



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Karen Schimke
Executive Deputy Commissioner

July 22, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Peter Van Buren, Esq.
NYS Department of Health
Corning Tower-Room 2438
Empire State Plaza
Albany, New York 12237

Anthony Scher, Esq.
Wood & Scher
Harwood Building
14 Harwood Court-Suite 512
Scarsdale, New York 10583

Seymour P. Kern, M.D.
7040 Ivy Street
Carlsbad, California 92002

RE: In the Matter of Seymour P. Kern, M.D.

Effective Date: 07/29/96
Dear Mr. Van Buren, Mr. Scher and Dr. Kern:

Enclosed please find the Determination and Order (No.96-13) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Empire State Plaza
Corning Tower, Room 438
Albany, New York 12237

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,

A handwritten signature in cursive script that reads "Tyrone T. Butler".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:rlw

Enclosure

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

COPY

IN THE MATTER
OF
SEYMOUR P. KERN, M.D.

ADMINISTRATIVE
REVIEW BOARD
DECISION AND
ORDER NUMBER
ARB 96-13

The Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of **ROBERT M. BRIBER, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D.** and **WILLIAM A. STEWART, M.D.**¹ held deliberations on April 19, 1996, to review the Hearing Committee on Professional Medical Conduct's (Hearing Committee) January 30, 1996, Determination finding Dr. Seymour P. Kern (Respondent) guilty of professional misconduct. The Respondent requested the Review through a Notice which the Board received on March 13, 1996. James F. Horan served as Administrative Officer to the Review Board. The Respondent filed a brief on his own behalf which the Board received on March 13, 1996. The Office of Professional Medical Conduct (Petitioner) submitted a brief through their Deputy Counsel, Peter D. Van Buren, which the Board received on March 19, 1996.

SCOPE OF REVIEW

New York Public Health Law (PHL) §230(10)(i), §230-c(1) and §230-c(4)(b) provide that the Review Board shall review:

¹Sumner Shapiro recused himself because he is acquainted with Sherman Fishman, who provided a character reference letter that is part of the Respondent's brief.

- whether or not a hearing committee determination and penalty are consistent with the hearing committee's findings of fact and conclusions of law; and
- whether or not the penalty is appropriate and within the scope of penalties permitted by PHL §230-a.

Public Health Law §230-c(4)(b) permits the Review Board to remand a case to the Hearing Committee for further consideration.

Public Health Law §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board.

HEARING COMMITTEE DETERMINATION

The Petitioner brought this case pursuant to Public Health Law Section 230(10)(p) and Education Law Section 6530(9)(a)(i), which provide an expedited hearing in cases in which professional misconduct charges against a Respondent are based upon a prior criminal conviction in New York or another jurisdiction or upon a prior administrative adjudication which would amount to misconduct if committed in New York State. The Petitioner alleged that the Respondent had been found guilty of professional misconduct by the Medical Board of California (California Board). The Petitioner alleged that if the Respondent's conduct in California had been committed in New York, the conduct would constitute practicing fraudulently, practicing with negligence on more than one occasion, practicing with gross negligence, practicing with incompetence on more than one occasion, practicing with gross incompetence, failing to comply with State or local laws or regulations, exercising undue influence on a patient, moral unfitness in the practice of medicine, false or misleading advertising and ordering excessive tests or treatment. The expedited hearing in these cases determines the nature and severity of the penalty which the Hearing Committee will impose based upon the criminal conviction or prior administrative adjudication.

The Hearing Committee in this case found that the Petitioner had met its burden of proof in establishing that the Respondent entered into a Stipulation with the California Board in which he admitted that the manner in which he billed insurance companies for performing radial keratomies was inaccurate and negligent. The Respondent also admitted that he negligently advertised to the public that radial keratomies would be covered by health insurance. The Committee found that the California Stipulation amounted to a finding of professional misconduct by California and the Committee found that the Respondent's admitted conduct would amount to misconduct if committed in New York.

The Hearing Committee voted to revoke the Respondent's license to practice medicine in New York State. The Hearing Committee noted that the Respondent's testimony before the Committee was not specific to questions asked and dealt with extraneous issues. The Committee found the Respondent to be intelligent and able, but found that the Respondent was an opportunist whose main objective was to make money off the practice of medicine. The Committee found that the evidence showed the Respondent encouraging his patients to exaggerate symptoms on their history forms to justify their need for insurance coverages, that the record contained numerous instances in which the Respondent's diagnoses and performance of various ocular procedures were not medically justified and that the record showed that bills submitted to insurance companies were often far in excess of customary costs. The Committee rejected the Respondent's request that the Committee limit the penalty against the Respondent to only the warning that the Respondent received from the State of Pennsylvania. The Committee found that the Respondent had significant history of contact with New York State and that there was, therefore, a greater obligation to protect our citizens.

REQUESTS FOR REVIEW

The Respondent's brief asserts that the Hearing Committee based its Determination improperly on unproven allegations and that the Respondent never admitted to committing fraud and there was no evidence that the Respondent committed fraud. The Respondent also contends that the Hearing Committee was biased and disregarded positive aspects of the Respondent's great contribution to the

field of medicine. The Respondent also points out that California stayed revocation of his license in that state and placed the Respondent on probation.

The Petitioner urges that the Review Board sustain the Hearing Committee's Determination and penalty. The Petitioner asserts that the Hearing Committee did not misunderstand or misinterpret the action that California took against the Respondent. The Petitioner asserts that the Hearing Committee was within its rights to take cognizance of the terms of the California Order, the documents submitted and the Respondent's testimony.

REVIEW BOARD DETERMINATION

The Review Board has considered the record below and the briefs which counsel have submitted.

The Review Board votes to sustain the Hearing Committee's Determination that the Respondent was guilty of professional misconduct. The Respondent signed a Stipulation with the California Board (Petitioner's Ex. 4) in which the Respondent admitted that:

- "the manner in which he billed insurance companies for his performing radial keratomies...was inaccurate and negligent..." (Stipulation paragraph 10, page 3); and
- "the manner in which he negligently advertised to the public that radial keratomies would be covered by health insurance was in violation of Section 2271." (Stipulation paragraph 11, page 3)

Section 2271 of the California Medical Practice Act provides that a licensee may be disciplined for any false or misleading advertising. The Review Board finds that the Respondent's conduct, if committed in New York, would constitute advertising in a false manner, willful or grossly negligent failure to comply with State laws, exercising undue influence on a patient in promoting the sale of goods and services, negligence on more than one occasion, fraud and moral unfitness.

The Review Board votes 4-0 to sustain the Hearing Committee's Determination to revoke the Respondent's license to practice in New York State. The Respondent induced patients into his office with advertising assurances that the Patient's treatment would be covered by insurance. The Respondent then billed for procedures which the Respondent did not perform. The Hearing Committee could clearly infer from that evidence that the Respondent's pattern of practice was fraudulent. The Respondent's admissions also support the Hearing Committee's conclusion that the Respondent main objective was to make money off his patients. In addition to the record from California, the Hearing Committee heard testimony from the Respondent. The Committee found that the Respondent was evasive and that he did not take responsibility for his actions. The Committee as the finders of fact can assess a witness for credibility and make judgements about a witness's character from that witness's testimony and other evidence. The Committee can also rely on their assessment of a Respondent and his possible remorse for his misconduct when the Committee determines what penalty is necessary to protect the public and deter similar misconduct.

Revocation is an appropriate penalty to impose against a Respondent who misled patients and who billed insurance companies falsely. In this case, the Committee also acted well within their authority to reject the Respondent's evidence in mitigation and base their penalty in part on the Respondent's evasive testimony and lack of remorse. The Hearing Committee who finds that a physician has committed misconduct must consider a penalty that will protect the citizens of New York. The Committee is in no way bound to impose a penalty similar to that which other states may have imposed for the same misconduct. The Hearing Committee in this case made clear the reasons why they felt a more severe sanction was necessary in New York. The Review Board agrees with the Hearing Committee that revocation is the appropriate penalty in this case.

ORDER

NOW, based upon this Determination, the Review Board issues the following **ORDER**:

1. The Review Board **SUSTAINS** the Hearing Committee on Professional Medical Conduct's April 19, 1996 Determination finding the Respondent guilty of professional misconduct.

2. The Review Board **SUSTAINS** the Hearing Committee's Determination to revoke the Respondent's license to practice medicine in New York State.

ROBERT M. BRIBER

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

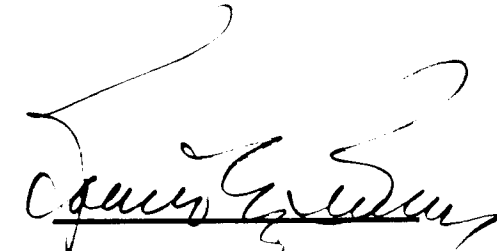
WILLIAM A. STEWART, M.D.

IN THE MATTER OF SEYMOUR P. KERN, M.D.

ROBERT M. BRIBER, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Kern.

DATED: Schenectady, New York

June 21, 1996



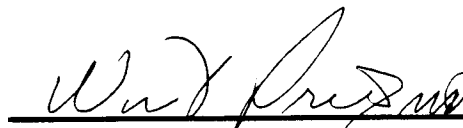
ROBERT M. BRIBER

IN THE MATTER OF SEYMOUR P. KERN, M.D.

-
WINSTON S. PRICE, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Kern.

DATED: Brooklyn, New York

July 19, 1996

A handwritten signature in cursive script, appearing to read "Winston S. Price", is written over a horizontal line.

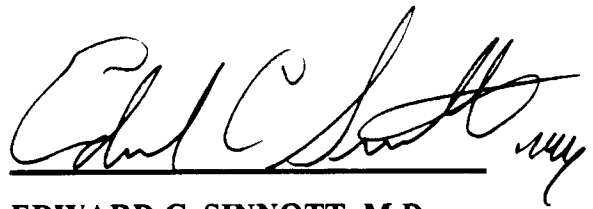
WINSTON S. PRICE, M.D.

IN THE MATTER OF SEYMOUR P. KERN, M.D.

EDWARD C. SINNOTT, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Kern.

DATED: Roslyn, New York

June 13, 1996

A handwritten signature in cursive script, appearing to read "Edward C. Sinnott, M.D.", written over a horizontal line. The signature is fluid and somewhat stylized.

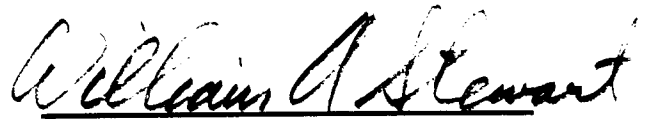
EDWARD C. SINNOTT, M.D.

IN THE MATTER OF SEYMOUR P. KERN, M.D.

WILLIAM A. STEWART, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Kern.

DATED: Syracuse, New York

13 June , 1996

A handwritten signature in cursive script that reads "William A. Stewart". The signature is written in black ink and is positioned above a horizontal line.

WILLIAM A. STEWART, M.D.