



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

August 28, 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David W. Smith, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza – Sixth Floor
New York, New York 10001

Manuel L. Saint Martin, J.D.
115-10 Queens Boulevard
Forest Hills, New York 11372

Bernard B. Schachne
P.O. Box 3116
Albany, New York 12203-0116

Raphael Bazin, M.D.
19 Gilcrest Road
Great Neck, New York 11021

RE: In the Matter of Raphael Bazin, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 01-64) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

A handwritten signature in black ink, appearing to read "Tyrone T. Butler". The signature is written in a cursive style with a large initial "T".

Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

In the Matter of

Raphael Bazin, M.D. (Respondent)

Administrative Review Board (ARB)

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

Determination and Order No. 01-64

COPY

**Before ARB Members Grossman, Lynch, Pellman, and Briber¹
Administrative Law Judge James F. Horan drafted the Determination**

**For the Department of Health (Petitioner):
For the Respondent:**

**David W. Smith, Esq.
Bernard B. Schachne, Esq.**

After a hearing below, a BPMC Committee determined that the Respondent made inappropriate diagnoses, ordered inappropriate treatments and submitted false billings in caring for five patients. The Committee found that such conduct violated a previous probation order and the Committee voted to revoke the Respondent's License to practice medicine in New York State (License). In this proceeding pursuant to N.Y. Pub. Health Law § 230-c (4)(a)(McKinney's Supp. 2001), the Respondent asks the ARB to nullify or modify that Determination. The Respondent alleges several procedural errors by the Committee and their Administrative Officer and alleges that the hearing record provides no support for the Committee's findings. After reviewing the hearing record and the parties' brief, the ARB affirms the Committee's Determination that the Respondent committed misconduct and we affirm the Determination to revoke the Respondent's License. On our own motion we vote to fine the Respondent \$ 5000.00 for his misconduct.

¹ ARB Member Winston Price, M.D. was unavailable to take part in the review on this case. The ARB reviewed the case with a four member quorum, see Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

Committee Determination on the Charges

The Petitioner commenced the proceeding by filing charges [Petitioner Exhibit 1] with BPMC alleging that the Respondent violated N. Y. Educ. Law §§ 6530(2-3), 6530(5), 6530(17), 6530(20), 6530(29) & 6530(35) (McKinney Supp. 2001) by committing professional misconduct under the following specifications:

- practicing medicine fraudulently,
- practicing medicine with negligence on more than one occasion,
- practicing medicine with incompetence on more than one occasion,
- exercising undue influence on a Patient for financial gain,
- engaging in conduct in practice that evidences moral unfitness,
- violating probation, and,
- ordering excessive tests or treatments unwarranted by patient condition.

The charges related to the care that the Respondent rendered to five persons, Patients A-E. The record identifies the Patients by letters to protect privacy. The Respondent denied the charges [Respondent Exhibit D] and a hearing ensued before the Committee that rendered the Determination now on review. That Committee consisted of two physicians, David Harris, M.D. and Adel R. Abadir, M.D. and a Physician Assistant, Michael R. Gonzalez, R.P.A.

The evidence before the Committee indicated that the Respondent entered into a Consent Order in October 1997 under which the Respondent agreed to serve on probation for two years [Petitioner Exhibit 3]. The probation terms required that the Respondent comply with the medical profession's standards and with the obligations that the law imposed on the profession. At hearing, the Petitioner introduced in evidence medical records and x-rays for Patients A-E and expert testimony by Louis J. Benton, M.D. The records indicated that the Respondent treated Patients A-E during his probation, October 1997-1999. Dr. Benton testified that in each patient case, the Respondent made an inappropriate diagnosis and provided the Patients with inappropriate treatment. Evidence also indicated that the Respondent billed the Patients' insurers for the treatment he provided to the Patients. The Respondent presented no expert testimony and the Respondent gave no testimony on his own behalf.

The Committee credited the testimony by Dr. Benton. The Committee concluded that the Respondent:

- made inappropriate diagnoses for all five Patients,
- provided inappropriate treatments to all five Patients, and,
- billed each Patients' insurers for the treatments deliberately, falsely and with intent to deceive.

The Committee dismissed the charge that the Respondent exercised undue influence over the Patients. The Committee sustained the charges that the Respondent ordered excessive, unwarranted treatments, that the Respondent practiced medicine fraudulently, with negligence on more than one occasion and with incompetence on more than one occasion and that the Respondent engaged in conduct that evidenced moral unfitness. The Committee found that the professional misconduct violated the Respondent's 1997 probation, so the Committee sustained the probation violation charge. The Committee voted to revoke the Respondent's License. The Committee stated that the record revealed multiple instances in which the Respondent manipulated the Patients and defrauded insurance carriers. The Committee concluded that no chance existed for remediation.

Review History and Issues

The Committee rendered their Determination on March 13, 2001. This proceeding commenced on April 4, 2001, when the ARB received the Respondent's Notice requesting a Review. Following the Notice, Bernard Schachne, Esq. substituted as counsel for the Respondent and the parties stipulated to extending the date for filing appeal briefs to May 31, 2001. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and response brief and the Petitioner's brief and response brief. The record closed when the ARB received the Petitioner's response brief on June 12, 2001. The Respondent

also attempted to submit additional documents to the ARB following the period for filing briefs and responses.

In his review notice, the Respondent argued that the Committee's Administrative Officer recommended the counsel who appeared for the Respondent at the hearing, that the Respondent was not allowed to review patient records that the Petitioner offered into evidence and was not allowed to call witnesses for his defense. The Respondent argued further that the Office for Professional Medical Conduct (OPMC) found no problems with his practice during the 1997-1999 probation. He also argued that he accepted the probation against his will and pleaded no contest to the charges.

The Respondent's brief argued that the evidence at the hearing failed to prove the charges and that the Petitioner failed to establish any intent by the Respondent to commit fraud. The Respondent raised 11 issues for review.

1. The BPMC Chairperson's failure to sign the 1997 Consent Order made the Order a nullity.
2. The Committee's Administrative Officer denied the Respondent fairness and due process by requiring the Respondent to abide by "Rules of the Forum" beyond the Officer's authority and beyond the requirements in the applicable statutes and regulations.
3. The hearing violated the Respondent's due process rights because the Committee Determination indicated that the Committee conducted the hearing pursuant to N.Y. Pub. Health Law § 230(10), rather than § 230(19) that sets the procedures for probation violation hearings.

4. The Committee erred in stating that the Respondent entered a "no contest" plea to the 1997 Consent Order, raising the possibility that the Committee failed to consider the entire record.
5. The Petitioner's expert, Dr. Benton, failed to identify the acceptable medical standards at issue in the case and the Committee erred in relying on that testimony.
6. The Committee failed to consider bias by Dr. Benton due to Dr. Benton's contractual relationship as an expert with OPMC.
7. The Respondent's attorney failed to appear for the scheduled hearing on October 26, 2000, the day at which the Respondent was to testify. Although the Respondent indicated a desire to appear at a later date to testify, the Respondent's counsel submitted only a "Reply to the Charges-Post Hearing Brief".
8. The State failed to establish that the State performed the 1997 Consent Agreement.
9. The Committee's Determination violated due process, lacked substantial evidence as a basis and was affected by error of law and abuse of discretion.
10. The Administrative Officer erred in instructing the Committee that the petitioner must prove the fraud charges by preponderant evidence rather than clear and convincing evidence.
11. In the final point, the Respondent makes specific comments on the evidence and Dr. Benton's testimony. He alleges that he turned over an x-ray to OPMC for Patient A, that the Petitioner failed to produce at the hearing. He also alleges prejudice because the Committee made findings about the care for Patient A, that included a time prior to the Consent Agreement.

The Brief requested that the ARB overturn the revocation order and reinstate the Respondent's License. The Brief contained several attachments, including some documents from outside the hearing record.

Following the date the ARB received the Respondent's Reply brief on June 6, 2001, the Respondent submitted a June 13, 2001 letter in which he stated that his Review Notice incorrectly indicated that the Respondent made a "no contest" plea to the 1997 Consent Order. On June 21, 2001 and June 25, 2001, the ARB received letters from the Respondent's attorney from the 1997 disciplinary case, who asked to submit the letters as an amicus brief. The attorney, Mr. Farren, discussed the 1997 Consent Order and the hearing in this case. In the second letter, Mr. Farren admitted that he failed to mail the first letter to the Petitioner's counsel and Mr. Farren charged that BPMC refused to allow the Respondent to testify. In a letter dated July 6, 2001, Mr. Farren indicated that he made a misstatement in the letter the ARB received on June 25th.

In response to the Respondent's review notice, the Petitioner's brief argued that the Respondent stated falsely that the Committee's Administrative Officer recommended the attorneys the Respondent hired for the hearing and stated falsely that the State had any responsibility for the Respondent's refusal to testify at the hearing. In response to the Petitioner's brief, the Petitioner's response brief argued that the ARB should disregard several attachments to the Respondent's brief from outside the hearing record. The Petitioner argued further that Issues 2, 3, 9 & 10 from the Respondent's brief raise matters beyond the ARB's review authority. As to Issues 1 and 4 involving the Consent Agreement, the Petitioner argues that the BPMC Chair signed the Consent Order and that the Respondent entered a 'no contest" plea to one charge in the Consent Order. As to the Administrative Officer's "Rules of the Forum", the Petitioner argues

that the Rules caused the Respondent no prejudice and changed no legal requirements. As to Issue 3, the Petitioner indicated that although the Committee's Determination referenced a hearing pursuant to N.Y. Pub Health Law § 230(10) rather than 230(19), the Respondent received all procedural rights he would have received under § 230(19). As to Issues 5 & 6 concerning the Petitioner's expert, the Petitioner argues that the evidence the Petitioner produced proved negligence and that the Respondent received a full opportunity to cross-examine Dr. Bender and raise any issues including bias. As to Issue 9, concerning the State's Performance under the Consent Order, the Petitioner argued that OPMC performed its function by monitoring the Respondent's performance during the probation. As to Issues 9 and 10 on the Standard of Proof, the Petitioner argues that the standard of proof in OPMC cases is preponderant evidence, Matter of Giffone v. DeBuono, 263 A.D.2d 713, 693 N.Y.S.2d 691 (3rd Dept. 1999) and that the Petitioner met that burden in this case. As to the arguments at Issue 11 on Patient Care, the Petitioner argues that if the Respondent felt that any records were missing, he should have raised an objection at the hearing or pre-hearing conference. The Petitioner also argues that the Respondent raised issues in his review brief concerning the Patients that the Respondent raised unsuccessfully in his post-hearing brief.

In addition to the matters the parties raised, the ARB considered an additional matter on our own motion. Following the decision by the Appellate Division for the Third Department in Matter of Orens v. Novello, No. 87430, slip op. (3rd Dept. June 21, 2001), the ARB discussed whether we should remand to the Hearing Committee for further proceedings as the Committee included a Physician Assistant, Mr. Gonzalez.

Determination

The ARB has considered the record and the parties' briefs. We refuse to accept the late submissions by the Respondent and Mr. Farren and we refuse to consider any evidence the Respondent offered from outside the hearing record. We affirm the Committee's Determination that the Respondent committed professional misconduct and we affirm the Committee's Determination to revoke the Respondent's License. On our own motion, we vote to fine the Respondent \$5000.00 for his fraudulent conduct.

Late or Post-Hearing Submissions: The Respondent submitted a letter from the Respondent and letters from Mr. Farren, after the time for submitting briefs had ended. The letter from the Respondent also went beyond raising issues for review. The Respondent tried to offer fact information about the 1997 Consent Order. This constituted an attempt to offer facts into the proceeding after the hearing, without testifying under oath and undergoing cross-examination. As to the submissions by Mr. Farren, the ARB accepts no amicus briefs. Under N.Y. Pub. Health Law § 230-c, the ARB accepts submissions only from the parties. In addition, Mr. Farren's letters also introduced facts from outside the hearing record, the submissions were after the date for filing briefs, Mr. Farren failed to provide the initial submission to the Petitioner's counsel and Mr. Farren's last letter admitted to a misstatement in one of the earlier letters.

The Respondent's brief also submitted documents as attachments from outside the hearing record. Under N.Y. Pub. Health Law § 230-c, the ARB may consider only briefs, response briefs and the hearing record. The Respondent had the opportunity to introduce evidence at the hearing and the pre-hearing conference. The attempt to introduce documents post-hearing denies the opposing party a chance to test that information, Matter of Ramos v.

DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997). The ARB gave no consideration to any documents from outside the hearing record.

Review Notice and Briefs: The Respondent raised several legal issues in his Notice and Brief. Many of those issues request action by the ARB to annul the Committee's Determination on procedural grounds. In reviewing a Committee's Determination, the ARB determines: whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law; and, whether the Penalty is appropriate and within the scope of penalties which N.Y. Pub. Health Law §230-a permits [N.Y. Pub. Health Law §230(10)(i), §230-c(1) and §230-c(4)(b)]. The ARB may also consider whether a party has filed a timely review notice, Matter of Weg v. DeBuono, 269 A.D.2d 683, 703 N.Y.S.2d 301 (3rd Dept. 2000). The ARB may remand a case to the Committee for reconsideration or further proceedings [PHL §230-c(4)(b)]. Nothing in the statutes or in any court decisions on those statutes recognizes authority by the ARB to annul a Committee's Determination on procedural or legal grounds. As we noted, we may remand for further proceedings. In instances in which the Respondent raised procedural complaints, we considered whether those complaints showed proper grounds for a remand.

The Respondent raised challenges to the 1997 Consent Order in his Review Notice and in his brief at Issues 1, 4 and 8. At Issue 1, the Respondent called the Consent Order a nullity because the former BPMC Chair failed to sign the Order. Petitioner's Hearing Exhibit 3, the Consent Order, indicates otherwise. The BPMC Chair signed the Consent Order on the cover page. Further, the Respondent never raised any objection to the Order's execution during the probation, at the hearing or when the Order came into evidence as Exhibit 3. In his Notice, the Respondent indicated that he signed the Consent "almost against my will". In the Consent, however, the Respondent signed the Consent after attesting that he made the Application of his

own free will. In Issue 4, the Respondent contested a statement by the Committee that the Respondent entered a "no contest" plea. In his Notice, however, the Respondent himself indicated that he entered a "no contest" plea. The Consent Order also indicated that the Respondent asserted that: "I can not defend successfully against the seventh specification" from the Statement of Charges. At Issue 8, the Respondent argued that the Petitioner failed to establish that OPMC performed the 1997 Consent Order. We disagree. The Consent Order began as an Application by the Respondent to have OPMC accept the Respondent's offer to plead "no contest" to the Seventh Specification, in exchange for OPMC accepting the Application and placing the Respondent on Probation to satisfy the 1997 disciplinary charges. The Respondent received that probation and OPMC accepted the Application.

The Respondent's Notice and Issue 1 in his Brief alleged error by the Committee's Administrative Officer. The Notice argued that the Administrative Officer, Judge Brandes, recommended the attorneys who represented the Respondent at the hearing below. The record indicates otherwise. On the October 23, 2000 hearing day, the Respondent stated at the hearing that he had originally intended to appear for the hearings without representation, but that Judge Brandes recommended strongly that the Respondent obtain legal counsel. The Respondent went on to state: "then I went and get [sic] those lawyers" [Hearing Transcript, page 131, lines 17-21]. The Respondent also challenged the protocols that Judge Brandes issued to the parties that the Judge referred to as "Rules of the Forum". The Respondent argued that these Rules went beyond the procedures set out in the Health Department hearing regulations at Title 10 NYCRR Part 51. Hearing Counsel for the Respondent made no objection to those Rules at hearing and neither hearing counsel nor the Respondent's brief cited to any actual prejudice to the Respondent from the Rules and cites no specific Rule that violated the Respondent's due process rights. Under

N.Y.A.P.A. § 304(5)(McKinney Supp. 2001), a presiding officer may regulate the course of a hearing. Under the Department of Health hearing regulations at Title 10 NYCRR § 51.9(c)(11), a hearing officer may do all acts and take all steps necessary to maintain a hearing's order and efficient conduct, if such acts are not otherwise prohibited. The Respondent's brief fails to specify what provisions in the Rules were "otherwise prohibited" acts.

At Issue 4 in his brief, the Respondent argued that the Committee acted beyond their authority in conducting a general hearing under N.Y. Pub. Health Law § 230(10) rather than a probation violation hearing under § 230(19). Although the Committee's Determination on page 1 stated that the Committee conducted the hearing pursuant to § 230(10), the Committee Determination at page 3 stated that the hearing involved probation violation charges. The Committee Determination at page 26 concluded that the Respondent violated probation and the Determination's Appendix I constituted the Notice of Probation Violation charges. Also, the Petitioner's counsel noted in his opening statement that the hearing was a probation violation proceeding [Hearing Transcript pages 17-19]. We find no reason to remand due to the incorrect reference on the Determination's first page to § 230(10). The Committee conducted a hearing and rendered a Determination on the probation violation charge.

In his Notice and at Issues 7 and 11 in his brief, the Respondent argued that he failed to receive an adequate opportunity to offer a defense. In the Notice, the Respondent argued that he never had the opportunity to review the records that the Petitioner offered. At Issue 11, the Respondent argued that the x-rays the Petitioner offered as Exhibit 5, failed to contain all the x-rays for Patient A. The hearing transcript, however, indicates that the Petitioner's counsel sent the Respondent copies of x-rays and medical records the Petitioner would introduce as Exhibits a few weeks prior to the hearing [Hearing Transcript page 6]. The Respondent made no objection

at that time to Exhibit 5 and made no complaint about the material the Respondent received from the Petitioner. If any problem existed with the exhibits or with disclosure the Respondent should have raised them at the pre-hearing conference or the hearing. We reject the Respondent's claims at Issue 11 about an additional x-ray, as a further attempt to introduce factual matters into the Review from outside the hearing record. At Issue 7, the Respondent seems to argue that he wanted to testify, but that his counsel submitted only a post hearing brief instead. At the end of the Petitioner's case on September 26, 2000, the Administrative Officer offered to allow the Respondent to begin his case [Hearing Transcript page 119]. The Respondent declined and indicated he would begin his case on the October 23, 2000 hearing date [Hearing Transcript page 120]. At the October 23, 2000 hearing day, the Respondent's counsel failed to appear. The Respondent indicated a willingness to proceed and testify without an attorney. The Administrative Officer recommended that the Respondent wait and testify at a later hearing date when his attorney was present. The Administrative Officer then left the Respondent to decide how to proceed. The Respondent indicated then a willingness to wait and return with counsel [Hearing Transcript page 131]. Committee Member Abadir then asked whether the Respondent wished to proceed and the Respondent again stated that he would wait [Hearing Transcript page 132]. The Committee and the Administrative Officer clearly presented the Respondent the opportunity to proceed. He chose against proceeding. Any prejudice to the Respondent resulted from the Respondent's decision and the conduct by the Respondent's counsel. We see no error here by the Committee and no reason to remand.

At Issues 9 and 10, the Respondent made arguments about the proper evidentiary standard to prove charges in the hearing. Under N.Y. Pub. Health Law § 230(10)(f), the Petitioner must prove the charges by preponderance of the evidence. The Respondent's brief

called that statute unconstitutional. The ARB lacks the authority to rule an act of the New York Legislature unconstitutional. The Respondent should direct those arguments to the courts.

At the introduction to his brief, the Respondent argued that the proof before the Committee failed to establish intent to commit fraud. We disagree. In order to sustain a charge that a physician practiced medicine fraudulently, a hearing committee must find that (1) the physician made a false representation, whether by words, conduct or by concealing that which the licensee should have disclosed, (2) the physician knew the representation was false, and (3) the physician intended to mislead through the false representation, Sherman v. Board of Regents, 24 A.D.2d 315, 266 N.Y.S.2d 39 (3rd Dept. 1966), aff'd, 19 N.Y.2d 679, 278 N.Y.S.2d 870 (1967). A committee may infer a respondent's knowledge and intent properly from facts that such committee finds, but the committee must state specifically the inferences it draws regarding knowledge and intent, Choudhry v. Sobol, 170 A.D.2d 893, 566 N.Y.S.2d 723 (3rd Dept. 1991). A committee may reject a respondent's explanation for a misrepresentation and draw the inference that the respondent intended or was aware of the misrepresentation, with other evidence as the basis, Matter of Brestin v. Comm. of Educ., 116 A.D.2d 357, 501 N.Y.S.2d 923 (3rd Dept. 1986). At page 26 in their Determination, the Committee concluded that the Respondent knew he was billing for non-existent conditions, with the sole intent to defraud insurers. The Committee inferred the Respondent intent because: "other than absolute incompetence, there is no other rational basis for the Respondent to have committed the acts proven". We affirm the Committee's Determination on fraud. The Respondent made false diagnoses on several patients, provided excessive, unnecessary treatments to the patients and billed for those unnecessary procedures. The repeated false diagnoses and billings revealed a pattern that established the Respondent acted knowingly and with fraudulent intent.

At Issues 5 and 6 in his brief, the Respondent challenges the testimony by the Petitioner's expert Dr. Benton. At Issue 5, the Respondent argued that Dr. Benton failed to identify the acceptable medical standards at issue. The ARB holds that Dr. Benton's testimony provided sufficient proof that the Respondent practiced negligently. Expert testimony and patient medical records provide evidence sufficient to prove negligence, if the expert testifies that a respondent failed to provide appropriate care to the patients at issue in the case, Matter of Moore v. State Bd. for Prof. Med. Cond., 258 A.D.2d 837, 686 N.Y.S.2d 129. In this case, Dr. Bender testified that the Respondent failed to satisfy appropriate or acceptable standards by providing treatments for non-existent medical conditions. At Issue 6, the Respondent argued that the Committee failed to specifically address the "contractual relationship" between Dr. Benton and OPMC. Dr. Benton's curriculum vitae lists him as an expert for OPMC [Petitioner Exhibit 14]. The Respondent's hearing brief calls that relationship a fundamental matter. The Respondent's post-hearing brief failed to raise that as an issue with the Committee. The Respondent's hearing counsel also failed to raise that issue with Dr. Benton during cross-examination. We see no error by the Committee in failing to discuss specifically every issue that the Respondent could have raised with the Committee, but failed to raise in challenging Dr. Benton's testimony.

At the Respondent's Issue 11, he challenges the Committee's findings concerning Patient A, because the Respondent's treatment for Patient A began in January 1996, prior to the time the Respondent commenced probation. We agree that any treatment prior to October 1997 falls outside the probation violation proceeding, because the probation began in October 1997. The Respondent's inappropriate care prior to the probation's commencement fails to constitute a violation of probation and such conduct provides no grounds for disciplinary action in this case. The Respondent's inappropriate diagnosis and treatment for Patient A continued after the

probation began, so the Committee could consider the inappropriate treatment following the Consent Order in determining the charges relating to Patient A. The treatments during the probation constituted negligence and incompetence on more than one occasion and amounted to excessive treatments unwarranted by the Patient's condition. The Respondent practiced fraudulently and engaged in conduct that evidenced moral unfitnes by knowingly and deliberately billing insurers during the probation, with the intent to defraud.

Also at Issue 11, the Respondent made arguments on the treatments to each Patient, in effect challenging the Committee's findings on those Patients. We affirm the Committee's findings on the charges in full, except as to those findings relating to the care for Patient A prior to the probation's commencement. The Committee found the testimony by Dr. Bender credible. We owe deference to the Committee as fact finder in their assessments on witness credibility. We also note that the Respondent presented no expert testimony to contradict Dr. Bender. As we held above, the Respondent received an opportunity to present such evidence. We also noted above that such evidence provided the Committee sufficient grounds to infer that the Respondent acted with intent in knowingly submitting false billings to insurers.

The Committee's Composition: On our own motion we consider whether we must remand for further proceedings due to the Committee's composition. In Matter of Orens v. Novello (supra), the Third Department annulled a BPMC Hearing Committee Determination because the three member panel included a Physician Assistant. Under N.Y. Pub. Health Law § 230(6), a BPMC Committee must consist of two physicians and a lay person. The Court in Orens ruled that Physician Assistants are not lay persons under § 230(6) and that BPMC Hearing Committee's may not include Physician Assistants. The Committee in the Respondent's case included a Physician's Assistant, Mr. Gonzalez.

Upon reviewing the Orens decision, we find no cause for remand. In Orens, the Appellate Division noted that Dr. Orens made a "timely objection" to the Hearing Committee's composition prior to the hearing, in time to cure the defect. The Respondent in this case made no such objection to the Committee's composition at hearing or during the review. Under the Orens ruling, the Respondent apparently waived any objection to the Committee's composition by failing to object at hearing.

Penalty: Under our authority from N.Y. Pub. Health Law § 230-c(4)(a), in reviewing a hearing committee determination, the ARB determines whether a Committee rendered an appropriate penalty and a penalty consistent with their findings and conclusions. The courts have interpreted the statute to mean that 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 (3rd Dept. 1993). The ARB may also choose to substitute our judgement and amend a Committee Determination on our own motion, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). We elect to exercise the authority to substitute our judgement in this case. We affirm the Committee's Determination to revoke the Respondent's License, but we modify that penalty to include a fine.

The Respondent subjected five Patients to unnecessary treatments, so that the Respondent could bill insurers fraudulently for those treatments. The Respondent betrayed the trust those Patients placed in him and used his License to commit fraud. The Respondent's conduct demonstrates his unfitness to practice medicine in New York. We hold that the Respondent's fraudulent conduct merits a financial penalty in addition to revocation order. Under N.Y. Pub. Health Law § 230-a(7), upon finding that a Respondent committed misconduct, we may assess a

fine up to \$10,000.00 on each misconduct specification for which we found the Respondent guilty. We vote to assess a fine totaling \$5000.00.

ORDER

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

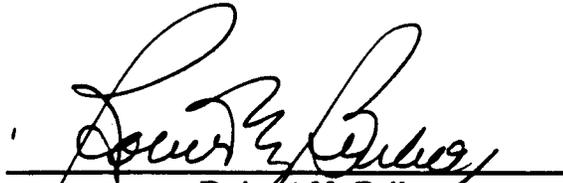
1. The ARB **AFFIRMS** the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB **AFFIRMS** the Committee's Determination to revoke the Respondent's License to practice medicine in New York State.
3. The ARB **MODIFIES** the Committee's Determination on our own motion to impose a \$5000.00 in addition to the revocation.
4. The Respondent shall pay that fine to the Bureau of Accounts Management, New York State Department of Health, Erastus Corning II Building, Room 1258, Empire State Plaza, Albany, New York, 12237, due within thirty (30) days of the effective date of this Order.
5. Any civil penalty not paid by the date prescribed herein shall be subject to all provisions of law relating to debt collection by the State of New York. This includes but is not limited to the imposition of interest, late payment charges and collection fees; referral to the New York State Department of Taxation and Finance for collection; and non renewal of permits or licenses [Tax Law § 171(27); State Finance Law § 18; CPLR § 5001; and Executive Law § 32].

Robert M. Briber
Thea Graves Pellman
Stanley L. Grossman, M.D.
Therese G. Lynch, M.D.

In the Matter of Raphael Bazin, M.D.

Robert M. Briber, an ARB Member concurs in the Determination and Order in the Matter of Dr. Bazin.

Dated: August 2, 2001, 2001


Robert M. Briber

In the Matter of Raphael Bazin, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Bazin.

Dated: July 25, 2001



Thea Graves Pellman

In the Matter of Raphael Bazin, M.D.

Stanley L. Grossman, an ARB Member concurs in the Determination and Order in the Matter of Dr. Bazin.

Dated: August 3, 2001

Stanley L. Grossman M.D.

Stanley L. Grossman, M.D.

In the Matter of Raphael Bazin, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in
the Matter of Dr. Bazin.

Dated: August 6, 2001

Therese G. Lynch M.D.

Therese G. Lynch, M.D.