IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID HOPPER,
Appellant,
vs.
THE STATE OF NEVADA BOARD OF PSYCHOLOGICAL EXAMINERS,
Respondent.

No. 69454

FILED

JAN 30 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended order granting permanent injunctive relief and an order granting attorney fees. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Appellant, David Hopper, is a licensed alcohol and drug abuse counselor ("LADC"). For a number of years, Hopper engaged in treating patients via "biofeedback," a process of monitoring a subject's brain activity while the subject simultaneously views the results of the monitoring. Hopper also administered and interpreted various psychological tests and diagnosed various clients as having psychological disorders. Hopper does not dispute that he has never been and is not now licensed to practice psychology in Nevada.

Respondent, the State of Nevada, Board of Psychological Examiners (the Board) learned of Hopper's activities and filed a complaint seeking injunctive relief to prevent Hopper from conducting and interpreting all psychological tests and, specifically, to cease conducting

biofeedback. Following a four-day evidentiary hearing, the court granted the injunctive relief, which Hopper now appeals.[1]

As a threshold issue, Hopper's conduct was the subject of a previous appeal before the Nevada Supreme Court in *Webb v. Clark Cty. Sch. Dist.*, 125 Nev. 611, 218 P.3d 1239 (2009), and both parties disagree regarding whether the supreme court's opinion in that case, by itself, governs the outcome of this appeal. The Board argues that *Webb* already conclusively found Hopper's conduct illegal, and therefore *Webb* alone controls the disposition of Hopper's case.

In *Webb*, the Nevada Supreme Court held that Hopper illegally practiced psychology without the proper licensing under the facts of that case, and comes close to suggesting that biofeedback, as a "specialized area pursuant to NRS 641.025," may require licensing as a psychologist. *Id.* at 624, 218 P.3d at 1248. But the Board makes too much of this; the supreme court did not hold that biofeedback, by itself, may only be practiced by someone licensed as a psychologist, because that was not the question before the court. Rather, the court held that Hopper illegally engaged in the practice of psychology when he practiced biofeedback on a patient whom he also diagnosed with post-traumatic stress disorder (PTSD). *Id.* Thus, the court did not rule as a matter of law that biofeedback alone requires a psychology license, only that Hopper's treatment of Webb, which included both biofeedback and psychological diagnosis, violated NRS 641.025. Thus, *Webb* dos not say that treating

[1]We do not recount the facts except as necessary to our disposition.

patients through biofeedback alone requires a psychology license as a matter of law.[2]

The district court permanently enjoined Hopper from conducting or interpreting psychological and neurological tests, from using the title "neuropsychophysiologist" or any other such misleading term, and from practicing psychology or biofeedback. Hopper argues all injunctive relief entered against him was error and should be reversed.[3]

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[2]Hopper argues that the NRS 641.025 is vague as a matter of law, and therefore this court should consider its legislative history to ascertain its meaning. However, he fails to cogently or logically explain why this means that the statute does not apply to him, and fails to proffer any alternative interpretation under which his conduct would be legal. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding this court need not consider claims that are not cogently argued or supported by relevant authority). Furthermore, the Nevada Supreme Court relied on the plain language of the same statute in *Webb*.

[3]We note Hopper also appealed from the August 7, 2013 order denying summary judgment, among other things, but as he did not make any arguments about this order in his briefing or reference it any way outside of his statement of the case, we will not address it. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Hopper also appealed the March 9, 2015 order granting permanent injunctive relief, which was amended on November 18, 2015. Because the amended order omitted a portion from the original order that "estopped [Hopper] from circumventing the jurisdiction of this court and seeking a ruling from [the drug and alcohol Board]" thereby revising the legal rights of Hopper, his appeal is properly taken from the amended order, not the original order. *See Campos-Garcia v. Johnson*, 130 Nev. ___, ___, 331 P.3d 890, 891 (2014) ("an appeal is properly taken from an amended judgment only when the amendment 'disturb[s] or revise[s] legal rights and obligations which the prior judgment had plainly and properly settled with finality.') (quoting *Morrell v. Edwards*, 98 Nev. 91, 92, 640 P.2d 1322, 1324 (1982)).

NRS 641.316 grants the Board the power to seek an injunction against anyone practicing psychology without a license without having to prove actual damages. Typically, this court reviews the district court's decision to grant a permanent injunction for an abuse of discretion. *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 291, 212 P.3d 1098, 1103 (2009). Additionally, we give deference to an agency's interpretation of its regulations. *See Public Agency Compensation Trust (PACT) v. Blake*, 127 Nev. 863, 868-69, 265 P.3d 694, 697 (2011) (holding this court will defer to an agency's interpretation of a regulation it is charged with enforcing so long as that interpretation doesn't conflict with existing statutory provisions or exceeds the agency's authority). However, we review de novo whether the agency's interpretation of a regulation conflicts with an existing statute or exceeds the agency's authority. *See Dep't of Motor Vehicles & Pub. Safety v. Jones-W. Ford, Inc.*, 114 Nev. 766, 773, 962 P.2d 624, 629 (1998) (recognizing that agencies have the power to construe their acts, but concluding questions of statutory interpretation are pure legal questions that we review de novo). Because the facts are not in dispute and this case presents a question of statutory interpretation only—whether NRS 641.025 is vague or in conflict with other statutes, and whether Hopper violated the plain language of NAC 641C.250 or NRS 641.440—we review de novo.

The court did not err in enjoining Hopper from conducting psychological and neurological tests or evaluations under the auspices of an LADC license

Hopper argues that he can engage in psychological and psychometric testing because he is trained in them, and NAC 641C.250 states that a person "licensed or certified as an alcohol and drug abuse counselor may . . . conduct testing for which the counselor was trained."

NAC 641C.250(c). Hopper therefore argues that this provision allows him, as an LADC, to engage in any manner of testing for which he has been trained, regardless of whether he is separately licensed for the testing. As the parties do not dispute the facts and instead disagree only on the application of the law to Hopper, we review de novo. *Sec'y of State*, 120 Nev. at 486 n.8, 96 P.3d at 735 n.8.

NAC 641C.250 and its companion regulations state that a counselor may conduct testing if the counselor is properly trained and if the testing is specifically related to the LADC's mandate to treat alcohol and drug addiction; but the regulations say nothing about whether separate licensing may also be required. NAC 641C.250 is titled "Authorized activities of counselor and certified intern; scope of practice of counseling," and must be read in tandem with the description in NRS 641C.100, which states the practice of counseling alcohol and drug abusers "means the application of counseling to reduce or eliminate the habitual use of alcohol or other drugs."

Nothing in these regulations suggests an intention to overrule every other licensing requirement that exists in Nevada law. Quite to the contrary, a fundamental axiom of statutory interpretation is that statutes must be read together unless it is clear that one was intended to overrule another. *See Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 827, 192 P.3d 730, 734 (2008). Here, the mere fact that NAC 641C.250 permits an LADC to engage in certain testing does not mean that the LADC is therefore automatically exempt from any other licensing requirement that may also apply to that testing. If other Nevada regulations require that the LADC obtain a separate license before

performing certain tests, then the LADC is governed by those regulations in the same way that any other citizen of Nevada would be.

To read the regulations otherwise (as Hopper would read them) would be to effectively read NAC 641C.250 as overriding the licensing requirements of any other statute, which would permit an LADC, but only an LADC, to engage in all manner of medical, psychological, and scientific practices without a license while prohibiting anyone else from doing so. Hopper's interpretation is contrary to the plain text of the regulations and is facially unreasonable, and his argument therefore fails.[4]

The court did not err by enjoining Hopper from using the title "neuropsychophysiologist" or any other such misleading word

The district court found that Hopper's incorporation of the word "psychology" throughout the term "neuropsychophysiologist" violated NRS 641.440. On appeal, Hopper argues that the district court erred by finding a violation of NRS 641.440, because the statute does not

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[4]We have also considered Hopper's argument that NRS 641C.065 also allows him to engage in diagnoses and treatment of alcohol and drug-related mental illnesses, but disagree with his premise. NRS 641C.065 defines the scope of practice for the "*clinical* practice of counseling alcohol and drug abusers" (emphasis added), but Hopper holds an LADC, not an LCADC. *See* NRS 641C.290 (describing different examinations for LCADC and LADCs); *see also* NAC 641C.250(7) (describing the different initials applicable to different forms of drug and alcohol counselors). To the extent that the district court relied on this statute to enjoin Hopper from further psychological testing, that reliance was erroneous, but we nonetheless affirm given the rest of our analysis herein. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 598, 245 P.3d 1198, 1202 (2010) (holding that this court will affirm a district court's order if the district court reached the correct result, even for the wrong reason.)

specifically include the word "neuropsychophysiologist" and that the Legislature could have included that term if it wanted to.

However, the plain language of NRS 641.440 clearly states that the use of *any* term identifying someone as a psychologist constitutes a violation of the statute if the person is not so licensed. The district court found, as a factual matter, that that "Hopper used the term 'neuropsychophysiologist' in such a manner that an average member of the public would believe that Hopper was a psychologist." By using the word "any," the Legislature clearly expressed its intent to reach terms such as Hopper used whether or not those words were separately listed in the statute. Hopper's interpretation of the statute simply ignores the broad and plain sweep of its text and his argument fails.

The court did not err by enjoining Hopper from conducting biofeedback

Hopper correctly notes that the district court's order contains some internal inconsistencies. For example, the district court held that, as a matter of law, treating patients through biofeedback requires a psychology license. It then also concludes that other boards, such as the Board of Marriage and Family Therapists, "working in conjunction with the Board of Psychological Examiners, may review their statutes and regulations and make independent determinations as to whether the modalities listed in NRS 641.025 are acceptable practices for those professions." But if biofeedback requires a psychology license as a matter of law, then these non-psychologist boards should not be able to make "independent determinations" as to whether they can license it. Indeed, the district court was presented with evidence that the Marriage and Family Therapist Board and the Board of Medical Examiners permitted licensed practitioners to use biofeedback techniques.

We need not resolve these inconsistencies, because they are not central to whether the injunction was issued in error. Whether or not the district court correctly stated in the abstract that a psychology license is always required to practice biofeedback of any kind, in issuing the injunction the district court found, as a factual matter, that Hopper's use of biofeedback fell outside the scope of his LADC license. The district court found testimony to this effect to be credible, and questions of credibility are for the finder of fact. *See Krause Inc. v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001) ("This court has repeatedly stated that it will not weigh the credibility of witnesses because that duty rests with the trier of fact."). Here, regardless of any inconsistencies or stray statements that may appear in the district court's order, the order contains sufficient grounds to enjoin Hopper from conducting biofeedback. *See* NRCP 61; *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 598, 245 P.3d 1198, 1202 (2010) (holding that this court will affirm a district court's order if the district court reached the correct result, even for the wrong reason).

The district court did not err by granting the Board attorney fees

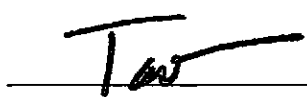
Lastly, Hopper argues the grant of attorney fees was unreasonable for a number of reasons. Grants of attorney fees are reviewed for an abuse of discretion. *Gunderson v. D.R. Horton*, 130 Nev. ___, ___, 319 P.3d 606, 615 (2014). If a trial court exercises its discretion in clear disregard of the law, there might be such an abuse. *Id.* (citing *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993)). *Brunzell* provides a general framework for determining whether fees are reasonable, such as consideration of the qualities of the attorney, the character of work to be done, the work actually performed, and the result. *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33

(1969). Here, the court considered all the *Brunzell* factors and determined the Board's attorney "provided a high quality of service in representing the Board in this case, had an exceptional character of work, performed a substantial amount of work, and received the best possible result." We therefore affirm the grant of attorney fees.

In light of the foregoing reasoning, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Rob Bare, District Judge
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