STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Dennis P. Whalen
Executive Deputy Commissioner

July 20, 1999

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Marcia E. Kaplan, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza – 6th Floor
New York, NY 10001

Michael Sussman, Esq.
25 Main Street
Goshen, NY 10924

James ~~Robert~~ Thomas Horne, M.D.
77 Pondfield Road
Bronxville, New York 10708

RE: In the Matter of James ~~Robert~~ Thomas Horne, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 99-62) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt **or** seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:mla
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

In the Matter of

James Thomas Horne, MD. (Respondent)

A proceeding to review a Determination by a Committee (Committee) from the Board for Professional Medical Conduct (BPMC)

COPY

Administrative Review Board (ARB)

Determination and Order No. 99-62

Before ARB Members Grossman, Lynch, Shapiro, Price and Briber
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): **Marcia E. Kaplan, Esq.**
For the Respondent: **Michael H. Sussman, Esq.**

After a hearing below, a BPMC Committee sustained charges that the Respondent suffers a mental condition that impairs his medical practice, that the Respondent practiced while so impaired, that he practiced with negligence on more than one occasion and that he maintained inaccurate medical records. The Committee voted to revoke the Respondent's License to practice medicine in New York (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 1999), the Respondent asks the ARB to nullify or modify the Committee's Determination, by dismissing charges that the Committee sustained or by reducing the sanction to monitoring and close supervision. After reviewing the record and the parties' briefs, the ARB affirms the Committee in full. We hold that the evidence at the hearing supported the Determination that the Respondent suffers a condition that impairs his practice, that the Respondent has practiced while impaired and that the Respondent has provided sub-standard care that has placed and will continue to place his patients at risk.

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(3), 6530(7-8) & 6530(32) (McKinney Supp. 1999) by committing professional misconduct under the following specifications:

- practicing medicine with negligence on more than one occasion,
- practicing medicine while impaired by mental disability,
- suffering from a psychiatric condition that impairs the ability to practice, and
- failing to maintain records that reflect patient care accurately.

The charges arose from the care that the Respondent, a plastic surgeon, provided to seven patients, A through G. The Respondent contested the charges that he provided sub-standard care or that any condition impairs his ability to practice medicine. After a hearing on the charges, the Committee rendered the Determination now on review.

The Committee sustained all charges. The Committee determined that the Respondent suffers from a psychiatric condition that impairs his ability to practice, but found expert testimony at the hearing inconclusive as to whether the Respondent suffered a frontal lobe disorder, an attention deficit disorder or some other disorder. The Committee found the disorder neither in remission nor in control. The Committee determined further that the Respondent practiced while impaired from 1996 until he surrendered his License temporarily in 1998. The Committee made that determination upon finding that the Respondent:

- formulated inappropriate treatment plans and/or rendered inappropriate care and treatment to all Patients A through G,
- maintained inadequate and disorganized patients records,

- failed to maintain an adequate narcotics log documenting drugs dispensed as against drugs purchased,
- placed his patients at risk and may have caused actual harm to Patients F and G,
- wrote prescriptions inappropriately in his own name for medication for the Respondent's wife and for Patient F, and
- exhibited rage and other inappropriate behavior in demanding medicines for office use and for his wife, from pharmacists at two hospitals and at other pharmacies.

The Committee concluded that the sub-standard care that the Respondent provided to Patients A through G also constituted practicing with negligence on more than one occasion, and that the Respondent's inadequate patient records and narcotics logs demonstrated a failure to maintain adequate records.

The Committee voted to revoke the Respondent's License. The Committee concluded that the Respondent's inability to diagnose accurately and create an appropriate treatment plan resulted in repeated, inadequate, inappropriate and poorly executed operations. The Committee concluded further that the Respondent's psychiatric condition affects his ability to practice both materially and adversely. The Committee found that the condition is neither treated, controlled or in remission.

Review History and Issues

The Committee rendered their Determination on April 8, 1999. This proceeding commenced on April 16, 1999, when the ARB received the Respondent's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the

Respondent's brief and the Petitioner's response brief. The record closed when the ARB received the response brief on May 20, 1999.

The Respondent argues that Petitioner failed to establish by preponderant evidence that the Respondent suffers from a degenerative psychiatric condition or that the Respondent committed significant errors in providing patient care. The Respondent contends that

- the Committee found no preponderant evidence to support a diagnosis for the Respondent's condition,
- the Petitioner's medical expert failed to present any written evidence as support for the expert's testimony about applicable medical standards,
- the Committee arrived at their Determination due to their bias against the Respondent, and,
- the Committee's Administrative Officer erred by refusing to allow the Respondent to establish applicable medical standards by reference to medical texts or journals.

The Respondent alleges that he suffers from an attention deficit disorder that caused the record-keeping and organizational deficiencies evident in the record. The Respondent contends that he can rectify these deficiencies and remain in practice. The Respondent requests that the ARB modify the sanction in this matter to permit the Respondent to practice with close supervision and monitoring by the Department of Health.

The Petitioner's response argues that the Respondent asks the ARB to go beyond our review authority, by substituting our judgement for the Committee's in weighing the evidence and judging witness credibility. The Petitioner requests that the ARB reject the Respondent's attacks on the Committee's impartiality and the Administrative Officer's rulings and that the ARB sustain the penalty that the Committee imposed.

Determination

All ARB members participated in this case and have considered the record and the parties' briefs. We affirm the Determination that the Respondent suffers from a condition that impairs him in medical practice. We affirm the Determination that the Respondent practiced while so impaired, failed to provide care according to accepted medical standards and failed to maintain adequate records. We reject the Respondent's challenges to the Committee's determination that accused the Committee of bias and that alleged error by the Committee's Administrative Officer. We affirm the Committee's Determination to revoke the Respondent's License.

The Respondent's Condition: The Respondent argues that the Committee failed to resolve the differences in expert opinion concerning what impairment the Respondent suffers and that the Petitioner failed to prove by preponderant evidence that the Respondent suffers, as claimed, from frontal lobe impairment, attention deficit disorder or another disordrer. The ARB holds that the Committee made a sufficient determination on the charges by finding the Respondent suffers from a condition that impairs practice, without the Committee actually arriving at a diagnosis for the condition. The charges alleged that the Respondent suffers from an impairing condition, without making a specific allegation as to which condition. The charge did note that the condition had been diagnosed as cerebral dysfunction in the frontal lobes [Committee Determination, Appendix first page].

An expert for the Petitioner, Stephen Billick, M.D., testified that the Respondent suffers from dementia, primarily focused in the frontal brain lobes, severe enough to impair his judgement and make medical practice difficult for him. The second Petitioner's expert, Wilfred G. van Gorp, Ph.D., testified that the Respondent's performance on a psychometric test indicated clinical impairment and frontal lobe dysfunction. Dr. van Gorp also testifed that someone

performing at the Respondent's level would experience difficulty in adapting to novel situations and rapid changes in his environment, so that a surgeon performing on that level could not be trusted to practice safely. An expert for the Respondent, Thomas Brown, Ph.D., testified that the Respondent suffers from a severe attention deficit disorder, that interferes with the Respondent's reading, writing and social relationships and that will become no less severe over time. The Respondent's treating psychiatrist, Francis Hayden, M.D., testified that he experienced difficulty in communicating with the Respondent during therapy sessions, and that the communication difficulties raised concern about the Respondent's ability to function. These opinions provided preponderant evidence to support the Committee's Determination that the Respondent suffers from a mental condition that impairs his ability to practice medicine.

The Respondent argued that preponderant evidence demonstrated that the suffered from an attention deficit disorder that presented no substantial impairment to the Respondent's ability to practice. One expert for the Respondent, Steven Mattis, Ph.D., testified that the Respondent suffered from mild rather than severe attention difficulties. That testimony by Dr. Mattis created a factual dispute as to the Respondent's condition, but that testimony failed to outweigh the evidence in the record that established that the Respondent suffers a disabling impairment. The Respondent also argued that results from tests that Dr. Mattis performed refuted any suggestion that the Respondent lacked executive judgement or the capacity to react well to crises. The Committee, however, found that results from a test that Dr. van Gorp performed indicated that the Respondent performed at a level at which he would experience difficulty adapting to novel situations and rapid changes in his environment. The conflict in the testimony by those two experts again raised a factual question for the Committee's resolution. The Committee credited the testimony by Dr. van Gorp. The Respondent argued further that test results established that the Respondent had an excellent memory, a strong counter-indication to frontal lobe disorder. The Committee made a specific conclusion, however, that despite the Respondent's claim to an

excellent memory, the Respondent displayed great difficulty in remembering questions and answering them directly and succinctly [Committee Determination, page 32, Observations and Impressions, paragraph 2].

The Respondent's Practice: The Respondent argued next that preponderant evidence failed to support the Committee's Determination that the Respondent practiced while impaired and that the Committee failed to ground their findings in credible evidence concerning standards for acceptable care and record-keeping. We hold that the expert testimony by the Petitioner's expert, Paul R. Weiss, M.D., and the Respondent's records demonstrate that the Respondent practiced medicine with negligence on more than one occasion and that he failed to maintain records that accurately reflect patient treatment. The Respondent attempted to discredit the testimony by Dr. Weiss, by arguing that Dr. Weiss failed to establish medical standards by reference to medical texts, journals or articles. The testimony by Dr. Weiss established the care standard, without Dr. Weiss attempting to bolster his expert opinion by reference to publications. The Respondent himself provided expert testimony on his own behalf concerning care standards and record keeping. That testimony again established a factual question for the Committee to resolve. The Committee gave several reasons in their Determination for refusing to credit the Respondent's testimony, such as the his unresponsiveness, the incredible nature of some answers and his unawareness about matters in his own records. The ARB owes the Committee deference in the Committee's role as fact finder and we see no grounds to overturn the Committee in their Determination to credit the expert testimony by Dr. Weiss over the testimony by the Respondent.

The proof before the Committee also provided preponderant evidence to establish a causal link between the Respondent's impairment and the sub-standard patient care and record keeping. The Committee found specifically that the Respondent's failure to review his records and his inability to correct the records reflected the impairment. The Committee also found that the Respondent demonstrated his impairment through his inability to appreciate the gravity of

particular medical situations and the Respondent's inability to deal with the situations. The Committee found further that the Respondent exhibited rage in demanding medications for his office use and for his wife and in his inappropriate prescribing for his wife and for Patient F.

Allegations As To Error And Bias: The Respondent argued that the Committee's Administrative Officer erred by refusing to allow the Respondent to refer to scholarly tests, journals or articles that supported the Respondent's testimony about medical standards and record keeping. The Respondent failed, however, to refer to any statute or case law to support that argument. The Petitioner argued in response that New York law bars a witness from buttressing testimony on direct, by using texts or treatises, Spensieri v Lasky, __ A.D.2d __, 685 N.Y.S.2d 821(Third Dept. 1998). We conclude that this argument between counsel raises legal issues that the Respondent should raise with the courts.

At page 3 in his brief, the Respondent characterized the Committee as biased. A Respondent fails to demonstrate prejudice, merely by raising an unsubstantiated allegation of bias. Matter of Moss v. Chassin, 209 A.D.2d, 889, 618 N.Y.S.2d 931, lv. denied 85 N.Y.2d 805, cert denied 116 S. Ct. 170. The Respondent provided no further details on the bias allegation and made no showing that the Committee's Determination flowed from bias, see Matter of Kabnick v. Chassin, 223 A.D.2d 935, 636 N.Y.S.2d 920, affd. 89 N.Y.2d 828. We have ruled already that preponderant evidence in the record provided the basis for the Committee's Determination and we reject any suggestion that Committee made their Determination due to any bias against the Respondent.

Penalty: The Respondent argued that revocation constituted an unjustified penalty absent evidence that the Respondent suffers from a degenerative disorder or that the Respondent has committed significant errors in patient care. We hold that the record demonstrates both that the Respondent suffers a condition that impairs him in practicing medicine and that the Respondent committed significant errors in patient care. We reject the Respondent's suggestion

that we could provide a sufficient remedy for the Respondent's sub-standard patient care and accommodate the Respondent's disability, by permitting the Respondent to practice under close supervision and monitoring by the Health Department.

The Committee determined that the Respondent placed all six patients at issue in this proceeding at risk. The Committee found that the Respondent failed to monitor patients appropriately before, after and during surgery, that he failed to monitor patients under anesthesia and that he failed to monitor Patient F for chronic pain. The Committee found the respondent's care for Patients F and G the most serious. As to Patient F, the Committee found that the Respondent failed to investigate the cause for the Patient's chronic pain well after surgery. The Respondent also continued to prescribe the narcotic analgesics Percocet and Roxicet to the Patient for one and one-half years following surgery, failed to address the Patient's primary problem and furthered the Patient's drug dependence. The Respondent also wrote prescriptions in his own name for Percocet that he intended for Patient F. As to Patient G, the Respondent attempted a secondary closure on a wound with necrotic or dead tissue. The Committee found that such a procedure exposed the Patient to needless risks, such as deformity and infection.

The Respondent rendered the care at issue in this proceeding from 1992 –1997. The care involved seven different patients. We find the incidents at issue sufficiently recent, frequent and widespread enough to reflect the Respondent's entire medical practice, rather than merely the care he rendered to these seven patients, and to demonstrate that the problems continue to this day. We conclude from the ongoing sub-standard care, over a five-year period, that the Respondent took no steps to correct his problems. At hearing, the Respondent demonstrated that he refuses to acknowledge his errors. He attempted to blame others, such as his secretary, for errors and he provided testimony that the Committee found incredible. The Respondent claimed at hearing that he possessed an excellent memory and his brief claimed that test results showed that the Respondent possessed an excellent memory. The Committee found, however, that the

Respondent displayed a difficulty in remembering questions. Such evidence supports the Committee's conclusion that the Respondent lacks insight into his deficiencies. We conclude that the Respondent presents as a poor candidate for rehabilitation. We also note that the Respondent's own expert Dr. Brown testified that the Respondent's disorder would become no less severe over time.

The Respondent's continued medical practice in this state would present a risk to his patients. The ARB sees no credible evidence in this record to demonstrate that the Respondent could correct the deficiencies in his practice to the point that he could practice safely. We conclude that license revocation constitutes the only penalty that would protect the public in this case. We vote 5-0 to affirm the Committee's Determination revoking the Respondent's License.

ORDER

NOW, with this Determination as our basis, the ARB renders the following **ORDER:**

1. The ARB **AFFIRMS** the Committee's Determination that the Respondent committed professional misconduct.

2. The ARB **AFFIRMS** the Committee's Determination to revoke the Respondent's License to practice medicine in New York State.

Robert M. Briber
Sumner Shapiro
Winston S. Price, M.D.
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of James Thomas Horne, M.D.

Sumner Shapiro, an ARB Member concurs in the Determination and Order in the Matter of Dr. Horne.

Dated: July 13, 1999

Sumner Shapiro

In the **Matter of James Thomas Horne, M.D.**

Robert M. Briber, an ARB Member concurs in the Determination and Order in the Matter of Dr. Horne.
Dated: July 14, 1999

Robert M. Briber

In the Matter of James Thomas Horne, M.D.

Winston S. Price, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Horne.

Dated: July 10, 1999

Winston S. Price, M.D.

In the Matter of James Thomas Horne, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Horne.

Dated: July 13, **1999**

Therese G Lynch MD

Therese G. Lynch, M.D.

In the Matter of James Thomas Horne, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Horne.

Dated: July 16, **1999**

SLG P Grossman M.D M.P.H.

Stanley L Grossman, M.D.