



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

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

Richard F. Daines, M.D.  
Commissioner

Wendy E. Saunders  
Chief of Staff

April 10, 2008

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

James R. Caputo, M.D.

Address Redacted

Timothy J. Mahar, Esq.  
NYS Department of Health  
ESP-Corning Tower-Room 2512  
Albany, New York 12237

Michael Paul Ringwood, Esq.  
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250 South Clinton Street - Suite 600  
Syracuse, New York 13202-1252

**RE: In the Matter of James R. Caputo, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 07-271) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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,

Redacted Signature

(James F. Horan, Acting Director  
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

James R. Caputo, M.D. (Respondent)

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

Administrative Review Board (ARB)

Determination and Order No. 07-271

COPY

Before ARB Members Grossman, Lynch, Pellman, Wagle and Wilson  
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Timothy J. Mahar, Esq.  
For the Respondent: Pro Se

Following a hearing below, a BPMC Committee determined that the Respondent practiced with negligence on more than one occasion and gross negligence in treating five patients. The Committee voted to suspend the Respondent's License to practice medicine in New York State for two years (License), to stay all but thirty days of the suspension, to limit the Respondent's License and to place the Respondent on probation for two years under the terms that appear in the Committee's Order. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2008), the parties ask the ARB to nullify or modify the Committee's Determination. After reviewing the record and the parties' review submissions, the ARB affirms the Committee's determination on the charges and affirms the Determination to limit the Respondent's License, to suspend the Respondent's License and to place the Respondent on probation. We increase the time for the suspension from two years to three years, but we stay all but thirty days of the suspension. We also increase the probation from two years to three years and we add a practice monitor to the probation terms.

### **Committee Determination on the Charges**

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(3-6) & 6530(32)(McKinney 2008) by committing professional misconduct under the following specifications:

- practicing medicine with negligence on more than one occasion,
- practicing medicine with gross negligence,
- practicing medicine with incompetence on more than one occasion,
- practicing medicine with gross incompetence, and,
- failing to maintain accurate patient records.

The charges related to the care that the Respondent, an obstetrician/gynecologist, provided to six persons (Patients A-F). The record refers to the Patients by initials to protect patient privacy.

Following the hearing, the Committee rendered the Determination now on review. The Petitioner brought the charges relating to Patients A, B, C and F originally in a hearing in 2005. Following a review on the determination from the 2005 Hearing, the ARB remanded for a new hearing before a different hearing committee. In this current proceeding, the Petitioner added charges relating to the treatment to Patients D and E.

The Committee dismissed all charges relating to Patient B and all specifications charging incompetence on more than one occasion, gross incompetence and failure to maintain accurate records. The Committee affirmed twenty-three factual allegations concerning the care for Patients A, C, D, E and F. The Committee found that the Respondent:

- ruptured Patient A's membranes in a 2001 delivery without adequate medical indications and/or in circumstances in which an increased risk existed for umbilical cord prolapse;
- attempted and/or performed a forceps rotation and/or a forceps delivery of Patient A's fetus without medical indications;
- failed to manage appropriately and/or adequately the second stage of Patient A's labor;

- failed to transfer Patient A's depressed baby to a pediatrician or neonatologist in a timely manner;
- failed to assess adequately the fetus following a non-stress test and prior to performing a cesarean section on Patient A in 2003;
- delivered Patient A's fetus by cesarean section without adequate medical indication;
- ruptured Patient C's membranes prematurely and/or without adequate medical indications;
- performed a forceps rotation and/or delivery on Patient C without adequate medical indications and/or contrary to accepted standards of medical care;
- failed to diagnose accurately a third trimester pregnancy for Patient D on one or more occasions;
- failed to review and/or analyze and/or assess adequately the serum progesterone levels for Patient D;
- failed to obtain and/or order an abdominal ultrasound evaluation on Patient D;
- failed to evaluate Patient D adequately prior to treating the Patient with IM Methotrexate;
- treated Patient D with IM Methotrexate and/or then performed a suction dilation and curettage for erroneous and/or inadequate medical indications;
- failed to manage appropriately a threatened abortion for Patient E;
- prescribed tocolytic agents in treating Patient E inappropriately and without adequate medical indications;
- placed a cervical cerclage (a procedure to place sutures in the cervix to prevent the cervix from dilating) in Patient E without adequate medical indications;
- failed to remove the cervical cerclage from Patient E in a timely manner;
- failed to treat significant anemia in Patient E adequately or in a timely manner at or about the time of the Patient's hospital discharge in July 2004;
- dictated a misleading hospital discharge for Patient E in July 2004;

- failed to obtain a pre-operative surgical consultation for Patient F, in view of the Patient's co-morbidities and increased risk for bowel injury;
- failed to evaluate, manage and/or treat adequately Patient F intra-operatively and/or post-operatively for the iatrogenic injury or injuries sustained by Patient F during a laparoscopic procedure on July 28, 2000;
- failed to evaluate, manage and/or treat Patient F timely or adequately following the Patient's July 28, 2000 discharge; and,
- failed to obtain a timely surgical consultation following Patient F's admission to Crouse Hospital on July 30, 2000.

The Committee determined that the Respondent's conduct amounted to practicing with negligence on more than one occasion in treating Patients A, C, D, E and F and practicing with gross negligence in treating Patients D, E and F.

In reaching their findings and conclusions, the Committee indicated that they afforded great weight to testimony by the Petitioner's expert witness, Richard C. Tatelbaum, M.D., and to transcribed testimony of the Respondent's expert Steven Burkhart, M.D. Dr. Burkhart testified at the 2005 Hearing and that testimony related to the care for Patients A, B, C and F. The Respondent also presented expert testimony from Ronald Stahl, M.D. concerning the care for Patients D, E and F. The Committee found that Dr. Stahl's expertise failed to rise to the level of either Dr. Tatelbaum or Dr. Burkhart and the Committee indicated that they accorded less weight to the testimony by Dr. Stahl. The Committee found the Respondent's testimony troubling. The Committee noted that the Respondent attempted to cover up his failure to recognize and treat the low hematocrit in Patient E in the discharge summary when Patient E left the hospital and that the Respondent demonstrated a capacity to perform prohibited actions in that he admitted to using forceps on multiple occasions in deliveries during a period when a hospital had limited the Respondent's privileges to use forceps.

The Committee voted to suspend the Respondent's License for two years, to stay all but thirty days of the suspension and to place the Respondent on probation for two years under the terms that appear at the end of the Committee's Determination. The Committee voted further to

place a permanent limitation on the Respondent's License to prohibit the Respondent from performing high forceps and mid forceps rotations or deliveries. The Committee concluded that the Respondent possesses the requisite skill and knowledge to practice medicine safely, but that he repeatedly failed to exercise the care that a reasonably prudent physician would exercise. The Committee indicated that they imposed the thirty-day actual suspension to provide the Respondent with time to reflect upon his prior misconduct and to redirect his energy and focus to practicing within accepted standards. The Committee also felt that the actual suspension would provide a significant monetary impact. The Committee stated that the probation to follow the suspension is necessary to ensure that the Respondent no longer exposes patients to unnecessary risk. The Committee stated that they imposed the License limitation in forceps deliveries because the Respondent's conduct shows he does not recognize the risks associated with forceps deliveries and because the Respondent's judgment about the appropriate circumstances for using forceps appears clouded by the Respondent's desire to display his self-professed ability.

#### Review History and Issues

The Committee rendered their Determination on December 7, 2007. This proceeding commenced on December 14 & 18, 2007, when the ARB received the Respondent's and the Petitioner's Notices requesting Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and reply brief and the Respondent's Brief and reply brief. The record closed when the ARB received the Respondent's reply brief on or about January 20, 2008.

The Petitioner argues that the evidence at the hearing also demonstrated misconduct in the treatment to Patient B and that the Respondent's misconduct also amounted to practicing with incompetence on more than one occasion and practicing with gross incompetence and with failing to maintain accurate records. The Petitioner asks that the ARB overturn the Committee

and sustain additional charges. The Petitioner argues further that the penalty that the Committee imposed fails to protect the public. The Petitioner requests that the ARB overrule the Committee and revoke the Respondent's License.

The Respondent asks that the ARB overturn the Committee's Determination, correct the official record and grant the Respondent financial restitution. The Respondent alleges malice and bias against him and the Respondent alleges that the hearing violated statutes, rules and due process. The Respondent contends that Petitioner failed to prove the charges and that the Petitioner failed to produce written standards of care that the Respondent violated.

#### ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine 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 PHL §230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3<sup>rd</sup> Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3<sup>rd</sup> Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3<sup>rd</sup> Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may



consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3<sup>rd</sup> Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

#### Determination

The ARB has considered the record and the parties' briefs. We affirm the Committee's Determination on the charges, the Determination to limit the Respondent's License, the Determination to suspend the Respondent's License and the Determination to place the Respondent on probation. We modify the Committee's Determination to extend the time period for the stayed portion of the suspension and for the probation and we modify the probation to include a practice monitor.

The ARB rejects the Respondent's argument that the Committee's Determination violated statutes, rules, due process and the ARB's remand order that followed the 2005 Hearing.

The ARB remanded after the 2005 Hearing because we found that bias by a member on the prior hearing committee pervaded the entire 2005 Hearing. The ARB remanded for a new hearing. The Respondent argues now that the ARB remanded for a new hearing on the charges from the 2005 Hearing alone, so that the Petitioner could bring no additional charges such as those concerning Patients D and E. The ARB made no such order. We remanded for a new hearing and required only a new hearing committee. Nothing on the remand order limited the Petitioner from bringing additional charges. The Respondent also argued that the hearing in the current proceeding denied him due process because he received no opportunity for voir dire on hearing committee members and because he failed to receive the discovery that he desired. The ARB finds that the hearing below followed the provisions on hearings under PHL § 230 and the provisions on disclosure under State Administrative Practice Act (SAPA) § 401 and Title 10 NYCRR Part 51. As the ARB noted in our Remand Order following the 2005 Hearing, we lack the authority to strike down those statutes. The ARB lacks the authority to grant the Respondent restitution as well. The Respondent also argued that the Committee's Determination failed to comply with SAPA § 307(1) because the Determination failed to contain rulings upon each of the proposed findings of fact that the Respondent submitted. The Respondent notes that SAPA § 307(1) requires that "if, in accordance with agency rules" a party submitted proposed findings of fact, the agency's decision must include a ruling on each proposed finding. The Respondent fails, however, to identify the Health Department rule/regulation that requires parties to submit proposed findings. No hearing committee determinations in BPMC cases contain rulings on each of a party's proposed findings.

The Respondent argued that bias pervaded the current proceeding as well and that the existence of such bias provides grounds on which to nullify the Committee's Determination. To

nullify a decision for bias, the party alleging bias must establish bias by more than just speculation and must show that the result in the hearing came from bias alone, Kabnick v. Chassin, 223 A.D.2d 935, 636 N.Y.S.2d 920 (3<sup>rd</sup> Dept. 1996). After reviewing this record, we find no validity to the Respondent's allegations concerning bias. The Respondent alleged bias prior to the hearing against Committee Member Sriskandarajah on grounds that the Member worked at a medical practice with the father of a Syracuse physician, whom the Respondent considers to be an enemy. The Committee's Administrative Officer conducted an inquiry on the Respondent's allegation and found no basis to recuse the Member. The ARB finds the allegations concerning a third person's relative constitute innuendo insufficient to demonstrate bias, Wolf v. Ambach, 95 A.D.2d 877, 464 N.Y.S.2d 244 (3<sup>rd</sup> Dept. 1983). The Respondent made no objections to the other Committee Members at hearing, but alleged bias against both in the review brief. The ARB finds these allegations also consisted of innuendo alone. The ARB rejects the contentions that the Committee's Determination resulted from bias. As we will discuss below, the ARB finds clear evidence in the record for the Committee's findings and conclusions. We note also that the Committee dismissed a number of the charges against the Respondent, such as all the allegations concerning Patient B and all allegations alleging incompetence and gross incompetence.

The Respondent also alleged bias against the Committee's Administrative Officer due to rulings the Administrative Officer made against the Respondent. The Respondent alleged bias in part because the Administrative Officer refused to recuse Dr. Sriskandarajah. We have noted above that no grounds existed for such recusal. The Respondent also alleged that the Administrative Officer failed to provide the Committee with a copy of the Respondent's proposed findings of fact. The Respondent conceded that he based that allegation on the

Committee's failure to make rulings on the proposed findings in the Committee's Determination. As we noted above, hearing committees in BPMC Determinations don't make such rulings, so the absence of such rulings in the Committee's Determination provides no basis for the Respondent's allegation. The Respondent also alleged bias because the Administrative Officer refused the Respondent's request for an adjournment in the first hearing day. The ARB finds nothing improper because the Administrative Officer made no change in the first hearing day. The Administrative Officer lacks such authority. Under PHL §230(10)(f), only the Committee may grant an adjournment of the first hearing day.

The ARB finds that the record in the proceeding provided the grounds for the Committee to find that the Respondent practiced with gross negligence in treating Patients D, E and F and with negligence on more than one occasion in treating Patients A, C, D, E and F. The Respondent argued that the Petitioner failed to prove the charges because the Committee gave equal weight to the testimony by both the Respondent's expert, Dr. Burkhart, and the Petitioner's expert, Dr. Tatelbaum. The Respondent asserted that if the Committee gives equal weight to the experts, then the party with the burden of proof has failed to prove the charges. The Committee's conclusions on witness credibility [Committee Determination page 50] did state that the Committee gave great weight to the testimony by both Drs. Burkhart and Tatelbaum. The Committee made other references, however, to the testimony they found credible beyond the statements at page 50. In the conclusions concerning Patient A's 2001 delivery, the Committee stated specifically that they concurred with Dr. Tatelbaum's opinion about rupturing the Patient's membranes [Committee Determination page 52]. In the Committee's Determination on Patient A's 2003 delivery, the Committee gave specific reasons why they rejected testimony by the Respondent and Dr. Burkhart concerning fetal lung maturity [Committee Determination page

54]. The Committee also made specific citations to the testimony on which they based the findings of fact in the Determination and noted that if conflicting evidence appeared in the record, the Committee considered and rejected the conflicting evidence. Further, Dr. Burkhart gave no testimony concerning the care for Patients D and E. The Respondent relied on his own testimony and that by Dr. Stahl to address the care for those Patients. The Committee made clear that they gave less weight to the testimony by Dr. Stahl than that by Dr. Tatelbaum and the Committee made clear that they found the Respondent's testimony troubling.

The ARB defers to the Committee, as the fact finder, in their conclusions about witness credibility. Under PHL § 230(10)(f), the Committee must make their conclusions on preponderance of the evidence. The ARB holds that the testimony the Committee found credible provided a preponderance of the evidence to prove the charges that the Respondent practiced with negligence on more than one occasion and gross negligence. We defer to the Committee further in their conclusions to dismiss the charges that the Respondent practiced with incompetence and gross incompetence and that the Respondent failed to maintain accurate records. The ARB agrees with the Committee that the Respondent possessed the skills and knowledge necessary to practice safely and that the Respondent's misconduct resulted from his failure to practice according to accepted care standards. We agree also that the Respondent's refusal to practice according to accepted standards rose to egregious levels in the cases of Patients D, E and F.

The ARB affirms the Committee's Determination to limit the Respondent's License permanently to prohibit the Respondent from performing high forceps and mid forceps rotations or deliveries. The ARB agrees with the Committee that the decision about using forceps should assess the level of risk involved. We agree further that, rather than assessing such risk, the

Respondent relies on his opinion about his skill in using forceps. The Respondent demonstrated impaired judgment in this regard by continuing to use forceps after his hospital suspended the Respondent's privileges to perform forceps deliveries. The ARB sees no alternative but to ban the Respondent from using mid and high forceps.

The ARB modifies the Committee's Determination and we suspend the Respondent's License for three years. We stay all but thirty days of that suspension, on the condition that the Respondent comply with the provisions in this Determination concerning probation. The ARB agrees with the Committee about the need to impress upon the Respondent a concern for safety rather than a reliance on his own skill. The ARB concludes that actual time on suspension will provide the Respondent time to reflect on the need to change his practice and impress on the Respondent that his continued refusal to practice according to accepted standards can result in the Respondent's permanent removal from medical practice.

The ARB agrees with the Committee concerning the need to impose a period of probation on the Respondent's License. The ARB modifies the Committee's Determination to increase the probation period from two years to three years. The ARB concludes that the three-year period will provide greater protection to the public by assuring that the Respondent is practicing by accepted standards. The ARB also modifies the probation by adding a practice monitor. The Respondent's prior refusal to abide by the restrictions his hospital imposed on forceps delivery leads the ARB to conclude that greater oversight will be necessary over the Respondent. The ARB amends the Probation Terms in the Committee's Order to add a new paragraph 8 to read:

" 8. Within thirty (30) days of the effective date of the Order, Respondent shall practice medicine only when monitored by a licensed physician, board certified in Obstetrics/Gynecology, proposed by Respondent and subject to the written approval of the Director of OPMC.

" a. The Respondent shall make available to the monitor any and all records or access to the practice requested by the monitor, including on-site observation. The practice monitor shall

visit Respondent's medical practice at each and every location, on a random unannounced basis at least monthly and shall examine a selection of records maintained by Respondent, including patient records, prescribing information and office records. The review will determine whether the Respondent's medical practice is conducted in accordance with the generally accepted standards of professional medical care. Any perceived deviation of accepted standards of medical care or refusal to cooperate with the monitor shall be reported within 24 hours to OPMC.

“ b. The Respondent shall be solely responsible for all expenses associated with monitoring, including fees, if any, to the monitoring physician.

“ c. The Respondent shall cause the practice monitor to report quarterly, in writing, to the Director of OPMC.

“ d. The Respondent shall maintain medical malpractice insurance coverage with limits no less than \$2 million per occurrence and \$6 million per policy year, in accordance with Section 230(18)(b) of the Public Health Law. Proof of coverage shall be submitted to the Director of OPMC prior to Respondent's practice after the effective date of this Order”

Paragraph 8 in the Committee's original Probation Terms now becomes Paragraph 9. The ARB concludes that the sanction that the Committee imposed and that we have modified will provide protection to the public, while allowing the Respondent to continue in practice. We reject the Petitioner's request that we revoke the Respondent's License.

ORDER

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

1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to suspend the Respondent License, but we increase the suspension from two years to three years and we stay the suspension after the Respondent completes thirty days of actual suspension.
3. The ARB affirms the Committee's Determination to limit the Respondent's License to prohibit the Respondent from performing high forceps or mid forceps deliveries.
4. The ARB affirms the Committee's Determination to place the Respondent's License on probation, but the ARB modifies the probation to increase the probation period from two years to three years and to add a practice monitor to the probation terms.

Thea Graves Pellman  
Datta G. Wagle, M.D.  
Stanley L. Grossman, M.D.  
Linda Prescott Wilson  
Therese G. Lynch, M.D.



In the Matter of James R. Caputo, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Caputo.

Dated: *L.P. Wilson*, 2008

Redacted Signature

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Linda Prescott Wilson

In the Matter of James R. Caputo, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the  
Matter of Dr. Caputo.

Dated: April 7, 2008

Redacted Signature

Thea Graves Pellman

In the Matter of James R. Caputo, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Caputo.

Dated: 4/4/, 2008

Redacted Signature

  
Datta G. Wagle, M.D.

In the Matter of James R. Caputo, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Caputo.

Dated: April 4, 2008

Redacted Signature

Stanley L Grossman, M.D.

In the Matter of James R. Caputo, M.D.

Therese G. Lynch, M.D., an AKB Member concurs in the Determination and Order in the

Matter of Dr. Caputo

Dated: April 3, 2008

Redacted Signature

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Therese G. Lynch, M.D.