

**DOH 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

December 22, 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Bradley C. Mohr, Esq.
NYS Department of Health
Corning Tower Room 2503
Empire State Plaza
Albany, New York 12237

Mamerto John Azurin, M.D.
343 Abbott Road
Buffalo, New York 14220

Terrence M. Connors, Esq.
Connors & Vilardo, LLP
1020 Liberty Building
420 Main Street
Buffalo, New York 14202

RE: In the Matter of Mamerto John Azurin, M.D.

Dear Mr. Mohr, Dr. Azurin and Mr. Connors:

Enclosed please find the Determination and Order (No. 97-231) 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.

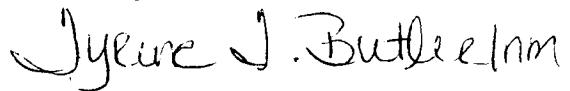
Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either **certified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

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nm

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH (Petitioner)

COPY

IN THE MATTER
OF
MAMERTO JOHN AZURIN, M.D. (Respondent)

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

ADMINISTRATIVE
REVIEW BOARD
(Board)
DETERMINATION
AND ORDER
ARB 97-231

Before: ROBERT M. BRIBER, SUMNER SHAPIRO, WINSTON S. PRICE, M.D., EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D., Board Members.

After a BPMC Committee conducted a hearing, pursuant to N.Y. Pub. Health Law §§ 230(7) & 230(10)(p) (McKinney's Supp. 1997), and issued a Determination sustaining charges that the Respondent violated N.Y. Educ. Law § 6530 (McKinney's Supp. 1997) by committing professional misconduct, the Petitioner now asks this Board to review the Committee's Determination, pursuant to N.Y. Pub. Health Law § 230-c (McKinney's Supp. 1997). The issue on review centers on whether the Committee imposed an appropriate penalty by suspending the Respondent's New York Medical License (License), pending formal retraining, and by placing the Respondent on probation following the retraining, upon determining that the Respondent practiced with negligence and incompetence in treating six patients and that the Respondent committed a crime under New York Law. The Board finds the Committee's Determination on the penalty inappropriate, due to the Respondent's criminal conduct and his repeated negligent and incompetent practice, that placed his patients at risk. The Board overturns the Committee and votes unanimously to revoke the Respondent's License.

Administrative Law Judge JAMES F. HORAN served as the Board's Administrative Officer and drafted this Determination. TERRENCE M. CONNORS & MARK R. UBA, Esqs. represented the Respondent. BRADLEY MOHR, Esq. represented the Petitioner.

COMMITTEE DETERMINATION ON CHARGES

The Petitioner commenced the hearing by filing charges with BPMC alleging that the Respondent violated N.Y. Educ. Law §§ 6530 (3-5), 6530 (9)(a)(i) & 6530(32) (McKinney's Supp.

1997) under the following categories:

- practicing medicine with negligence on more than one occasion,
- practicing medicine with incompetence on more than one occasion,
- practicing medicine with gross negligence,
- committing a crime under New York Law, and
- failing to maintain accurate patient records.

The charge relating to a crime alleged that the Respondent entered a guilty plea in New York State Supreme Court for Erie County to attempted Grand Larceny. Under N.Y. Pub Health Law §230(10)(p) (McKinney's Supp. 1997), when the charges against a Respondent involve a prior criminal conviction in New York or another jurisdiction, the only issue for the Committee to consider on those charges involves the nature and severity for the penalty to impose against the Respondent, Matter of Wolkoff v. Chassin, 89 NY2d 250 (1996).

The other charges related to the care that the Respondent provided to fourteen persons, Patients A through H, to treat obesity, except that the gross negligence charge related to only Patients A, E, G, L, M and N. The record refers to the Patients by initials to protect their privacy.

At a pre-hearing conference, Administrative Law Judge (ALJ) **LARRY G. STORCH**, who served as the Committee's Administrative Officer, determined that the charges presented a striking similarity in that the allegations in virtually every patient case charged the Respondent with failing to:

- obtain/document adequate initial histories and physical examinations,
- provide adequate primary care,
- order/perform adequate laboratory and/or urine testing,
- prescribe appropriately a variety of anorexiant drugs and other controlled substances, and
- maintain legible records that reflect accurately the evaluation and treatment for the patient.

The ALJ limited the Petitioner to presenting evidence only as to Patients A, E, G, L, M and N, because those patients represented a cross-section of the issues and because the Patients represented

the cases in which the Petitioner charges gross negligence.

Three BPMC Members, **PETER D. KANE, M.D., Chair, MOHAMMED GHAZI-MOGHADAM, M.D. and ANN SHAMBERGER** comprised the Committee who conducted the hearing in this matter and who rendered the Determination which the Board now reviews. The Committee sustained the charges that the Respondent practiced with negligence and incompetence on more than one occasion in treating Patients A, E, G, L, M and N, that the Respondent failed to maintain accurate records for Patients A, E, G, L, M and N and that the Respondent committed a crime under New York Law. The Committee sustained no gross negligence charges and dismissed without prejudice the charges relating to all other patients. The Committee sustained the allegations that the Respondent failed to:

- obtain/document adequate initial histories and physical examinations,
- provide adequate primary care,
- order/perform adequate laboratory and/or urine testing,
- prescribe appropriately a variety of anorexiant drugs and other controlled substances, and
- maintain legible records that reflect accurately the evaluation and treatment for the patient.

The Committee found that the Respondent practiced below accepted practice standards in treating obesity by prescribing anorexiant medication to the Patients at issue on a long term basis:

- without considering other medical conditions as the cause for the obesity,
- despite the manufacturers' recommendations to use the anorexiants on a short term basis,
- despite the Patients' failure to lose weight and, in some cases, their increase in weight, and
- despite complications that could develop.

The Committee found further that the Respondent practiced below acceptable standards by using the powerful diuretic Lasix as an adjunct to his weight loss regimen. In addition, the Committee found that the Respondent treated certain patients suffering from viral infections with antibiotics, although

antibiotics are indicated to treat bacterial rather than viral infections. As to Patient A, the Committee found that the Respondent prescribed the hypnotic drugs Noludar and Placidyl on numerous occasions to the Patient, without indication in the Patient's record, and despite being on notice that the Respondent had a history for drug dependence and that the Respondent was obtaining benzodiazepines from sources other than the Respondent.

The Committee also found that the Respondent had committed a crime under New York Law, due to the Respondent's guilty plea in New York Supreme Court for Erie County, to attempted Grand Larceny in the second degree, a Class E felony. At the time he entered the plea, the Respondent admitted that he filed claim forms with the New York State Medical Assistance Program (Medicaid) that the Respondent knew to contain false statements and false information [Petitioner's Exhibit 18, page 29]. The Respondent also admitted that he received Twelve Thousand Six Hundred Sixty-Seven and 10/100 Dollars (\$12,667.10) from Medicaid in reimbursement for the claims [Petitioner's Exhibit 18, page 29]. The Court sentenced the Respondent to a conditional discharge and to pay restitution.

In reaching their findings, the Committee relied on testimony by the Petitioner's expert witness Dr. Grahame Fitz. Although the Committee noted problems in some testimony by Dr. Fitz, the Committee found him more reliable than the Respondent's expert Dr. Julian Ambrus, who admitted that he based his testimony on assumptions and guesses. The Committee found the Respondent's testimony to be an attempt to reconstruct what he might have done or could have done and found the Respondent to have poor recollection. The Committee rejected the Respondent's attempt to use a report, that the Committee referred to as the Weintraub Study [Respondent's Exhibit C], to defend long term anorexiant use for weight loss. The Committee found that the Weintraub Study began after the Respondent had started treating the Patients at issue, that the Study used the anorexiant medications in combination with other medication and the Weintraub protocols also employed cardiac fitness programs, behavior modification and group meetings. The Respondent's treatment regime involved no medication combinations or any other Weintraub Study protocol elements.

In their penalty discussion, the Committee stated that the Respondent exhibited shortcomings across a broad range of issues pertaining to medical practice and that the Respondent provided ineffective treatments for obesity that posed potential dangers to patients. The Committee considered

it lucky that the Respondent had caused no harm to patients. The Committee concluded, however, that the Respondent showed a willingness to improve his skills and that the Respondent required a comprehensive retraining program in all general practice facets, in order to practice with reasonable skill and safety. The Committee also concluded that the Respondent should perform no practice until he completes such a program successfully. The Committee voted to suspend the Respondent's License until he successfully completes retraining, except to the extent necessary for retraining, and placed the Respondent on probation with a practice monitor for three years following the retraining. The Committee gave no consideration to the Respondent's criminal conviction in determining the sanction, because the Respondent received a conditional discharge, the lowest possible sanction, as a sentence and because the Respondent paid restitution.

REVIEW HISTORY AND ISSUES

The Committee rendered their Determination on September 12, 1997. The Petitioner then commenced this proceeding on October 6, 1997, when the Board received the Notice requesting a Review pursuant to N.Y. Pub. Health Law § 230-c(4)(a)(McKinney's Supp. 1997). The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and reply brief and the Petitioner's brief and reply brief. The Respondent submitted his hearing memorandum as his brief. The Board received the Respondent's brief on November 5, 1997, the Petitioner's brief on November 6, 1997, the Respondent's reply on November 17, 1997 and the Petitioner's reply on November 13, 1997.

Petitioner's Issues: The Petitioner asks that the Board overturn the Hearing Committee and revoke the Respondent's License. The Petitioner contends that comprehensive retraining constitutes an impractical and inadequate sanction for the Respondent's poor judgement, the Respondent's skill and knowledge deficits and the Respondent's criminal activity.

In reply to the Petitioner's brief, the Respondent contends that the Petitioner based their appeal on material outside the record, such as the Petitioner's supposition that no retraining program would accept the Respondent and that the Respondent would be unable to complete the program.

successfully. The Respondent answers that since the Committee suspended his License until successfully completing retraining, the Respondent's failure to enter or complete a program successfully would mean the Respondent would remain unable to practice. The Respondent also challenged the Petitioner's assertion that, by calling an expert witness to justify the Respondent's patient care, the Respondent demonstrated that he lacks insight into his practice deficiencies.

Respondent's Issues: The Respondent's Hearing Memorandum, that he submitted as a brief, argues that the charges against the Respondent involve mostly substandard record keeping and handwriting, rather than substandard patient care. The Respondent challenged Dr. Fitz's qualifications to testify as an expert about the Respondent's practice, and cites to testimony by the Respondent and Dr. Ambrus and to the Weintraub Study as proof that the Respondent practiced according to accepted medical standards. The Respondent also denies providing primary care to the Patients at issue and denies, therefore, being subject to a primary care provider's standards. The Respondent asserts that the criminal conviction resulted from billing errors, for which the Respondent took responsibility, and that the Respondent had no intention to use incorrect billing codes.

In their reply brief, the Petitioner contends that the Respondent raised no arguments showing that the Committee made a Determination on the charges inconsistent with their findings and conclusions. The Petitioner argues that the Board should, therefore, sustain the Committee's findings.

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 December 5, 1997. We sustain the Committee's Determination that the Respondent committed negligence and incompetence on more than one occasion, and failed to maintain accurate records for Patients A, E, G, L, M & N. We also sustain the Committee's Determination that the Respondent committed a crime under New York Law. We overturn the Committee's Determination as to the penalty for the Respondent's misconduct and we vote to revoke his License.

The testimony by Dr. Fitz and the Respondent's records provided proof that supported the Committee's findings and conclusions. The Board finds those findings and conclusions consistent with the Committee's Determination that the Respondent practiced with negligence and incompetence on more than one occasion in treating the Patients at issue in this case and maintained inaccurate records. The Committee discussed in detail their reasons for placing greater reliance on the testimony by Dr. Fitz than on the testimony by Dr. Ambrus or the Respondent. The Committee also explained in convincing detail their reasons for rejecting the Respondent's contention that the Weintraub Study proved that the Respondent practiced within medically accepted standards.

The Board sustains the Committee's Determination that the Respondent committed a crime under New York Law. We reject the Respondent's attempt to characterize the conduct underlying his 1989 criminal conviction as merely a billing dispute. The Respondent admitted during his guilty plea to the criminal charges that he submitted false statements and false information knowingly in claims to Medicaid [Petitioner's Exhibit 18, page 29]. The Respondent's testimony at the hearing that he had no intent to use incorrect billing codes on his Medicaid claims [transcript pages 1441-1442]

constituted an attempt to relitigate his criminal conviction. The only issue for the Committee to consider concerning the Respondent's criminal conviction involved whether to impose a further penalty for the criminal conduct, Matter of Wolkoff v. Chassin, (supra). The hearing before the Committee provided no forum for the Respondent to try to relitigate the criminal conviction, Matter of Singla v. Dept. of Health, 229 AD2d 798, 646 NYS 2d 426 (Third Dept. 1996).

The Board overturns the Committee's penalty because we find the penalty an inadequate and inappropriate sanction for the Respondent's extensive misconduct. Committing fraud in billing the Medicaid Program, standing alone, provides sufficient grounds to revoke a physician's license, and when the fraudulent conduct occurs in addition to negligent and incompetent patient care, the Board has that much greater support for a penalty removing such physician from practice, Matter of Bezar v. DeBuono, __ AD2d __, 659 NYS2d 547 (1997). The Committee decided against revoking the Respondent's License because they felt a comprehensive retraining program could correct the Respondent's practice deficiencies and because they saw no need to punish the Respondent further for his criminal conduct. We disagree.

We overturn the Committee, in part, because we find the Respondent's problems too extensive to correct through retraining. Retraining can improve record keeping practices and can correct focal deficiencies in skill and knowledge, but the Respondent demonstrated global rather than focal deficiencies in skill and knowledge. The Respondent displayed deficiencies in basic and essential medical skills, such as examinations, diagnosis, prescribing and treatment. If the Respondent has failed to learn these skills after decades in practice, we see no reason to conclude that the Respondent can acquire these skills through retraining. Further, neither retraining nor continuing education can teach the Respondent integrity, Matter of Bezar v. DeBuono, (supra). The Respondent's criminal conduct demonstrates that the Respondent lacks the necessary integrity to practice medicine. In addition, retraining offers no remedy for the negligent or careless patient care the Respondent provided to the Patients involved in this matter. The Committee found the Respondent's obesity treatment ineffective and potentially dangerous and found the Respondent lucky to have avoided causing any patient harm. The Respondent demonstrated particularly blatant neglect in prescribing hypnotic medications for Patient A, even though the Respondent had reason to know that Patient A

had an addiction history and was obtaining benzodiazepines from other sources. Finally, the Board finds the Committee acted inappropriately by imposing no sanction for the Respondent fraudulent conduct against the Medicaid program. Although the Supreme Court imposed the lightest sentence possible against the Respondent, the Court based its sentence, in part, on the possible sanction against the Respondent's License due to this action and on the time and expense the Respondent saved for the Court by foregoing a trial and pleading guilty to attempted Grand Larceny [Petitioner's Exhibit 18, pages 40-41].

The Board agrees with the Committee that the Respondent constitutes a danger to his patients. We conclude that no sanction other than revocation would protect the public due to the possible danger from the Respondent's continued practice. We vote to revoke the Respondent's license due to his continued negligent and incompetent patient care. We conclude further that the Respondent betrayed the public trust the public places in the medical profession by submitting claims he knew to contain false information to the Medicaid Program. We conclude that the Respondent's fraudulent conduct, standing alone would also warrant License revocation. The Board's finds no mitigation in the Respondent's attempt to relitigate or repudiate his guilty plea.

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 **OVERTURNS** the Committee's Determination to suspend the Respondent's License until he completes formal retraining and to place the Respondent on probation thereafter.
3. The Board **REVOKE**S the Respondent's License to practice medicine in New York State.

ROBERT M. BRIBER

SUMNER SHAPIRO

WINSTON S. PRICE, M.D.

EDWARD SINNOTT, M.D.

WILLIAM A. STEWART, M.D.

IN THE MATTER OF MAMERTO JOHN AZURIN, 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. Azurin.

DATED: Brooklyn, New York

DEC 19th, 1997



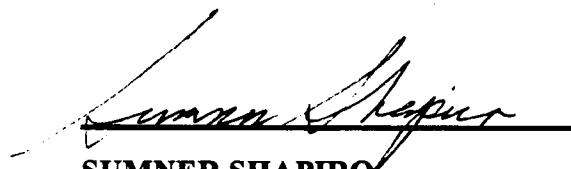
WINSTON S. PRICE, M.D.

IN THE MATTER OF MAMERTO JOHN AZURIN, 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. Azurin.

DATED: Delmar, New York

Dec 19, 1997

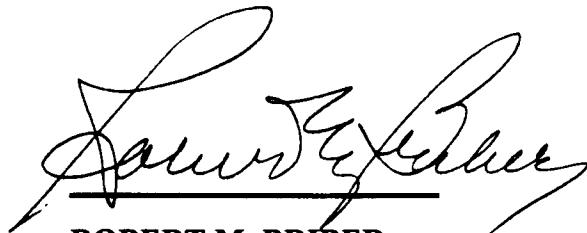

SUMNER SHAPIRO

IN THE MATTER OF MAMERTO JOHN AZURIN, 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. Azurin.

DATED: Schenectady, New York

12/19 , 1997

A handwritten signature in black ink, appearing to read "Robert M. Briber". The signature is fluid and cursive, with a horizontal line underneath it.

ROBERT M. BRIBER

IN THE MATTER OF MAMERTO JOHN AZURIN, 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. Azurin.

DATED: Roslyn, New York

Dec 19, 1997



EDWARD C. SINNOTT, M.D.