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

March 5, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Cindy Fascia, Esq.
Associate Counsel
Bureau of Professional Medical Conduct
New York State Department of Health
Corning Tower - Room 2438
Empire State Plaza
Albany, New York 12237

Joel Stephen Weiss, M.D.
Suite 100
7333 North Freeway
Houston, Texas 77076

Nathan L. Dembin, Esq.
225 Broadway, Suite 1905
New York, New York 10007

RE: In the Matter of Stephen Joel Weiss, M.D.

Dear Ms. Fascia, Dr. Weiss and Mr. Dembin:

Enclosed please find the Determination and Order (No. BPMC-95-171) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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:

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

NEW YORK STATE DEPARTMENT OF HEALTH 19

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:crc

Enclosure

NEW YORK STATE DEPARTMENT OF HEALTH 19

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

COPY

IN THE MATTER

-OF-

STEPHEN JOEL WEISS, M.D.

Respondent

DECISION
AND
ORDER
OF THE
HEARING
COMMITTEE
ON REMAND

BPMC ORDER NO. 95- 171

This matter was commenced by a Notice of Hearing and Statement of Charges, both dated April 17, 1995 which were served upon **STEPHEN JOEL WEISS, M.D.**, (hereinafter referred to as "Respondent"). **TERESA S. BRIGGS, M.D., Ph.D. Chairperson, DAVID T. LYON, M.D., M.P.H.,** 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. **JONATHAN M. BRANDES, ESQ.**, Administrative Law Judge, served as the Administrative Officer (hereinafter referred to as the "ALJ). A hearing was held on July 12, 1995 at the, Cultural Education Center, Empire State Plaza, Albany, New York.

The State Board For Professional Medical Conduct (hereinafter referred to as "PMC") appeared in this proceeding by **CINDY M. FASCIA, ESQ.,** Associate Counsel, Bureau of Professional Medical Conduct, of counsel to **HENRY M. GREENBERG, ESQ.,** General Counsel.[1] Respondent appeared in person and by Nathan L. Dembin & Associates, **NATHAN L. DEMBIN, ESQ.**, of counsel.

Evidence was received. Legal arguments were heard. The parties submitted written closing statements and arguments of law. A transcript of these proceedings was made. The Committee issued a Decision and Order dated August 11, 1995.

[1]At the time this matter was originally captioned and heard, PMC appeared by JERRY JASINSKI, ESQ., Acting General Counsel.

By a Notice of Appeal, received by the Administrative Review Board for Professional Medical Conduct (hereinafter referred to as the "ARB") on August 28, 1995, Respondent appealed the Decision and Order of the Committee. By an Order arising from deliberations of October 28, 1995, the ARB remanded the matter to the Committee for further proceedings. In the said Order, the ARB directed the Committee to:

1. Allow Respondent to testify;
2. Allow Respondent to offer evidence in mitigation of a possible penalty;
3. Allow Respondent to discuss the present status of his Texas probation
4. Allow PMC to reply to Respondent's representation;
5. Explain the basis upon which the Committee concluded, in it's first decision, that Respondent was not an honest patient provider.

On January 22, 1996, the Committee reconvened. Respondent made an opening statement through counsel. Respondent testified, was cross-examined by PMC and questioned by the Committee. No further evidence was offered by either party. The parties decided that Committee should not consider the briefs submitted to the ARB. Now, upon consideration of the entire record, both that received at the original hearing as well as that received on January 22, the Committee issues this Decision and Order on Remand.

STATEMENT OF CASE

Respondent is charged with professional misconduct pursuant to Education Law Section 6530(9)(b) [Having been found guilty of improper practice or professional misconduct by another state disciplinary agency] and Education Law Section 6530 (9)(d) [disciplinary action taken by the authorized disciplinary agency of another state, where the conduct from which the action in the other state arises would amount to misconduct in this state]. The charge herein arises from suspension (stayed in lieu of probation) of Respondent's license to practice medicine by the Texas State Board of Medical Examiners (hereinafter referred to as "the Texas Board"). The charges are also based upon the imposition of probation upon Respondent by the Louisiana State Board of Medical Examiners (hereinafter referred to as the Louisiana Board").

On June 3, 1994, Respondent entered into an Agreed Order with the Texas board. The Agreed Order arose from acts of medical incompetence, negligence, overcharging patients and over-treating patients.[2] The Louisiana Board took action against Respondent's license based solely upon the findings by the Texas board. The allegations in this proceeding and the underlying decision by the Texas and Louisiana authorities are more particularly set forth in the Notice of Referral Proceeding and Statement of Charges (Exhibit 1), a copy of which is attached to this Decision and Order on Remand as Appendix One.

FINDINGS OF FACT

The Committee adopts the factual statement set forth on pages one through five of the Statement of Charges (Appendix One) as its findings of fact and incorporates them herein. In addition, the Committee adopts the findings of fact and conclusions of law set forth by the Texas Board on page one and two of Exhibit 3. The Committee notes that the Texas Board had significantly more information before it than does this body. However, the Committee further notes that Respondent was protected by counsel during the Texas proceeding (see Ex. 3, Page 1, first par.). Furthermore, as explained by the ALJ, under the legal doctrine of Collateral Estoppel, the findings and conclusions of the Texas Board could not be contested by Respondent, were entitled to significant weight and could be relied upon by this body.

CONCLUSIONS

In compliance with the directions of the ARB, Counsel gave an opening statement and Respondent was allowed to testify at this proceeding. Notwithstanding the doctrine of Collateral Estoppel, in the interest of fairness, Respondent was allowed to amplify and explain his view of the Agreed Order. According to Respondent, he did not admit to lapses in patient care in the Agreed Order. Rather, Respondent asserts that his shortcomings were merely ministerial and surrounded issues of sub-standard record-keeping

The Committee finds the above assertion by Respondent and those which are discussed to be deceptive and disingenuous. In so finding, the Committee points to the plain language of the Texas stipulation

[2]see Ex. 3, p. 2, Conclusions of Law, particularly paragraph 1

which was signed by Respondent under the protection of counsel. In so finding, the Committee also assessed the demeanor of Respondent during testimony. It was the unanimous conclusion of this body that Respondent was not forthright with the panel during questioning. Respondent was evasive and tried to mislead the panel. While the Committee understands that a litigant would be expected to place his testimony in the best light possible, Respondent's insistence upon his innocence of anything beyond record keeping errors is so grossly contrary to the written documents that it goes beyond mere rhetoric and enters the realm of intentional fabrication.

There are six assertions on page 2 of the Texas Stipulation (Ex. 3). Each of the assertions include a combination of verbs which indicates clinical conduct as well as recording lapses were being cited. The first assertion states: "[Respondent] failed to accurately *interpret* and *record* diagnostic findings" (emphasis supplied). Were this assertion limited to record keeping, the word interpret would be unnecessary. The same conclusion can be drawn from the second assertion on page 2 which states: "[Respondent] failed to *formulate* or *document* appropriate treatment plans....(emphasis supplied)." While the Committee acknowledges that the verb *document* may refer to record keeping violations, the term *formulate* clearly refers to a clinical lapse. Each of the remaining assertions (c, d, e and f) contain verbs that offer no doubt that the Texas authorities and Respondent were settling issues of clinical practice as well as record-keeping.

At one point in his testimony, Respondent suggested he was forced to accept the Order as it was presented by the Texas authorities. The Committee finds Respondent's assertion to defy credulity. Respondent was represented by counsel. It is the responsibility of an attorney to review settlements for subtle as well as gross errors of meaning. The verbs referring to clinical conduct would have constituted a gross departure from the intent of a document addressed to other than clinical errors. Yet, Respondent executed the document in issue. Furthermore, Respondent's assertion that the Texas authorities would countenance no changes is also belied by the fact that the document contains hand-written changes that appear to be of little substantive importance. On the second line of paragraph 4 and on the first line of Paragraph 5, the word *"May"* is changed to *"September"* and "*approximately September*", respectively. These relatively subtle changes indicate that the authors of the document were willing to make changes as warranted. It stands to reason, a substantial change such as removing the verbs which refer to clinical activity as opposed to mere

record keeping would have been insisted upon by both Respondent and his attorney. Such changes are essential to the core meaning of the Order. The Committee finds it fantastic to accept that Respondent would have signed the settlement if it were so far from accuracy.

Respondent also testified that his lapses involved only a small number of patients. Again, the document shows Respondent to be other than truthful. Paragraph 4 uses the term "numerous patients." While the distinction is not extensive, it does go to the seriousness of the underlying event. Respondent also asserted that under the Texas Order, he was under limited monitoring. However, a reading of the document itself shows Texas reserved the right to review each and every patient record drafted by Respondent. Finally, as part of the Order, Respondent was required to attend Continuing Medical Education (CME) in "pain management". "Pain management" is a clinical issue and is a far cry from ministerial functions of practice management. The assertion that Respondent was cited for mere ministerial faults is completely at odds with a direction to take such a specialized course of study in what is clearly a clinical subject.

Respondent has admitted he has engaged in "persistently and flagrantly overcharging or over-treating patients." Over-treatment and overcharging are faults which do not consider clinical mismanagement. Rather, they are faults that reflect on the honesty of Respondent. In addition, Respondent also agreed he engaged in activity evidencing a "failure to practice medicine in an acceptable manner." This second assertion refers to incompetence or negligence (or both) in the clinical practice of medicine. Hence, the Committee has found Respondent to be "neither a competent clinician nor an honest patient provider." Respondent's testimony served to confirm and strengthen these conclusions.

The appeal in this matter raised the question, "why was this body so stringent with Respondent?" The Committee concludes the real question is, "why was Texas so lenient?" It must be remembered that Louisiana, which is not a state in which Respondent was practicing, banned Respondent from practice for a period of five years. Nevertheless, in an effort to meet the expectations of the ARB, and protect the people of this state, the following Order shall be issued:

ORDER

WHEREFORE, Based upon the forgoing facts and conclusions,

IT IS HEREBY ORDERED THAT:

1. The Factual allegations in the Statement of Charges are **SUSTAINED.**

   Furthermore, it is hereby **ORDERED** that;

2. The Specifications of Misconduct contained within the Statement of Charges (Appendix One) are **SUSTAINED**;

   Furthermore, it is hereby **ORDERED** that;

3. The license of Respondent to practice medicine in this state is **SUSPENDED FOR A PERIOD OF FIVE YEARS FROM THE DATE OF THIS ORDER**;

   Furthermore, it is hereby **ORDERED** that;

4. After the period of suspension set forth in paragraph 3 above is completed, should Respondent desire to practice in this State, the following conditions shall apply:

   Respondent must document that he has successfully completed all the requirements of the States of Texas and Louisiana as set forth in the Orders herein and any future Orders issued by either State;

   Respondent must document that he has not been charged with professional misconduct in any jurisdiction, for a period of five years commencing AFTER completion of the requirements of the States of Texas and Louisiana.

5. This order shall take effect **UPON RECEIPT** or **SEVEN (7) DAYS** after mailing of this order by Certified Mail.

Dated:
Albany, New York
March 4 **1996**

TERESA S. BRIGGS, M.D., Ph.D. Chairperson

DAVID T. LYON, M.D., M.P.H.
D. MARISA FINN

TO: **CINDY M. FASCIA, ESQ.**
Associate Counsel
Bureau of Professional Medical Conduct
New York State Department of Health
Corning Tower Building
Empire State Plaza
Albany, N.Y. 12237

JOEL STEPHEN WEISS, M.D.
Suite 100
7333 North Freeway
Houston, Texas 77076

NATHAN L. DEMBIN, ESQ.,
Nathan L. Dembin & Associates, P.C.
225 Broadway Suite 1905
New York, N.Y. 10007

APPENDIX ONE

STATE OF NEW YORK : DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

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IN THE MATTER	:	NOTICE
OF	:	OF
STEPHEN JOEL WEISS, M.D.	:	HEARING

----------x

TO: STEPHEN JOEL WEISS, M.D.
Suite 100
7333 North Freeway
Houston, Texas 77076

PLEASE TAKE NOTICE:

A hearing will be held pursuant to the provisions of N.Y. Pub. Health Law §230 (McKinney 1990 and Supp. 1995) and N.Y. State Admin. Proc. Act Sections 301-307 and 401 (McKinney 1984 and Supp. 1995). The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on the 14th day of June, 1995, at 10:00 in the forenoon of that day at the Cultural Education Building, Room E, Concourse Level, Empire State Plaza, Albany, New York and at such other adjourned dates, times and places as the committee may direct.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. You shall appear in person at the hearing and may be represented by counsel. You have the right to produce witnesses and evidence on your behalf, to issue or have subpoenas issued on your behalf in order to require the production of witnesses and documents and

Petitioner's Exhibit 1

7/11/95 MET

you may cross-examine witnesses and examine evidence produced against you. A summary of the Department of Health Hearing Rules is enclosed.

The hearing will proceed whether or not you appear at the hearing. Please note that requests for adjournments must be made in writing and by telephone to the Administrative Law Judge's Office, Empire State Plaza, Tower Building, 25th Floor, Albany, New York 12237, (518-473-1385), upon notice to the attorney for the Department of Health whose name appears below, and at least five days prior to the scheduled hearing date. Adjournment requests are not routinely granted as scheduled dates are considered dates certain. Claims of court engagement will require detailed Affidavits of Actual Engagement. Claims of illness will require medical documentation.

Pursuant to the provisions of N.Y. Pub. Health Law Section 230 (McKinney 1990 and Supp. 1995), you may file an answer to the Statement of Charges not less than ten days prior to the date of the hearing. If you wish to raise an affirmative defense, however, N.Y. Admin. Code tit. 10, Section 51.5(c) requires that an answer be filed, but allows the filing of such an answer until three days prior to the date of the hearing. Any answer shall be forwarded to the attorney for the Department of Health whose name appears 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.

At the conclusion of the hearing, the committee shall make

findings of fact, conclusions concerning the charges sustained or dismissed, and, in the event any of the charges are sustained, a determination of the penalty to be imposed or appropriate action to be taken. Such determination may be reviewed by the administrative review board for professional medical conduct.

THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE BE REVOKED OR SUSPENDED, AND/OR THAT YOU BE FINED OR SUBJECT TO THE OTHER SANCTIONS SET OUT IN NEW YORK PUBLIC HEALTH LAW SECTION 230-a (McKinney Supp. 1995). YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York
April 17, 1995

Peter D. Van Buren

PETER D. VAN BUREN
Deputy Counsel

Inquiries should be directed to:

Cindy M. Fascia
Associate Counsel
Division of Legal Affairs
Bureau of Professional
Medical Conduct
Corning Tower Building
Room 2429
Empire State Plaza
Albany, New York 12237-0032
(518) 473-4282

STATE OF NEW YORK : DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

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IN THE MATTER	:	STATEMENT
OF	:	OF
STEPHEN JOEL WEISS, M.D.	:	CHARGES

----------X

STEPHEN JOEL WEISS, M.D., the Respondent, was authorized to practice medicine in New York State on July 1, 1972 by the issuance of license number 112493 by the New York State Education Department. The Respondent is not currently registered with the New York State Education Department to practice medicine in New York State.

FACTUAL ALLEGATIONS

1. Respondent, on or about June 3, 1994, entered into an Agreed Order with the Texas State Board of Medical Examiners, which ratified said Order on or about June 22, 1994.

2. Respondent, in the Findings of Fact of said Order, was found to have committed the following conduct with regard to "numerous patients between approximately November, 1988 and approximately September 1992":

   - Respondent failed to accurately interpret and record diagnostic findings;

NEW YORK STATE DEPARTMENT OF HEALTH 10

- Respondent failed to formulate or document appropriate treatment plans or clinical rationale for subsequent testing.
- Respondent recommended surgical intervention even though patients were poor surgical candidates;
- Respondent ordered unnecessary referrals for epideral (sic) steroid injections, intravenous colchicine injections, and functional capacity evaluations;
- Respondent ordered physical therapy for periods of more than a year; and
- Respondent considered chemonucleolysis and performed multiple imaging studies in spite of the absence of sufficient objective physical findings, reproducible radiculopathy and previous negative test results.

3. Respondent, in the Texas Board's Conclusions of Law in said Order, was found to have violated the Medical Practice Act of Texas, V.A.C.S., Article 4495b, Section 3.08(4)(G), in that Respondent was "persistently and flagrantly overcharging and overtreating patients"; and Section 3.08(18), by reason of Respondent's "professional failure to practice medicine in an acceptable manner consistent with public health and welfare."

4. Respondent, under the terms of said Order, had his license to practice medicine in Texas suspended, which suspension was stayed. Respondent was placed on probation for five years, under the numerous and highly specific terms and conditions set forth in the Board's Order.

5. Respondent's conduct upon which the Texas Board's findings of misconduct were based would, if committed in New York State, constitute professional misconduct under the laws of

New York State, specifically N.Y. Educ. Law §6530(3) [practicing with negligence on more than one occasion]; and/or N.Y. Educ. Law §6530(5) [practicing with incompetence on more than one occasion]; and/or N.Y. Educ. Law §6530(35) [ordering of excessive tests, treatment, or use of treatment facilities not warranted by the condition of the patient].

6. Respondent, on or about February 6, 1995, entered into a Consent Order with the Louisiana State Board of Medical Examiners, which issued said Order on or about March 2, 1995.

7. Respondent, in said Consent Order, waived his right to notice of charges and formal adjudication of this matter before the Louisiana Board, which had recommended that Respondent be charged with violation of the Louisiana Practice Act. Respondent, in said Consent Order, acknowledged "the substantial accuracy" of certain information, including the Agreed Order between Respondent and the Texas Board. Respondent further acknowledged that "proof of such information upon administrative evidentiary hearing would establish grounds under the [Louisiana Practice] Act for the suspension, revocation, or such other action as the Board might deem appropriate against his license to practice medicine in the state of Louisiana."

8. Respondent, under the terms of the Louisiana Consent Order, was placed on a five year period of probation, during which time he was prohibited from relocating to Louisiana to practice medicine. In the event that Respondent chooses to return to Louisiana subsequent to that five year period of prohibition, he is required to appear before the Board at least sixty (60) days in advance of said relocation to demonstrate to the Board his compliance with all other probationary terms and discuss with the Board his intended plans for the practice of medicine in Louisiana.

9. The conduct upon which the Louisiana Board's disciplinary action was based would, if committed in New York state, constitute professional misconduct under the laws of New York state, specifically N.Y. Educ. Law §6530(9) (d) [having disciplinary action taken by another state]; and/or N.Y. Educ. Law §6530(9)(b) [having been found guilty of professional misconduct under the laws of New York State]; and/or N.Y. Educ. Law §6530(3) [practicing with negligence on more than one occasion]; and/or §6530(5) [practicing with incompetence on more than one occasion]; and/or N.Y. Educ. Law §6530(35) [ordering of excessive tests, treatment, or use of treatment facilities not warranted by the condition of the patient].

FIRST SPECIFICATION

Respondent is charged with professional misconduct under N.Y. Educ. Law §6530(9)(b), by reason of his 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, in that Petitioner charges;

1. The facts in Paragraphs 1 through 5.

SECOND SPECIFICATION

Respondent is charged with professional misconduct under N.Y. Educ. Law §6530(9)(d), by reason of having his license to practice medicine revoked, suspended or having other disciplinary action taken, where the conduct resulting in the revocation, suspension or other disciplinary action involving the license would, if committed in New York state, constitute professional misconduct under the laws of New York state, in that Petitioner charges:

2. The facts in Paragraphs 1 through 9.

DATED: April 17, 1995
Albany, New York

Peter D. Van Buren

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