



# Department of Health

ANDREW M. CUOMO  
Governor

HOWARD A. ZUCKER, M.D., J.D.  
Commissioner

SALLY DRESLIN, M.S., R.N.  
Executive Deputy Commissioner

September 19, 2016

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Percy Aspi Erachshaw, D.O.  
418 Stanhope Street  
Brooklyn, New York 11237

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Wood & Scher  
222 Bloomingdale Road – Suite 311  
White Plains, New York 10605

Claudia Morales Bloch, Esq.  
NYS Department of Health  
Bureau of Professional Medical Conduct  
145 Huguenot Street  
New Rochelle, New York 10801

**RE: In the Matter of Percy Aspi Erachshaw, D.O.**

Dear Parties:

Enclosed please find the Determination and Order (No. 16-314) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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  
Riverview Center  
150 Broadway – Suite 355  
Albany, New York 12204

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,



James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH:  
Enclosure

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

In the Matter of

**Percy Aspi Erachshaw, D.O. (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. 16-314**

**GCPY**

**Before ARB Members D'Anna, Koenig, Grabiec, Wilson and Milone  
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner): Claudia Morales Bloch, Esq.  
For the Respondent: Anthony Z. Scher, Esq.**

After a hearing below, a BPMC Committee found that the Respondent practiced with negligence on more than one occasion and gross negligence in treating three patients. The Committee suspended the Respondent's license for "at least six months" and ordered the Respondent to undergo a competency examination. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2016), both parties ask the ARB to nullify or modify the Committee's Determination. After reviewing the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination that the Respondent practiced with negligence on more than one occasion and with gross negligence. The ARB overturns the order that the Respondent undergo a competency examination. The ARB suspends the Respondent's License for six months and places the Respondent on probation for five years following the suspension, under the terms that appear as the Appendix to this Determination.

### Committee Determination on the Charges

Pursuant to PHL § 230 *et seq*, BPMC and its Committees function as a duly authorized professional disciplinary agency of the State of New York. The Committee in this case conducted a hearing into charges that the Respondent committed professional misconduct in practicing surgery under the following specifications:

- practicing medicine fraudulently, a violation under New York Education Law (EL) §6530(2) (McKinney Supp. 2016),
- practicing medicine with gross negligence, a violation under EL § 6530(3);
- practicing medicine with negligence on more than one occasion, a violation under EL § 6530(4);
- practicing medicine with incompetence on more than one occasion, a violation under EL § 6530(6);
- engaging in conduct in the practice of medicine that evidences moral unfitness, a violation under EL § 6530(20); and,
- failing to maintain accurate patient records, a violation under EL § 6530(32).

The charges related to the surgical care that the Respondent provided to five persons, Patients A-E. The record refers to the Patients by initials to protect privacy. Following a hearing on the charges, the Committee rendered the Determination on review.

The Committee dismissed the misconduct specifications that charged incompetence on more than one occasion, practicing fraudulently, moral unfitness and failure to maintain accurate records. The Committee also dismissed all charges concerning Patients A and C.

The Committee found that the Respondent practiced with gross negligence and with negligence in treating Patient B. The Committee found that the Respondent performed a primary

repair of an umbilical hernia in June 2009, without determining if the hernia was reducible, which was important due to the Patient's comorbidities. The Respondent performed further surgery on Patient B in December 2009 to repair a recurrent umbilical hernia with mesh, and on November 2, 2010, the Respondent performed a minilaparotomy with removal of mesh and primary repair of umbilical hernia. The Committee found that Patient B returned to Wyckoff Heights Medical Center in grave condition on November 5, 2010 and that another surgeon performed an exploratory laparotomy, subtotal colectomy, small bowel resections, primary small bowel anastomosis and endileostomy. Patient B died on November 7, 2010. The Patient's medical record showed a history for vascular disease, peripheral vascular disease, hepatitis c, liver failure, diabetes hypertension, obesity, asthma and alcohol abuse. The Committee found that the history was not taken on the first visit, but was taken only after the surgery. Further, the Committee found that the medical history for Patient B failed to obtain a history of the Patient's co-morbidities. The Committee noted that the Respondent testified (at page 1216 in the hearing transcript) that the Respondent found out about the Patient's hepatitis c and liver failure only after the Respondent had performed two surgical procedures. In addition, the Committee found that the medical history showed a weight of 235 pounds, but failed to list a height, which the Committee found to be an essential fact in evaluating obesity.

The Committee sustained charges that the Respondent practiced with negligence on more than one occasion and gross negligence in treating Patients D and E. The Respondent performed a laparoscopic cholecystectomy on Patient D. The Committee found that there are standard approaches to dissecting the anatomy out to delineate the cystic duct and the cystic artery, but the Respondent failed to use any of the appropriate and standard techniques to identify the anatomy and, in particular, the cystic duct. The Committee found further that the Respondent failed to

isolate structures in a way that would allow a positive identification based on their anatomic structure. The Committee concluded that if the Respondent had followed the procedures there would not have been an injury to the ductal system. In their conclusions on the charges, the Committee noted that the Respondent caused injury to the ductal system and failed to recognize the injury. In the case of Patient E, the Committee concluded that the Respondent proceeded to surgery to remove the Patient's gallbladder, which had been removed many years previously. The Committee found that the Respondent failed to perform an adequate medical history and that an adequate medical history would have revealed that that Patient E had no gall bladder.

The Committee concluded that the Respondent committed sufficiently egregious misconduct worthy of the suspension of the Respondent's License. The Committee voted to suspend the Respondent License for "at least six months", and ordered that thereafter, the Respondent should undergo a competency examination pursuant to PHL § 230(7)(c). The Committee stated that if the examination found that Respondent competent to return to practice, the suspension would end. The Committee provided further that if the examination found the Respondent incompetent to return to practice, then the suspension would continue under such terms as the Director of the Office of Professional Medical Conduct will specify.

#### Review History and Issues

The Committee rendered their Determination on March 28, 2016. This proceeding commenced on April 4, 2016, when the ARB received the Respondent's Notice requesting a Review. The ARB received a Notice of Review from the Petitioner on April 6, 2016. 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 record closed when the ARB received both parties' reply briefs on May 20, 2016.

The Petitioner alleged error by the Committee because the Committee found testimony by the Respondent's expert witness, David Mayer, M.D., more credible than the testimony by the Petitioner's expert witness, Thomas Gouge, M.D. The Petitioner asked that the ARB overturn the credibility determination as to Dr. Mayer's testimony and to sustain additional charges. The Petitioner argued further that the Committee imposed a penalty insufficient to protect the public health and the Petitioner asked the ARB to overturn that penalty and to revoke the Respondent's License.

The Respondent noted that the Committee dismissed 83 of the 88 Factual Allegations that the Petitioner charged. The Respondent argued that the record failed to support the five Factual Allegations that the Committee did sustain and the Respondent asked that the ARB dismiss those Allegations. The Respondent argued further that, even if the ARB affirms the Committee's Determination to sustain the five Factual Allegations, the Committee imposed an unreasonable penalty. The Respondent argues that no grounds exist for either a suspension or a competency examination.

#### 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. The ARB affirms the Committee's Determination on the charges. We overturn the Committee's Determination to order a competency examination. The ARB suspends the Respondent's License for six months and places the Respondent on probation for five years following the suspension. The Probation Terms appear at the Appendix to this Determination.

Under PHL §§ 230(10)(g) and 230-c(4)(b), a hearing committee makes findings of fact and the ARB reviews those findings for consistency with the committee's determination and penalty. In this case, the Petitioner is requesting that the ARB go beyond our authority and make our own findings of fact. We decline that request. We defer to the Committee in their Determination on witness credibility. We rule that the Committee's findings are consistent with their Determination that the Respondent practiced with negligence on more than one occasion and with gross negligence in treating Patients B, D and E. We note that at page 20 in their Determination, the Committee stated incorrectly that they sustained the misconduct specification that charged negligence on more than one occasion for all five Patients at issue in this case. The Committee actually sustained the specification as to three of the Patients. We agree with the Committee that the record revealed a somewhat careless surgeon whose practice at times presented a clear danger to patients.

We find the Committee's Determination to order a competency examination inconsistent with the Committee's findings. At pages 19-20 in their Determination, the Committee dismissed the specification that charged practicing with incompetence on more than one occasion. Later at page 20, however, the Committee stated that the Respondent's treatment of Patient D had been incompetent because the Respondent failed to follow appropriate and standard techniques and

approaches. The failure to follow appropriate standards, however, amounts to negligence in practice rather than incompetence, Moore v. State Board for Professional Medical Conduct, 258 A.D.2d 837, 686 N.Y.S.2d 129 (3<sup>rd</sup> Dept. 1999). At page 25 in the Determination, the Committee once again referred to the Respondent as practicing with incompetence in treating Patients D and E, but the Committee then references the Respondent's general carelessness. The Committee then ordered the competency evaluation. The ARB finds that carelessness amounts to negligence in practice rather than incompetence. The ARB overturns the Committee's Order for the examination because we find that the Respondent's misconduct arose from carelessness rather than incompetence.

The ARB affirms the Committee's Determination to suspend the Respondent for six months. We agree with the Committee that the Respondent committed sufficiently egregious misconduct worthy of the suspension of the Respondent's License. The Respondent should use this time separated from practice to reflect on his errors and the Respondent should realize that if he fails to correct his practice pattern, he could face a longer and perhaps permanent separation from practice. To assure that the Respondent has corrected his practice pattern, the ARB places the Respondent on probation for five years following the suspension, under the terms that appear at the Appendix to this Determination. Those terms include the requirement that the Respondent practice with a monitor. The monitor may not be a partner in the Respondent's medical practice.

**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 modifies the Committee's Determination as to the sanction for that misconduct to remove the Order that the Respondent submit to a competency examination.**
- 3. The ARB suspends the Respondent's License for six months and places the Respondent on probation for five years under the terms that appear in the Appendix to this Determination.**

**Peter S. Koenig, Sr.  
Steven Grabiec, M.D.  
Linda Prescott Wilson  
John A. D'Anna, M.D.  
Richard D. Milone, M.D.**

In the Matter of Percy Aspi Erachshaw, D.O.

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

Matter of Dr. Erachshaw.

Dated: 15 Sept 2016



Linda Prescott Wilson



**In the Matter of Percy Aspi Erachshaw, D.O.**

**Peter S. Koenig, Sr., an ARB Member concurs in the Determination and Order in the Matter of Dr. Erachshaw.**

**Dated: September 13, 2016**



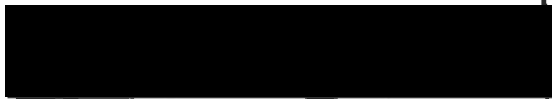
**Peter S. Koenig, Sr.**

In the Matter of Percy Aspi Erachshaw, D.O.

Steven Grabiec, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Erachshaw.

Dated: 9/13, 2016



Steven Grabiec, M.D.

In the Matter of Percy Aspi Erachshaw, D.O.

Richard D. Milone, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Erachshaw.

Date September 13, 2016

  
Richard D. Milone, M.D.

In the Matter of Perci Aspi Erachshaw, D.O.

John A. D'Anna, M.D., an ARB Member concurs in the Determination and Order in the Matter of Dr. Erachshaw.

Dated: September 13 2016



John A. D'Anna, M.D.



## TERMS OF PROBATION

1. The Respondent's conduct shall conform to the moral and professional standards of conduct in his profession and in governing law. Any act of professional misconduct by Respondent as defined by New York Education Law §§ 6530 or 6531 shall constitute a violation of probation and may subject Respondent to an action pursuant to New York Public Health Law § 230 (10) or (19), or both.
2. The Respondent shall remain in continuous compliance with all requirements of New York Education Law § 6502, including but not limited to the requirements that a licensee shall register and continue to be registered with the New York State Education Department (except during periods of actual suspension) and that a licensee shall pay all registration fees. Respondent shall not exercise the option provided in New York Education Law § 6502(4) to avoid registration and payment of fees.
3. The Respondent shall provide to the Director, Office of Professional Medical Conduct (Director), Riverview Center, Suite 355, 150 Broadway, Albany, New York, 12204, at least every six months and as otherwise requested, or within thirty days of any change in the information, the following information in writing:
  - a. a full description of the Respondent's employment and practice;
  - b. all professional and residential addresses and telephone numbers within and outside of New York State;
  - c. any and all information concerning investigations, arrests, charges, convictions or disciplinary actions by any local, state, or federal agency;
  - d. any and all information concerning investigations, terminations, or disciplinary matters by any institution or facility.
4. The Respondent shall provide to the Director copies of all applications relating to the practice of medicine, including but not limited to, privileges, insurance, and licensure, in any jurisdiction, concurrent with their submission.
5. The Respondent shall cooperate fully with, and will respond within two weeks to, Office for Professional Medical Conduct (OPMC) requests to provide written periodic verification of Respondent's compliance with these terms of probation. Upon the

Director's request, the Respondent shall meet personally with a person designated by the Director.

6. The probation period shall toll when Respondent is not engaged in active medical practice in New York State for a period of thirty consecutive days or more. The Respondent shall notify the Director in writing, if Respondent is not currently engaged in, or intends to leave, active medical practice in New York State for a consecutive thirty-day period. The Respondent shall then notify the Director again at least fourteen days before returning to active practice. Upon the Respondent's return to active practice in New York State, the probation period shall resume, and the Respondent shall fulfill any unfulfilled probation terms and such additional requirements as the Director may impose.
7. The Director, or his/her designee, may review Respondent's professional performance. This review may include but shall not be limited to:
  - a. A review of office records, patient records, hospital charts, and/or electronic records; and
  - b. Interviews with or periodic visits with Respondent and staff at practice locations or OPMC offices.
8. The Respondent shall maintain complete and legible medical records that accurately reflect the evaluation and treatment of patients, and contain all information required by State rules and regulations concerning controlled substances.
9. Upon returning to practice following the suspension of his License, the Respondent shall practice only when monitored by a licensed physician, board certified in an appropriate specialty, ("practice monitor") proposed by Respondent and subject to the Director's written approval. The practice monitor may not be a partner in the Respondent's medical practice.
  - 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 on a random unannounced basis at least quarterly and shall examine a selection (no less than 20) of records maintained by Respondent. The review will determine whether Respondent's charting is conducted in accordance with the generally accepted standards of professional medical care. Any perceived deviation from 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.
  - 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 within 30 days after the date of this Determination and Order.
10. Respondent shall comply with these Terms of Probation, and shall bear all associated compliance costs. Upon receiving evidence of noncompliance with or a violation of these terms, the Director and/or the Board for Professional Medical Conduct may initiate a violation of probation proceeding, and/or any other proceeding authorized by law, against the Respondent.