



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

Public

July 5, 2005

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Eric Daiter, M.D.
9 South Rohallion Drive
Rumson, New Jersey 0760-1220

Eric Daiter, M.D.
Twin Plaza Progress Street
Edison, New Jersey 088200

Bonnie M. Weir, Esq.
The Weir Law Firm
991 Route 22 West
Suite 200
Bridgewater, New Jersey 08807

Robert Bogan, Esq.
Paul Robert Maher, Esq.
NYS Department of Health
Office of Professional Medical Conduct
433 River Street, Suite 303
Troy, New York 12180

RE: In the Matter of Eric Daiter, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 05-130) 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.

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.

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
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

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,

A handwritten signature in black ink, appearing to read "Sean D. O'Brien". The signature is fluid and cursive, with the first name "Sean" written in a larger, more prominent script than the last name "O'Brien".

Sean D. O'Brien, Director
Bureau of Adjudication

SDO:djh

Enclosure

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

IN THE MATTER

OF

ERIC DAITER, M.D.

COPY
DETERMINATION

AND

ORDER

BPMC No. 05-130

A hearing was held on June 22, 2005, at the offices of the New York State Department of Health ("the Petitioner"). A Notice of Referral Proceeding and a Statement of Charges, both dated March 23, 2005, were served upon the Respondent, **Eric Daiter, M.D.** Pursuant to Section 230(10)(e) of the Public Health Law, **Andrew J. Merritt, M.D.**, Chairperson, **Paul F. Twist, D.O.**, and **Ms. Frances Tarlton**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. **John Wiley, Esq.**, Administrative Law Judge, served as the Administrative Officer.

The Petitioner appeared by **Donald P. Berens, Jr., Esq.**, General Counsel, by **Robert Bogan, Esq.**, and **Paul Robert Maher, Esq.**, of Counsel. The Respondent appeared in person and was represented by **Bonnie M. Weir, Esq.**, The Weir Law Firm, 991 Route 22 West, Suite 200, Bridgewater, New Jersey 08807.

Evidence was received 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 when 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 State or another jurisdiction, or upon a prior administrative adjudication regarding conduct that 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, the Respondent is charged with professional misconduct pursuant to Education Law Section 6530(9)(b) and (d). Copies of the Notice of Referral Proceeding and the Statement of Charges are attached to this Determination and Order as Appendix 1.

WITNESSES

For the Petitioner: None

For the Respondent: Eric Daiter, M.D.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers below in parentheses refer to exhibits, denoted by the prefix "Ex." These citations refer to 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. All Hearing Committee findings were unanimous.

1. Eric Daiter, M.D., the Respondent, was authorized to practice medicine in New York State on July 1, 1997, by the issuance of license number 170680 by the New York State Education Department (Petitioner's Ex. 4).

2. On September 29, 2004, the New Jersey Department of Law and Public Safety, Division of Consumer Affairs, State Board of Medical Examiners ("New Jersey Board"), by a Final Decision and Order ("New Jersey Order"), suspended the Respondent's license to practice medicine for one year, the first nine months stayed, imposed a \$7,500.00 monetary penalty and assessed costs, based on gross malpractice, gross negligence, and repeated malpractice, negligence or incompetence (Petitioner's Ex. 5).

HEARING COMMITTEE CONCLUSIONS

The Hearing Committee concludes that the conduct of the Respondent would constitute professional misconduct under the laws of New York State, had the conduct occurred in New York State, pursuant to:

- New York Education Law Section 6530(3) - "Practicing the profession with negligence on more than one occasion;"
- New York Education Law Section 6530(4) - "Practicing the profession with gross negligence on a particular occasion;"
- New York Education Law Section 6530(5) - "Practicing the profession with incompetence on more than one occasion;" and
- New York Education Law Section 6530(6) - "Practicing the profession with gross incompetence..."

VOTE OF THE HEARING COMMITTEE

FIRST SPECIFICATION

"Respondent violated New York Education Law Section 6530(9)(b) by 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..."

VOTE: Sustained (3-0)

SECOND SPECIFICATION

"Respondent violated New York Education Law Section 6530(9)(d) by having his license to practice medicine suspended or having other disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in suspension or other disciplinary action would, if committed in New York state, constitute professional misconduct under the laws of New York state..."

VOTE: Sustained (3-0)

HEARING COMMITTEE DETERMINATION

The New Jersey Order involves four surgeries performed by the Respondent. On April 3, 1996, the Respondent performed a hysteroscopy on patient C.U. at Riverview Medical Center in Red Bank, New Jersey. Later that day, he performed the same operation at Riverview on patient A.H. On June 11, 1996, the Respondent performed a hysteroscopy on patient D.D. at Kimball Medical Center in Lakewood, New Jersey. On June 12, 1996, the Respondent performed a hysteroscopy and a laparoscopy at Kimball on patient S.M.

A hysteroscopy is an inspection of the uterus using a device called a hysteroscope. Because the walls of the uterus normally contract against each other, the surgeon must inject a distention medium into the uterus to separate the walls and allow visual instrumental examination of the uterine cavity. There are several acceptable distention media that the surgeon can choose. Among them is a five percent dextrose in water solution, commonly called D5W. This is the distention medium that the Respondent claimed that he specified as his preference at Riverview and Kimball at the times at issue.

Sterile water is not an acceptable distention medium for hysteroscopies. Sterile water can cause hemolysis, hyponatremia, fluid overload, edema, intravascular coagulation and water intoxication. The use of sterile water as a distention medium during a hysteroscopy can be a fatal mistake.

In all four hysteroscopies, the Respondent used sterile water as the distention medium. He testified that in all four instances, he specified that he wanted to use D5W, that staff mistakenly hung a bag of sterile water instead, and that he learned of the mistake after completion of the surgery. He testified that he should have checked the distention medium being hung and that he accepts responsibility for this, but that he should not be blamed for choosing sterile water as a distention medium because he had been unaware of this choice. This argument can be accepted regarding all the patients except S.M. In the New Jersey Order, the New Jersey Board rejected findings concerning C.U., A.H. and D.D., in the Initial Decision written by the Administrative Law Judge who held the administrative hearing for the Respondent. Regarding C.U., A.H. and D.D., the Administrative Law Judge had rejected the Respondent's argument that he did not know during surgery that the distention medium was sterile water. The New Jersey Board, however, rejected this approach and chose to conclude that the Respondent, after learning about the use of sterile water in the first of these surgeries (C.U.), should have checked before the A.H. and D.D. surgeries to ensure that the correct distention medium had been hung.

The situation is different for S.M.'s surgery. Not only did the New Jersey Board adopt a fact finding from the Initial Decision that the Respondent had known during surgery that sterile water was the distention medium; the New Jersey Board added an additional sentence to this fact finding to bolster that conclusion. The following is taken from the New Jersey Order. It is the fact finding from the Initial Order with the New

Jersey Board's amendments to it. There are two additions by the New Jersey Board that are underlined and a deletion that is in brackets. The Dr. Damien mentioned is a former employer of the Respondent who testified against him. The fact finding reads as follows:

In respondent's "Progress Notes," he wrote that he had used sterile water as the distention medium for S.M. [He did not also write, e.g., that a nurse had hung it contrary to his instruction.] I acknowledge that Dr. Damien may be in competition with respondent and have some hostility towards him, but I also accept Dr. Damien and Mrs. Damien as credible in their testimony that, in discussing the surgery, respondent stated that he had asked for sterile water. Other testimony of witnesses including Risk Manager Johnson arriving during the incident and Joanne O'Connell, support the conclusion that Dr. Daiter was aware he was using sterile water. That is, I find that, in violation of the standard of care, respondent requested and/or knew that he was using sterile water as the distention medium for S.M.'s hysteroscopy and that his statement that sterile water had been "substituted" was an attempt to disassociate himself from the cause of its use. Respondent did not candidly and/or contritely admit fault in his use of the dangerous sterile water as the hysteroscopic distention medium.

This paragraph states that the Respondent knew that the distention medium used during the S.M. surgery was sterile water. This Hearing Committee, pursuant to the requirements of New York State Public Health Law Section 230(10)(p), must accept the findings of the New Jersey Board and reject any defense raised by the Respondent that contradicts those findings. Therefore, the Hearing Committee rejects the Respondent's contention that he did not know until the surgery was over that sterile water was the distention medium that had been used. We conclude that at some point during the hysteroscopy he knew that sterile water was the distention medium and that he chose to continue using sterile water for the remainder of the procedure.

There are two other differences between S.M.'s surgery and the surgery performed on the other three patients. There was no contention in the New Jersey proceedings that the Respondent failed to provide competent medical care for the other three patients in any respect other than the use of sterile water. For patient S.M., however, the New Jersey Board found that during surgery there was an imbalance between the amount of

distention medium that entered the patient and the amount that exited her body and that the Respondent's failure to respond correctly to this problem endangered the patient. The other difference between the other three patients and patient S.M. is that there was no allegation for the other three patients that the Respondent's mistake caused any actual harm. However, for patient S.M., the New Jersey Board found that the Respondent's mistakes caused patient S.M.'s death.

During S.M.'s surgery, distention of the uterus was lost. The Respondent checked for the cause and could not find one. He had the nurse replace the distention fluid bag, but this did not solve the problem. The Respondent discontinued the hysteroscopy and performed a laparoscopy. One purpose of the laparoscopy was to determine whether there had been a perforation of the uterine wall during the hysteroscopy. Such a perforation would have explained the loss of and inability to reachieve distention. No such perforation was found, however.

The Respondent decided to complete the hysteroscopy. At that point, he knew the amount of distention medium in the hysteroscopy outflow trap (that is, distention medium that had entered and then exited the patient's body) as well as that there was some distention medium that had found its way to the sheets and the floor. The Respondent did not at that point know how much distention medium had entered the patient's body. The Respondent was told by a nurse that there was a significant imbalance between the distention medium that had entered the patient and the amount that had exited. The Respondent, rather than investigating whether there was a dangerous amount of distention medium retained by the patient, chose to continue with the hysteroscopy. A third bag of sterile water was hung and the amount of sterile water entering the patient continued to exceed the amount exiting her body to a degree that posed a danger to the patient. The Respondent, nonetheless, continued to perform the hysteroscopy. S.M.

became bradycardic, her eyes became congested (indicating edema), and she became cyanotic. The Respondent discontinued the hysteroscopy. The patient was experiencing acute pulmonary edema and cardiac arrest. Efforts to revive her were unsuccessful. The cause of death was the entry of a substantial volume of sterile water into S.M.'s vascular system, causing fluid overload, pulmonary edema and water intoxication.

The Respondent testified that a factor in mitigation is that until shortly before the patient's cardiac arrest, there was no indication from the patient's vital signs that anything was going wrong. Therefore, according to the Respondent, there was no reason to believe that the hysteroscopy needed to be terminated before completion and that steps had to be taken immediately to address the imbalance between the input and outflow of distention fluid. This argument is rejected. The Respondent knew that he was using sterile water as his distention medium. Therefore, he knew or should have known that the input and outflow imbalance meant that there was a high risk of the problems that, in fact, were occurring, problems that proved to be fatal. This is true regardless of the patient's stable vital signs. The imbalance of the dangerous distention medium should have alerted him to the need to address that problem effectively and immediately, but he decided to continue with the hysteroscopy instead.

The Petitioner recommended that the Respondent be subjected to a suspension of his license for one year, the last nine months suspended, a \$5,000.00 fine, and one year of probation to commence when and if he returns to the practice of medicine in New York State. We will instead impose a censure and reprimand and a \$5,000.00 fine. The reason that the penalty imposed is less than the penalty sought by the Petitioner is not that the Hearing Committee believes that the Respondent's transgressions were minor. They were anything but minor. However, nine years have passed since these incidents occurred. In that time, the Respondent has implemented precautionary steps in his

surgical routine to ensure that such errors never happen again. He has sought and received education on relevant subjects (for example, a course taught by Ceana Nezhat, M.D., in 2001). Respondent's Ex. B, C and D are certifications from the Respondent's colleagues. They testify to the high quality of medical care that the Respondent presently provides. This Hearing Committee believes that the Respondent is no longer a danger to patients. Therefore, a suspension of his license and probation would serve no legitimate purpose. The censure and reprimand and the fine are sufficient penalties given the circumstances of this case.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondent is censured and reprimanded.
2. A fine of \$5,000.00 is imposed on the Respondent. The fine must be paid within sixty days of the effective date of this order to the NYS Department of Health, Bureau of Accounts Management, Empire State Plaza, Corning Tower, Room 1258, Albany, NY 12237. Failure to pay the fine by the required date will subject the Respondent to all provisions of law relating to debt collection by New York State. This includes but is not limited to imposition of interest, late payment charges and collection fees; referral to the NYS Department of Taxation and Finance for collection; and non-renewal of permits or licenses.
3. This Order shall be effective upon service on the Respondent in accordance with the requirements of Public Health Law Section 230(10)(h).

DATED: Marcellus, New York
7/11, 2005

Andrew J. Merritt M.D.
Andrew J. Merritt, M.D.
Chairperson

Paul F. Twist, D.O.
Frances Tarlton

APPENDIX I

ORIGINAL



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

IN THE MATTER

OF

ERIC DAITER, M.D.
CO-04-12-6157-A

NOTICE OF

REFERRAL

PROCEEDING

TO: ERIC DAITER, M.D.
 9 South Rohallion Drive
 Rumson, NJ 07760-1220

ERIC DAITER, M.D.
Twin Plaza Progress Street
Edison, NJ 08820

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of N.Y. Pub. Health Law § 230(10)(p) and N.Y. State Admin. Proc. Act Sections 301-307 and 401. The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 21st day of April 2005, at 10:00 in the forenoon of that day at the Hedley Park Place, 433 River Street, 5th Floor, Troy, New York 12180.

At the proceeding, evidence will be received concerning the allegations set forth in the attached Statement of Charges. 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 that 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, Hedley Park Place, 5th Floor, 433 River Street, Troy, New York, ATTENTION: HON. SEAN O' BRIEN, DIRECTOR, BUREAU OF ADJUDICATION, (hereinafter "Bureau of Adjudication") as well as the Department of Health attorney indicated below, on or before April 11, 2005.

Pursuant to the provisions of N.Y. Public Health Law §230(10)(p), you shall file a written answer to each of the Charges and Allegations in the Statement of Charges no later than ten days prior to the hearing. Any Charge of Allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such an answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. You may file a brief and affidavits with the Committee. Six copies of all such papers you wish to submit must be filed with the Bureau of Adjudication at the address indicated above on or before April 11, 2005, 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

March 23, 2005



PETER D. VAN BUREN

Deputy Counsel

Bureau of Professional Medical Conduct

Inquiries should be addressed to:

Robert Bogan
Associate Counsel
New York State Department of Health
Office of Professional Medical Conduct
433 River Street – Suite 303
Troy, New York 12180
(518) 402-0828

STATE OF NEW YORK

DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER

OF

ERIC DAITER, M.D.
CO-04-12-6157-A

STATEMENT

OF

CHARGES

ERIC DAITER, M.D., the Respondent, was authorized to practice medicine in New York state on July 1, 1997, by the issuance of license number 170680 by the New York State Education Department.

FACTUAL ALLEGATIONS

September 24, 2004 MS

A. On or about ~~April 26, 2004~~, the State of New Jersey, Department of Law & Public Safety, Division of Consumer Affairs, State Board of Medical Examiners (hereinafter "New Jersey Board"), by a Final Decision and Order (hereinafter "New Jersey Order"), suspended Respondent's license to practice medicine for one (1) year, the first nine (9) months stayed, the last three (3) months actual and imposed a \$7,500.00 monetary penalty, \$4,488.27 costs of investigation and \$43,053.07 costs of transcription and reporting services, based on gross malpractice, gross negligence, repeated malpractice, and repeated negligence or incompetence.

B. The conduct resulting in the New Jersey Board disciplinary action against Respondent would constitute misconduct under the laws of New York state, pursuant to the following sections of New York state Law:

1. New York Education Law §6530(3) (negligence on more than one occasion);
2. New York Education Law §6530(4) (gross negligence);
3. New York Education Law §6530(5) (incompetence on more than one occasion);

and/or

4. New York Education Law §6530(6) (gross incompetence).

SPECIFICATIONS
FIRST SPECIFICATION

Respondent violated New York Education Law §6530(9)(b) by 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 A and/or B.

SECOND SPECIFICATION

Respondent violated New York Education Law §6530(9)(d) by having his license to practice medicine suspended or having other disciplinary action taken by a duly authorized professional disciplinary agency of another state, where the conduct resulting in suspension or other disciplinary action would, if committed in New York state, constitute professional misconduct under the laws New York state, in that Petitioner charges:

2. The facts in Paragraphs A and/or B.

DATED: *March 23*, 2005
Albany, New York


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