



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

January 30, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

E. Marta Sachey, Esq.
Associate Counsel
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.

Dear Ms. Sachey, Mr. Scher and Dr. Kern:

Enclosed please find the Determination and Order (No. 96-13) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:

NEW YORK STATE DEPARTMENT OF HEALTH 420

NEW YORK STATE DEPARTMENT OF HEALTH 19

Office of Professional Medical Conduct
New York State Department of Health
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays all action until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by **certified mail**, upon the Administrative Review Board **and** the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

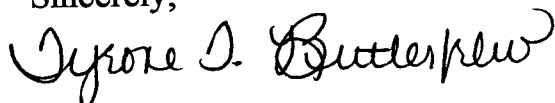
The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Empire State Plaza
Corning Tower, Room 2503
Albany, New York 12237-0030

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,



Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

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

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

**DETERMINATION
AND
ORDER**

BPMC-96-13

A Notice of Hearing and Statement of Charges, both dated October 23, 1995, were served upon the Respondent, **SEYMOUR P. KERN, M.D., JOSEPH G. CHANATRY, M.D., (Chair), NANCY J. STUBBE, M.D. and D. MARISA FINN**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **CHRISTINE C. TRASKOS, ESQ.**, Administrative Law Judge, served as the Administrative Officer. A hearing was held on November 29, 1995. The Department of Health appeared by **JERRY JASINSKI, ACTING GENERAL COUNSEL**, by **E. MARTA SACHEY**, Associate Counsel. The Respondent appeared by **WOOD & SCHER, ANTHONY SCHER, ESQ.**, of counsel. Evidence was received and witnesses sworn and heard and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing where a licensee is charged solely with a violation of Education Law Section 6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York or another jurisdiction, or upon a prior administrative adjudication

regarding conduct which would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, Respondent is charged with professional misconduct pursuant to Education Law Section 6530 (9)(b). A copy of the Notice of Referral Proceeding and Statement of Charges is attached to this Determination and Order in Appendix I.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. Respondent was authorized to practice medicine in New York State on December 31, 1970, by the issuance of license number 107859 by the New York State Education Department.
(Pet. Ex. #3)
2. On or about September 16, 1992, the Division of Medical Quality, Medical Board of California, State of California ("Medical Board of California") issued an accusation in Case No. D-4948 against the Respondent. The accusation alleged that the Respondent, an ophthalmologist, provided medical care to numerous patients between 1985 and 1987. Respondent used his treatment of these patients and performance of radial keratotomies as a means to, among others, defraud insurance companies. The accusation specifically alleged that Respondent (I) used false and misleading advertising to attract patients to his practice so that he might perform radial keratotomies upon them; (II) created false and fraudulent medical records with respect to his patients' diagnoses and treatment so that insurance

companies would pay for the procedure and other items associated with it; and (III) thereafter submitted false and fraudulent claims to insurance companies for payment of those services purportedly rendered. Based on the foregoing, Respondent was alleged to have violated California Business and Professions Code §§810, 2271, 2261, 2262, and 2234(e). In addition, Respondent was alleged to have departed from the standards of the medical community in performing bilateral ocular surgeries without medical need, in violation of California Business and Professions Code §2234(b) and 2234(d), i.e. gross negligence and incompetence.

3. On or about February 1, 1995, the Respondent entered into a Stipulation in Settlement, Decision and Order ("Stipulation") in Case No. D-4948. By the Stipulation, Respondent admitted that the manner in which he billed the insurance companies for performing radial keratotomies as set forth in the accusation was inaccurate and negligent, in violation of California Business and Professions Code §2234(a) and (c). Additionally, Respondent admitted that the manner in which he negligently advertised to the public that radial keratotomies would be covered by health insurance was in violation of §2271 (making false or misleading advertising).
4. Based on the foregoing admissions, Respondent's Physician's and Surgeons certificate was revoked. The revocation was stayed and Respondent was placed on probation for five years upon specified terms and conditions. The terms included, among others: that Respondent was to perform no ophthalmological surgery of any kind until he received medical clearance to do so from his monitoring physician; within six months of Respondent's having resumed the active practice of medicine, he was to take an oral clinical examination in subjects involving general ophthalmology and/or radial keratotomy to be administered by the Medical Board of California; that he should perform 100 hours of community service in each of the first two years of probation at a facility to be determined by mutual agreement between

Respondent and the Board; that Respondent's practice of ophthalmology should be monitored by another physician in Respondent's field of practice, who shall provide periodic reports to the Medical Board, with the monitor also being required to render an opinion approving any surgical plan suggested by Respondent prior to the actual performance of the surgery; and that Respondent should take and successfully complete a course in ethics during the first year of probation. Respondent's probation will thus expire on or about January 31, 2000.

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee unless noted otherwise.

The Hearing Committee unanimously concluded that the Department has sustained its burden of proof. The preponderance of the evidence demonstrates that Respondent was disciplined by the Medical Board of California for fraudulent billing of insurance companies and false or misleading advertising. As a result, the California Board revoked Respondent's license, stayed the revocation and placed the Respondent on probation for five years upon specified terms and conditions. Section 6530(9)(b) of the Education Law defines professional misconduct as "having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York State, constitute professional misconduct under the laws of New York State."

The record is replete with instances of Respondent's fraudulent billing of insurance companies for the initial exam, in describing procedures performed in the operative report and the follow-up review. Respondent also falsely advertised information regarding insurance coverage for radial keratotomies. (Pet. Ex. 4) Therefore, the Hearing Committee concluded that Respondent's admitted underlying conduct in California would constitute professional misconduct in New York.

As a result, the Hearing Committee voted to sustain the First Specification of professional misconduct contained within the Statement of Charges.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine in New York State should be revoked. This determination was reached upon due consideration of the full spectrum for penalties available pursuant to statute, including revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

Respondent appeared at the hearing but, the Hearing Committee found generally that his answers were not specific to questions asked. He often wandered in his responses and brought up extraneous issues not germane to the original question. For example, Respondent was questioned by the Hearing Committee about his need to use an assistant surgeon instead of a nurse during a radial keratotomy procedure. (T. 53-59) The Hearing Committee found no medical justification for a second physician in the explanation offered by Respondent. In fact, Respondent's answer that radial keratotomies involve pressure on the eyeball that could result in cardiac arrest was particularly insulting to the panel. (T. 57)

There is no question that Respondent is intelligent and that he has demonstrated his abilities not only as a physician, but also as an electrical engineer. The Hearing Committee however, believes that Respondent is also an opportunist whose main objective is to make money off the practice of medicine. The evidence shows that Respondent encouraged his patients to exaggerate their symptoms on their patient history forms to justify the need for insurance coverage. The record also contains numerous instances in which Respondent's diagnosis and performance of various ocular procedures were not medically justified. Bills submitted to insurance companies were often far in excess of customary costs.

Respondent argued that any penalty imposed should be no greater than the warning letter issued by the State of Pennsylvania . (T. 69, Resp. Ex. K) However, when questioned about his concern in maintaining his New York State license, Respondent testified that he is a native of New York State, that he has family here and that he has appeared in this State in the past as an expert witness. (T. 32) The Hearing Committee believes that because Respondent has a significant history of contact with New York State, there is a greater obligation to protect its citizens. In addition, the Hearing Committee further believes that a message must be sent that New York State will not tolerate physicians who not only defraud insurance companies, but also mislead their patients. For the foregoing reasons, revocation is the appropriate sanction in this instance.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The Specification of professional misconduct contained within the Statement of Charges (Petitioner's Exhibit #1) is **SUSTAINED**;
2. Respondent's license to practice medicine in New York State be and hereby is **REVOKED**.

**Dated: Albany, New York
, 1996**

Joseph G. Chanatry M.D.
JOSEPH G. CHANATRY, M.D. (Chair)

**NANCY J. STUBBE, M.D.
D. MARISA FINN**

TO: E. Marta Sachey, Esq.
Associate Counsel
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

APPENDIX I

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

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IN THE MATTER : NOTICE OF
OF : REFERRAL
SEYMOUR P. KERN, M.D. : PROCEEDING

-----x

TO: SEYMOUR P. KERN, M.D.
7040 Ivy Street
Carlsbad, California 92002

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law Section 230(10)(p) (McKinney Supp. 1995) and N.Y. State Admin. Proc. Act Sections 301-307 and 401 (McKinney 1984 and Supp. 1995). The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 18th day of October, 1995 at 10:00 o'clock in the forenoon of that day at Hearing Room E, Concourse Level, Cultural Education Building, Empire State Plaza, Albany, New York 12237.

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the proceeding will be made and the witnesses at the proceeding will be sworn and examined.

You may appear in person at the proceeding and may be represented by counsel. You may produce evidence or sworn testimony on your behalf. Such evidence or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the

licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered which would show that the conviction would not be a crime in New York State. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.

If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must be submitted to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Corning Tower Building, 25th Floor, Empire State Plaza, Albany, New York 12237, ATTENTION: HON. TYRONE BUTLER, DIRECTOR, BUREAU OF ADJUDICATION, (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, on or before October 6, 1995.

You may file a written answer, brief, and affidavits with the Committee. Six copies of all papers you wish to submit must be filed with the Bureau of Adjudication at the address indicated above on or before October 6, 1995 and a copy of all papers must be served on the same date on the Department of Health attorney indicated below. Pursuant to Section 301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person.

The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated

above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the administrative review board for professional medical conduct.

SINCE THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT SUSPENDS OR REVOKES YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE AND/OR IMPOSES A FINE FOR EACH OFFENSE CHARGED, YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York
August 31, 1995



PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be addressed to:

MICHAEL A. HISER
Associate Counsel
NYS Department of Health
Division of Legal Affairs
Corning Tower Building
Room 2429
Empire State Plaza
Albany, New York 12237
(518) 473-4282

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

-----X

IN THE MATTER : STATEMENT
OF : OF
SEYMOUR P. KERN, M.D. : CHARGES

-----X

SEYMOUR P. KERN, M.D., the Respondent, was authorized to practice medicine in New York State on December 31, 1970, by the issuance of license number 107859 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about September 16, 1992, the Division of Medical Quality, Medical Board of California, State of California ("Medical Board of California") issued an accusation in Case No. D-4948 against the Respondent. The accusation alleged that the Respondent, an ophthalmologist, provided medical care to numerous patients between 1985 and 1987. Respondent used his treatment of these patients and performance of radial keratotomies as a means to, among others, defraud insurance companies. The accusation specifically alleged that Respondent (i) used false and misleading advertising to attract patients to his practice so that he might perform radial keratotomies upon them; (ii) by created false and fraudulent medical records with respect to his patients' diagnoses and treatment so that insurance companies would pay for the procedure and other items associated with it;

and (iii) thereafter submitted false and fraudulent claims to insurance companies for payment of those services purportedly rendered. Based on the foregoing, Respondent was alleged to have violated California Business and Professions Code §§ 810, 2271, 2261, 2262, and 2234(e). In addition, Respondent was alleged to have departed from the standards of the medical community in performing bilateral ocular surgeries without medical need, in violation of California Business and Professions Code §2234(b) and 2234(d), i.e. gross negligence and incompetence.

B. On or about February 1, 1995, the Respondent entered into a Stipulation in Settlement, Decision and Order ("Stipulation") in Case No. D-4948. By the Stipulation, Respondent admitted that the manner in which he billed the insurance companies for performing radial keratotomies as set forth in the accusation was inaccurate and negligent, in violation of California Business and Professions Code §2234(a) and (c). Additionally, Respondent admitted that the manner in which he negligently advertised to the public that radial keratotomies would be covered by health insurance was in violation of §2271 (making of false or misleading advertising)

C. Based on the foregoing admissions, Respondent's Physicians and Surgeons certificate was revoked. The revocation was stayed and Respondent was placed on probation for five years upon specified terms and conditions. The terms included, among others: that Respondent was to perform no ophthalmological surgery of any kind until he received medical clearance to do so from his treating physician; within six months of Respondent's

having resumed the active practice of medicine, he was to take an oral clinical examination in subjects involving general ophthalmology and/or radial keratotomy to be administered by the Medical Board of California; that he should perform 100 hours of community service in each of the first two years of probation at a facility to be determined by mutual agreement between Respondent and the Board; that Respondent's practice of ophthalmology should be monitored by another physician in Respondent's field of practice, who shall provide periodic reports to the Medical Board, with the monitor also being required to render an opinion approving any surgical plan suggested by Respondent prior to the actual performance of the surgery; and that Respondent should take and successfully complete a course in ethics during the first year of probation. Respondent's probation will thus expire on or about January 31, 2000.

D. The conduct resulting in the disciplinary action taken by the Medical Board of California involving the license of the Respondent would, if committed in New York State, constitute professional misconduct under the laws of New York State, specifically, New York Education Law §6530(2) (McKinney Supp. 1995) (all references to the Education Law hereafter include the 1995 McKinney Supplement) (practicing the profession fraudulently); and/or New York Education Law §6530(3) (practicing the profession with negligence on more than one occasion); and/or New York Education Law §6530(4) (practicing the profession with gross negligence on a particular occasion);

and/or New York Education Law §6530(5) (practicing the profession with incompetence on more than one occasion); and/or New York Education Law §6530(6) (practicing the profession with gross incompetence); and/or §6530(16) (a willful or grossly negligent failure to comply with substantial provisions of federal, state, or local laws, rules, or regulations governing the practice of medicine); New York Education Law §6530(17) (exercising undue influence on the patient, including the promotion of the sale of services, goods, appliances or drugs in such manner as to exploit the patient for the financial gain of the licensee); and/or New York Education Law §6530(20) (conduct in the practice of medicine which evidences moral unfitness to practice medicine); and/or New York Education Law §6530(27) (advertising or soliciting for patronage that is not in the public interest, because it is false, fraudulent, deceptive or misleading); and/or New York Education Law §6530(35) (ordering of excessive tests, treatment, or use of treatment facilities not warranted by the condition of the patient).

SPECIFICATION OF MISCONDUCT

FIRST SPECIFICATION

HAVING BEEN FOUND GUILTY OF PROFESSIONAL MISCONDUCT

Respondent is charged with having been found guilty of improper professional practice or professional misconduct by a duly authorized disciplinary agency of another state, where the conduct upon which the finding was based would, if committed in

New York State, constitute professional misconduct under the laws of New York State, within the meaning of New York Education Law §6530(9)(b), in that Petitioner charges:

1. The facts in Paragraphs A, B, C and/or D.

SECOND SPECIFICATION
HAVING HAD DISCIPLINARY ACTION TAKEN

Withdrawn

Respondent is charged with having disciplinary action taken against him by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the disciplinary action involving Respondent's license would, if committed in New York State, constitute professional misconduct under the laws of New York State, within the meaning of New York Education Law §6530(9)(d), in that Petitioner charges:

2. The facts in Paragraphs A, B, C and/or D.

DATED: *August 31*, 1995
Albany, New York

Peter D. Van Buren
PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional
Medical Conduct