STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

April 16, 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ehud Arbit, M.D.
166 Elm Road
Englewood, NJ 07631

Anthony Z. Scher, Esq.
Wood & Scher
The Harwood Building
Scarsdale, NY 10583

Diane Abeloff, Esq.
NYS Department of Health
5 Penn Plaza – Sixth Floor
New York, NY 10001

RE: In the Matter of Ehud Arbit, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 00-369) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:nm

Enclosure

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

In the Matter of

Ehud Arbit, M.D. (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. 00-369

Before ARB Members Grossman, Lynch, Price and Briber[1]
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): **Dianne Abeloff, Esq.**
For the Respondent: **Anthony Z. Scher, Esq.**

After a hearing below, a BPMC Committee determined that the Respondent practiced medicine with gross negligence in performing surgery on a single patient. The Committee voted to suspend the Respondent's License and to place the Respondent on probation for three years. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2000), the Petitioner asks the ARB to modify the Determination by sustaining misconduct charges concerning additional patients and by increasing the penalty against the Respondent. The Respondent asks that the ARB overturn the Committee's finding on gross negligence, or in the alternative, to sustain the Committee's penalty. After reviewing the record and submissions by the parties, we vote 4-0 to affirm the Committee's Determination that the Respondent committed gross negligence in treating one patient and we reject the Petitioner's request that we sustain additional charges. We vote 3-1 to affirm the penalty the Committee imposed.

[1] ARB Member Thea Graves Pellman recused herself from participating in this case because she sat on the Hearing Committee. The ARB reviewed the case with a four member quorum, see Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

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(3-6) (McKinney Supp. 2001) by committing professional misconduct under the following specifications:

- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- practicing medicine with incompetence on more than one occasion, and,
- practicing medicine with gross incompetence.

The charges involved the care and treatment that the Respondent, a surgeon, provided to eleven persons, Patients A-K. The Respondent denied the charges and a hearing ensued before the BPMC Committee that rendered the Determination now on review. The Petitioner withdrew the charges concerning Patient E during the hearing. The record refers to the patients by letter to protect patient privacy.

The Committee dismissed the charges concerning Patients A-G and I-K. The Committee sustained the charge that the Respondent practiced with gross negligence in treating Patient H. The Committee found that the Respondent decided to perform a discectomy and decompression at level C6-7, following an evaluation and a review on a Magnetic Resonance Imaging (MRI) on the Patient's cervical spine. On the date for the surgery, the Respondent operated instead on the C5-C6 disc and failed to perform surgery at the C6-C7 level. The Committee found that the Respondent acted unreasonably in operating at the C5-C6 level and that the Respondent did so without sufficient explanation or medical justification. The Committee found the Respondent evasive in explaining why he changed the procedure. The Committee also found the Patient suffered harm, because the error required the Patient to undergo a second surgical procedure and anesthesia six months later to correct the problem at C6-C7. The Committee found the operation on the wrong disc equivalent in seriousness to an operation on the wrong limb.

In assessing a sanction for the Respondent's misconduct, the Committee considered that BPMC disciplined the Respondent four years ago for failing to examine a patient chart, MRI or even the patient prior to performing surgery on the patient. The Committee concluded that the

prior disciplinary action failed to ensure any greater caution by the Respondent. The Committee also considered that the Respondent ceased practice in February 2000, almost a year prior to the Committee's Determination.

The Committee decided against revoking the Respondent's License because they found that the Respondent possessed talent and skills necessary to provide good surgical care. The Committee concluded that three years on probation would ensure that the Respondent will provide safe care. The Committee established probation terms that include a practice monitor, a limitation to practice in a government licensed or operated facility and a requirement that the Respondent complete a course on medical record keeping. The Committee stated that the probation and the voluntary suspension provided a sufficient sanction.

Review History and Issues

The Committee rendered their Determination on December 29, 2000. This proceeding commenced on January 9, 2001, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and Response brief and the Respondent's brief and response brief. The record closed when the ARB received the response brief on February 23, 2001.

The Petitioner asks that the ARB review the entire record and reconsider the findings concerning all the Patients. The Petitioner asks specifically that the ARB overturn the Committee and sustain charges relating to Patients A and D. The Petitioner argues that the prior disciplinary action and the misconduct in treating Patient H makes the Respondent a recidivist, who has failed to learn anything from the prior action. The Petitioner contends that the probation and the retroactive suspension will have no effect on the Respondent and the Petitioner challenges the Committee's authority to make a suspension retroactive.

The Respondent argues that the conduct involving Patient H amounted to a record keeping failure only, because the Respondent failed to document the reasons for deciding to perform the surgery on Patient H at a different location. The Respondent contends that the Committee sustained the charge against Patient H due to enormous pressure on them to find misconduct against the Respondent. The Respondent cites to negative public statements about him from the Commissioner of Health and alleges that the Petitioner brought baseless charges concerning the other Patients. The Respondent asks that the ARB dismiss the charge and findings relating to Patient H.

Determination

The ARB has considered the record and the parties' briefs. We vote 4-0 to affirm the Committee's Determination on the charges and 3-1 to affirm the Committee's Determination on penalty.

The Petitioner asked the ARB to review the findings on Patient A, because the Committee split 2-1 in dismissing the charges concerning Patient A. The Petitioner asked that we exercise our judgement consistently with the dissenting member and sustain the charges. The Committee's Determination, however, gave no indication as to the dissenting member's judgement on the charges and the Petitioner failed to provide any argument about why the ARB should overturn the judgement by the Committee majority. We reject the request to overturn the dismissal on the charges concerning Patient A.

In challenging the Determination to dismiss the charges concerning Patient D, the Petitioner argued that the Committee failed to provide reasons for disregarding testimony by two witnesses. The Petitioner's challenge concerning the findings on Patient D asked in effect that we

overturn the Committee's judgement on witness credibility. In explaining their rulings on the charges relating to Patient D, the Committee's exhaustive and well reasoned Determination stated that they found the Respondent credible in his explanation for events in the Patient's care. The ARB owes the Committee deference in their judgement on credibility and we see no reason to overturn that judgement in this case.

In challenging the Committee's Determination to sustain the gross negligence charge relating to Patient H, the Respondent argued that his only error in that case amounted to bad record keeping for failing to document his reasons for changing his operative plan. The Committee, however, found the Respondent's testimony evasive concerning when he changed his operative plan. The Respondent's records showed that Patient H suffered pain consistent with a problem at the C6-7 level. The Respondent planned surgery at that site but on the date for surgery, the Respondent operated at the C5-C6 site. That surgery failed to relieve the Patient's pain and the Respondent performed additional surgery at the C6-C7 site that finally relieved the pain. The ARB agrees with the Committee that the Respondent committed an egregious error in failing to operate at the C6-7 site during the initial surgery and by exposing the Patient to a second surgery to relieve the problem at the C6-7 site. We would, however, consider the egregious conduct an incomplete initial operation rather than wrong site surgery.

The Respondent's disciplinary record showed that the Respondent entered into a Consent Agreement in which he accepted a Censure and Reprimand for providing treatment unwarranted by the Patient's condition. In this case, the Respondent has practiced with gross negligence by exposing Patient H to additional surgery and anesthesia. Three ARB members conclude that the Respondent's conduct warrants a period of actual suspension, with time on probation to follow. At the time before the hearing below commenced, the Respondent suspended his practice

voluntarily to forestall a summary suspension order by the Commissioner of Health. The majority agrees with the Committee that the time on voluntary suspension should count as the period on actual suspension for purposes of the sanction in this case. The majority disagrees with the Petitioner that the voluntary suspension produced no actual effect. The suspension caused the Respondent economic loss and disrupted his practice. The Suspension provided the Respondent time to reflect on his practice and showed him that continued substandard care could result in a further disruption or a termination in his practice. The majority also agrees with the Committee that the monitoring, restriction and retraining terms under the probation will effect the Respondent's re-entry ling safe and effective patient care. The dissenting member would revoke the Respondent nse due to the Respondent's substandard and twice-disciplined practice and his failure to learn from the prior disciplinary proceeding.

ORDER

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

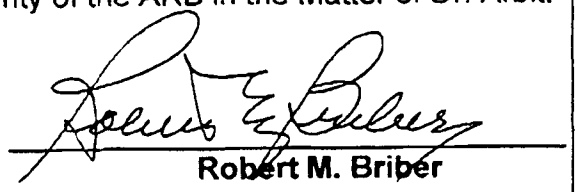
1. The ARB **AFFIRMS** the Committee's Determination that the Respondent practiced with gross negligence in treating one patient.
2. The ARB **AFFIRMS** the Committee's Determination to suspend the Respondent's License, to limit the suspension to the time the Respondent spent away from practice from February 2000 to the effective date for the Committee's Order and to place the Respondent on probation for three years under the terms that appear at Appendix III to the Committee's Determination.

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

In the Matter of Ehud Arbit, M.D.

Robert M. Briber, an ARB Member, affirms that he participated in this case and that this Determination reflects the decision by the majority of the ARB in the Matter of Dr. Arbit.

Dated: March 25, 2001

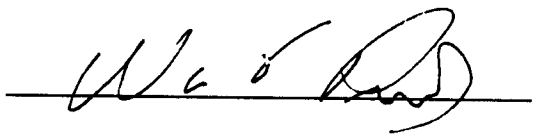


Robert M. Briber

In the Matter of Ehud Arbit, M.D.

Winston S. Price, M.D., an ARB Member affirms that he participated in this case and that this Determination reflects the decision by the majority of the ARB in the Matter of Dr. Arbit.

Dated: 4/13, **2001**



Winston S. Price, M.D.

In the Matter of Ehud Arbit, M.D.

Stanley L. Grossman, an ARB Member affirms that he participated in this case and that this Determination reflects the decision by the majority of the ARB in the Matter of Dr. Arbit.

Dated: March 22, **2001**

S L Grossman M.D

Stanley L Grossman, M.D.

In the Matter of Ehud Arbit, M.D.

Therese G. Lynch, M.D., an ARB Member affirms that he participated in this case and that this Determination reflects the decision by the majority of the ARB in the Matter of Dr. Arbit.

Dated: March 24, 2001

Therese G. Lynch M.D.

Therese G. Lynch, M.D.