salvi are not only not "highly relevant," they have little if any relevance, and exclusion is not cause for reversal.

B. Exclusion Of Dr. Gatchel's Testimony

¶91 During the hearing, the administrative law judge tentatively ruled that the Dr. Gatchel evidence would be admitted. A video recording of Dr. Gatchel's deposition was played for the administrative law judge. After the hearing and after the parties briefed whether Dr. Gatchel's testimony was admissible, the administrative law judge recommended it be excluded, and the Board adopted that recommendation.

¶92 The part of the deposition testimony that Dr. Salvi contends was admissible relates to Dr. Gatchel's opinion that patients, like the women here, who suffer from fibromyalgia and chronic pain are more likely to misinterpret touch than people not suffering from those disorders. Specifically, Dr. Salvi points to Dr. Gatchel's agreement with the proposition that persons suffering from fibromyalgia and chronic pain "might misperceive touch that occurs in the course of a medical examination." Dr. Salvi also points to Dr. Gatchel's testimony that such patients "might feel as though they're being violated in some way even

though they are not," and that "when the glands are being evaluated, are around the breast, the inner thigh, and they might be basically perceived as sexual even though they were not."[16]

¶93 Dr. Salvi contends that Dr. Gatchel's expert testimony was admissible under cases such as ***State v. Jensen***, 147 Wis. 2d 240, 432 N.W.2d 913 (1988), and ***State v. Richardson***, 189 Wis. 2d 418, 525 N.W.2d 378 (Ct. App. 1994), because the tendency of patients suffering from fibromyalgia and chronic pain to misperceive a doctor's touch is not a matter of common knowledge and experience. We will assume without deciding that Dr. Gatchel's testimony was admissible under the ***Jensen*** line of cases, but we nonetheless conclude that the Board's decision to exclude Dr. Gatchel's testimony does not warrant reversal.

¶94 A careful examination of what Dr. Gatchel actually said reveals that he said very little. Dr. Gatchel said only that such patients might misperceive a doctor's touch, and might perceive the touching of glands around the breasts and inner thighs as sexual when it is not. This testimony does not address whether such patients have a tendency to report touching *that did not occur at all*. For example, Dr. Gatchel does not suggest that such a patient would perceive that a doctor put pressure on her vagina when the pressure he applied was not on or

[16] We assume, for purposes of this discussion, that a foundation for Dr. Gatchel's factual assumption that the four women suffered from fibromyalgia or chronic pain was supplied by Dr. Salvi's testimony.

We also note that Dr. Gatchel's deposition includes many questions by the DOE attorney about Gatchel's opinion of the truthfulness of the particular women in this case. Dr. Salvi does not complain that these opinions were improperly excluded. To the contrary, we agree with his attorney's comments during the deposition to the effect that much time was wasted on this different topic by the DOE attorney given that Dr. Salvi was not attempting to elicit Dr. Gatchel's opinion of the truthfulness of the women.

immediately adjacent to the patient's vagina. Rather, all that Dr. Gatchel actually says is that such patients sometimes misperceive touching.

¶95 We note that the only example of misperception that Dr. Gatchel gave was that patients suffering from fibromyalgia and chronic pain sometimes report pain that does not exist when a doctor probes for pain. This example does not suggest that such patients perceive touching that does not occur, but rather that they falsely report that the touching that does occur causes pain.

¶96 As we explained in prior sections of this opinion, the critical factual dispute in this case was not whether the women misperceived as sexual the probing and palpations of lymph nodes and other body parts *as described by Dr. Salvi*. The critical factual dispute was whether Dr. Salvi did more than he admitted doing. For example, whether he simply probed parts of K.F.'s breasts with his fingertips or went beyond that and placed his open hands on her breasts.

¶97 A comparison with ***Jensen*** is instructive. In ***Jensen***, one issue was whether an expert should be allowed to tell a jury that actual child sexual assault victims often "act out" at school. ***Jensen***, 147 Wis. 2d at 244-49. The evidence was offered to rebut the defense theory that these actions by the child showed that the child's accusation was false. ***Id.*** at 250-52. The ***Jensen*** court concluded that the expert's testimony was admissible to prevent a false assumption by the jurors that the child's behavior was inconsistent with that of an actual sexual assault victim. ***Id.*** What is noteworthy about ***Jensen*** for our purposes is that there was no dispute in that case that the child engaged in the described "acting out" behavior; the dispute was over what the jurors should make of that behavior.

¶98 Here, there was a significant dispute over what occurred and, as we have explained, Dr. Gatchel's opinion testimony did not address that topic. His

testimony might have had significant probative value if he had explained that patients suffering from fibromyalgia and chronic pain sometimes perceive touching that does not occur, but he did not.

¶99 The Board's decision reflects that it understood the limitations of the Dr. Gatchel evidence. The Board wrote:

> [Dr. Gatchel] would only be able to testify as to how an individual might behave or react under a given set of circumstances. Dr. Salvi argues that it is not necessary for an expert to examine a person to have an opinion relevant to the dispute, so long as the general testimony can be tied to the evidence in the case.... Dr. Gatchel's opinion cannot be tied to the evidence in this case. Therefore, ... such testimony would be irrelevant and misleading.

Given that the Board credited the descriptions provided by the female patients, rather than Dr. Salvi's denials, the Board is correctly observing that Dr. Gatchel's opinion cannot be "tied to the evidence" that the Board found credible. This might not have been a basis on which to exclude the evidence in the first instance, but it plainly shows that exclusion did not affect the Board's decision.

¶100 Furthermore, in a case such as this, where the same entity both decides admissibility and acts as fact finder, there is little practical difference between the entity concluding that evidence should be excluded because it is not relevant and the entity concluding that evidence may be admitted, but that it has such de minimis probative value that it carries no significant weight. Here, the bottom line is that the Board concluded that there was no significant value to Dr. Gatchel's testimony. We agree.

Conclusion

¶101 For the reasons above, we affirm the decision of the Medical Examining Board and reverse the circuit court. Because we affirm the Board's disciplinary decision, we also reverse the circuit court's order awarding attorneys' fees and costs under WIS. STAT. § 814.245. It necessarily follows that, if the Board properly imposed discipline on Dr. Salvi, its position was substantially justified under that statute.

By the Court.— Judgment and order reversed.

Not recommended for publication in the official reports.