



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

433 River Street, Suite 303

Troy, New York 12180-2299

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

Dennis P. Whalen  
*Executive Deputy Commissioner*

August 13, 1997

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Frederick Zimmer, Esq.  
NYS Department of Health  
Corning Tower Room 2503  
Empire State Plaza  
Albany, New York 12237

Anders Holmberg, M.D.  
4039 Barnes Avenue  
Bronx, New York 10466

B. Anthony Morosco, Esq.  
175 Main Street  
White Plains, New York 10601

**RE: In the Matter of Anders Holmberg, M.D.**

Dear Mr. Zimmer, Dr. Holmberg and Mr. Morosco:

Enclosed please find the Determination and Order (No.97-97) 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.

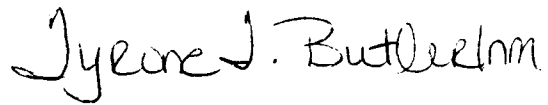
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

A handwritten signature in black ink that reads "Tyrone T. Butler". The signature is written in a cursive style with a large, stylized initial "T".

Tyrone T. Butler, Director  
Bureau of Adjudication

TTB:nm

Enclosure

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

COPY

IN THE MATTER

OF

ANDERS HOLMBERG, M.D. (Respondent)

Proceeding to review a Determination by a Hearing Committee  
(Committee) from Board for Professional Medical Conduct  
(BPMC)

ADMINISTRATIVE  
REVIEW BOARD  
DECISION AND  
ORDER NUMBER  
ARB NO. 97-97

**BEFORE: ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D.,  
EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D.**

After a hearing into charges that the Respondent committed professional misconduct, due to a criminal conviction for defrauding the Medicaid program, a BPMC Committee sustained the charge and voted to censure and reprimand the Respondent. In this proceeding pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997), the New York State Department of Health (Petitioner) asks the Board to overturn the Committee's Determination and to revoke the Respondent's New York Medical License. The Respondent requests that the Board delay our final Determination in this case pending a decision in the Respondent's appeal from his criminal conviction, or in the alternative, that the Board sustain the Hearing Committee's Determination. After considering the hearing record and the parties' briefs, the Board rejects the Respondent's request that we delay our Determination and we vote 3-2 to sustain the Hearing Committee's Penalty.

Administrative Law Judge **JAMES F. HORAN** served as the Board's Administrative Officer and drafted this Determination.

**B. ANTHONY MOROSCO, ESQ.** represented the Respondent.

**FREDERICK ZIMMER, ESQ.** (Asst. Counsel NYS Dept of Health) represented the Petitioner.

## COMMITTEE DETERMINATION ON CHARGES

The Petitioner filed charges with BPMC alleging that the Respondent violated N.Y. Educ. Law §6530(9)(a)(i)(McKinney Supp. 1997), due to a criminal conviction for violating a New York State Law. The Petitioner brought the case pursuant to N.Y. Pub. Health Law §230(10)(p)(McKinney's Supp. 1997), which authorizes BPMC to refer cases dealing with criminal convictions as an expedited proceeding (Direct Referral). The statute limits such proceeding strictly to receiving evidence to determine the nature and severity for the penalty that the Committee will impose for the criminal conduct.

**IRVING KAPLAN, Chair, ALBERT J. BARTOLETTI, M.D. and J. LARUE WILEY, M.D.** comprised the BPMC Committee who conducted the hearing on the charge, pursuant to N.Y. Pub. Health Law §230(7)(McKinney's Supp. 1997), and who rendered the Determination which the Board now reviews. Administrative Law Judge **LARRY G. STORCH** served as the Committee's Administrative Officer. The Committee determined that the Respondent was convicted in Albany County Court on one count of grand larceny in the third degree and on eleven counts of offering a false instrument for filing in the third degree, all felonies. The Court sentenced the Respondent to serve One Hundred Eighty (180) days in the Albany County Jail, to serve five years on probation and to make restitution amounting to Forty-Two Thousand Five Hundred Four Dollars (\$42,504.00).

The Committee sustained the charge that the Respondent's criminal conviction constitutes professional misconduct and the Committee voted to censure and reprimand the Respondent. The Committee concluded that the Respondent's continued medical practice represents no risk to the public and that the Court sentenced the Respondent to incarceration for a considerable period. The Committee found that the Respondent's criminal activity arose from submitting bills to the Medicaid program for preparing orthotic devices, using a code for preparing devices by casting and fabrication, when the Respondent had actually prepared the devices by using pedograph tracings, a method for which no Medicaid code exists. The Committee found no attempt on the Respondent's part to obtain unjust enrichment and noted that there were no allegations that patients failed to receive devices, that the Respondent made devices improperly, that the Respondent submitted claims for non-existent

patients or that the Respondent submitted claims for patients with no need for the devices.

### **REVIEW HISTORY AND ISSUES**

The Committee rendered their Determination on April 18, 1997. The Petitioner then commenced this proceeding by filing a Review Notice, pursuant to N. Y. Pub. Health Law § 230-c(4)(a) (McKinney's Supp. 1997), that the Board received on May 5, 1997. The Respondent then requested an extension to the June 6, 1997 date for filing briefs, to which the Petitioner consented. The Board's Administrative Officer granted the extension until July, 1997, because the Board had no deliberations on schedule until July 25th. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's brief and reply brief. The Board received the Respondent's brief on July 18, 1997, the Petitioner's brief on July 14, 1997 and the Petitioner's reply on July 24, 1997.

**Respondent's Issues:** The Respondent requests that the Board hold our final Determination in abeyance until the Appellate Division for the Third Department renders a decision in the Respondent's appeal from his criminal conviction. The Respondent argues that the Appellate Division stayed the Respondent's conviction and that no judgement now exists as a predicate for a Direct Referral proceeding. In the alternative, the Respondent asserts that the County Court's criminal sanction punished the Respondent adequately for his crime and that the Hearing Committee's Determination represented an adequate and just result concerning the Respondent's License.

**Petitioner's Issues:** The Petitioner asks the Board to overturn the Hearing Committee's Determination, because the Committee allowed the Respondent to relitigate his criminal conviction and because the Committee erred in concluding that the Respondent lacked larcenous intent. The Petitioner argues that the Respondent stands convicted for defrauding the Medicaid program, for billings amounting to over Forty Thousand Dollars (\$40,000.00). The Respondent contends the medical profession can tolerate no such fraud and asks that the Board revoke the Respondent's License, or if we feel revocation to be too harsh a Penalty, that the Board place the Respondent on probation, to ensure no repeat in his fraudulent practices.

## REVIEW BOARD AUTHORITY

In reviewing a Committee's Determination, the Board determines: whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law, and whether the Penalty is appropriate and within the scope of penalties which the law permits [N.Y. Pub. Health Law § 230(10)(i), § 230-c(4)(b)(McKinney's Supp. 1997)]. The Board may remand a case to the Committee for further consideration [N.Y. Pub. Health Law § 230-c(4)(b)(McKinney's Supp. 1997)]. The Board's Determinations result from a majority concurrence among the Board's Members [N.Y. Pub. Health Law § 230-c(4)(c)(McKinney's Supp. 1997)].

The Review Board may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 Ad 2d 86, 606 NYS 2d 381 (Third Dept. 1993), in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 AD 2d 940, 613 NYS 2d 759 (Third Dept. 1994), and in determining credibility Matter of Minielly v. Comm. of Health 222 AD 2d 750, 634 NYS 2d 856 (Third Dept. 1995).

## REVIEW BOARD DETERMINATION

The Board has considered the record and the parties' briefs. We conducted deliberations in this case on July 25, 1997. Dr. Stewart participated in the deliberations by telephone conference. The Board votes 5-0 to sustain the Hearing Committee's Determination that the Respondent committed professional misconduct, due to his criminal conviction. The Board votes 5-0 to reject the Respondent's request that we delay our determination in this matter pending the Respondent's criminal appeal. The Board votes 3-2 to sustain the Hearing Committee's Penalty, a censure and reprimand.

We rejected the request to hold the case in abeyance, because a professional disciplinary proceeding that arises from a criminal conviction may proceed, even with an appeal pending from the criminal conviction, Matter of Kirsch v. Board of Regents, 79 AD2d 823, 435 NYS2d 151 (Third

Dept. 1980). Although the Board recently issued an Interim Order holding another case in abeyance during an appeal to the Court of Appeals (Matter of Caselnova, ARB, June 12, 1997), in that review from a probation violation proceeding, the Appellate Division had issued a final decision rather than merely issuing a stay and that final decision invalidated the probation terms from which the probation violation proceeding arose, Matter of Caselnova v. New York State Dept. of Health, \_\_ AD2d \_\_, 653 NYS2d 398 (Third Dept. 1997).

The majority votes to sustain the Hearing Committee's Penalty, because we find the County Court's sentence punishes the Respondent sufficiently for his conduct and eliminates the need to take action against the Respondent's License. The Certificate of Conviction (Petitioner's Exhibit 3) indicates that the underlying criminal activity occurred in 1985 and/or 1986 and involved the Respondent's practice as a podiatrist, for which the Respondent holds a License in addition to his License to practice medicine. The passage in time since the criminal conduct indicates to the majority that the Respondent is unlikely to commit further misconduct in the future. We conclude further that the severe criminal sanction will deter similar conduct by others. We note also that no allegations relate to the Respondent's care for patients, so we conclude that the Respondent poses no danger to the public.

The dissenting members agree with the Petitioner that the Hearing Committee erred by allowing the Respondent to relitigate his criminal conviction before the Committee. The dissenting members feel that the Respondent's criminal activity violates the trust that the public places in the medical profession and would revoke the Respondent's medical License.

**ORDER**

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

1. The Board **SUSTAINS** the Committee's Determination that the Respondent committed professional misconduct.
2. The Board **REJECTS** the Respondent's request that the Board delay our final Determination in this case.
3. The Board votes 3-2 to **SUSTAIN** the Committee's Determination to censure and reprimand the Respondent.

**ROBERT M. BRIBER**

**SUMNER SHAPIRO**

**WINSTON S. PRICE, M.D.**

**EDWARD SINNOTT, M.D.**

**WILLIAM A. STEWART, M.D.**

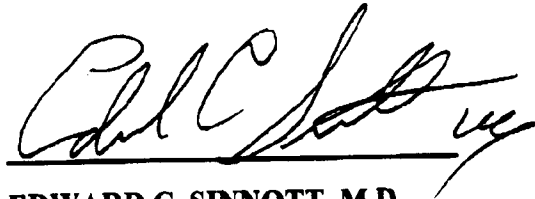


**IN THE MATTER OF ANDERS HOLMBERG, M.D.**

**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. Holmberg.

**DATED: Roslyn, New York**

*Aug 1*, 1997



**EDWARD C. SINNOTT, M.D.**

**IN THE MATTER OF ANDERS HOLMBERG, M.D.**

**SUMNER SHAPIRO**, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Dr. Holmberg.

**DATED: Delmar, New York**  
August 2, 1997

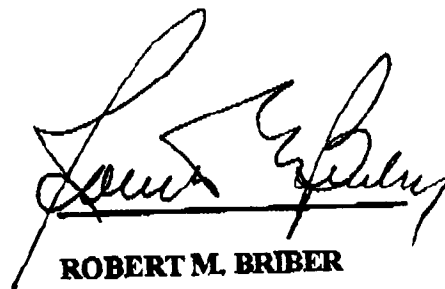
  
**SUMNER SHAPIRO**

**IN THE MATTER OF ANDERS HOLMBERG, M.D.**

**ROBERT M. BRIBER**, a member of the Administrative Review Board for Professional Medical Conduct, affirms that this Determination reflects the majority's decision in the Matter of Dr. Holmberg.

**DATED: Schenectady, New York**

**August 3 , 1997**



**ROBERT M. BRIBER**

**IN THE MATTER OF ANDERS HOLMBERG, M.D.**

**WILLIAM A. STEWART, M.D.**, a member of the Administrative Review Board for Professional Medical Conduct, affirms that this Determination reflects the majority's decision in the Matter of Dr. Holmberg.

**DATED: Syracuse, New York**

*3 Aug*, 1997

*William A Stewart*

**WILLIAM A. STEWART, M.D.**

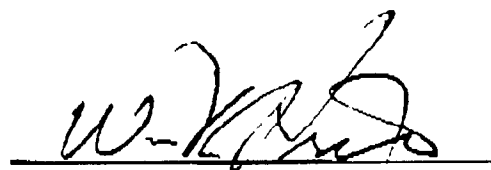
HOLMBERG ARB

**IN THE MATTER OF ANDERS HOLMBERG, 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. Holmberg.

**DATED: Brooklyn, New York**

8/9/97, 1997

A handwritten signature in black ink, appearing to read 'W. S. Price', is written over a horizontal line.

**WINSTON S. PRICE, M.D.**