

July 1, 2013

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Harshad Bhatt, M.D.  
94-54 Lefferts Boulevard  
Richmond Hill, New York 11419

Harshad Bhatt, M.D.  
REDACTED

Lawrence Kobak, Esq.  
Kern, Augustine, Conroy &  
Schopmann, P.C.  
865 Merrick Avenue-Suite 200 South  
Westbury, New York 11690

Gerard A. Cabrera, Esq.  
NYS Department of Health  
Bureau of Professional Medical Conduct  
90 Church Street – 4<sup>th</sup> Floor  
New York, New York 10007

**RE: In the Matter of Harshad Bhatt, M.D.  
a.k.a. Harshadrai Chimindral Bhatt, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 13-204) 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to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate.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,

REDACTED

James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH:cah

Enclosure

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

In the Matter of

Harshad Bhatt, M.D., a/k/a  
Harshadrai Chimindral Bhatt, M.D.  
(Respondent)

Administrative Review Board (ARB)

Determination and Order No. 13-204

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

COPY

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

For the Department of Health (Petitioner): Gerard A. Cabrera, Esq.  
For the Respondent: Lawrence F. Kobak, Esq.

After a hearing below, a BPMC Committee sustained charges that the Respondent committed professional misconduct. The Committee voted to revoke the Respondent's License to practice medicine in New York State (License) and to fine the Respondent \$120,000.00. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2013), both parties agree that the Committee imposed an excessive fine and both parties ask the ARB to reduce the fine amount, but the parties disagree over the amount to reduce. After considering the Committee's Determination, the hearing record and the parties' review submissions, the ARB votes 5-0 to sustain the Committee's Determination on the charges and to sustain the Determination to revoke the Respondent's License. The ARB reduces the fine to \$40,000.00.

### Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent violated New York Education Law (EL) §§ 6530(2-3), 6530(5), 6530(20-21) & 6530(32) (McKinney Supp. 2013) 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,
- engaging in conduct that evidences moral unfitness,
- willfully filing a false report, and,
- failing to maintain accurate patient records.

The charges involved care, reports and billing for surgery on patients with injuries from automobile accidents. Following the hearing on the charges, the Committee rendered the Determination now on review.

The Committee sustained all specifications against the Respondent. The Committee found that the Respondent represented falsely in an operative report and insurance claim that the Respondent performed surgery on Patient A, when in fact the Respondent had performed no surgery on Patient A. Further, the Committee found that the Respondent indicated in operative reports that he had performed surgery on Patients B, C, D and E, but the Respondent failed to prepare medical records for those Patients. In addition, the Committee found that the Respondent deviated from accepted standards in performing surgeries on Patients F, G, H and I. The Committee also found that the Respondent represented knowingly and falsely, on operative reports and insurance claims, that the Respondent performed certain procedures on Patients F, G and H. The Respondent performed no such procedures on those Patients.

The Committee voted to revoke the Respondent's License. In addition to the charges the Committee sustained, the Committee received further information concerning the Respondent during the penalty phase in deliberations. The record in the penalty phase revealed the Respondent's 1994 criminal conviction in New York State Supreme Court for Queens County for submitting false Medicare claims. A disciplinary proceeding before BPMC and the ARB followed the criminal conviction and resulted in the revocation of the Respondent's License. The Committee found the information on the Medicare false claims disturbing, because in his testimony before the Committee, the Respondent denied any prior problem with billing for surgery. The penalty phase record showed that the Respondent regained his License from the Board of Regents in 2001 after a restoration proceeding. In that proceeding, the Respondent assured the Board of Regents that, if he regained this License, he would run his office in a proper manner, employ billing persons and follow strict accounting procedures. The Committee found that the Respondent misled the Hearing Committee and broke his promise to the Board of Regents. The Committee also found that the Respondent failed to learn from his past mistakes.

The Committee also voted to impose a fine pursuant to PHL § 230-a(7). The Committee found that the Respondent's misconduct had resulted in a financial gain to the Respondent. The Committee fined the Respondent \$10,000.00 for each sustained misconduct specification, for a total fine of \$120,000.00.

#### Review History and Issues

The Committee rendered their Determination on March 13, 2013. This proceeding commenced on March 29 and April 1, 2013, when the ARB received the Petitioner's and then the Respondent's Notices requesting a Review. The record for review contained the Committee's

Determination, the hearing record, the Respondent's brief and the Petitioner's brief. The record closed when the ARB received the Petitioner's brief on April 25, 2013.

Both parties agree that the Committee imposed an excessive fine and both parties limited their review briefs to requesting that the ARB reduce the fine. The parties agree that the New York State Supreme Court Appellate Division for the Third Department has ruled that a Committee may not impose separate fines when misconduct violates different provisions under EL § 6530, but arises from the same factual conduct, Colvin v. Chassin, 214 A.D.2d 854, 625 N.Y.S.2d 351 (3<sup>rd</sup> Dept. 1995); Selkin v. State Board for Professional Medical Conduct, 279 A.D.2d 720, 719 N.Y.S.2d 195 (3<sup>rd</sup> Dept. 2001).

The parties disagree on the amount for the reduced fine. The Petitioner requests a \$60,000.00 fine and argues that this record presents six factual instances of misconduct: repeated negligence/incompetence, failure to maintain accurate records and four instances of fraudulent billing. The Respondent argues that the ARB should limit the fine to between \$20,000.00 and \$40,000.00. The Respondent contends that the case dealt with only two issues: operative reports and indications for surgery. The Respondent argues further, that if the ARB considers each surgery to be separate, then there were only three patient surgeries at issue.

#### 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 and we affirm the Committee's Determination to revoke the Respondent's License. Neither party challenged the Determination on the charges or on the revocation. We modify the fine the Committee imposed and reduce the fine to \$40,000.00.

The provisions at PHL § 230-a(7) permit a Committee to impose a fine not to exceed \$10,000.00 upon each specification of misconduct on which the Committee has found a Respondent guilty. The statute contains no definition for the word "specification". The provisions at EL § 6530 contain misconduct definitions currently in forty-nine sections. Some of those, such as EL § 6530(9), contain sub-sections. The standard statement of charges in a BPMC case [see Hearing Exhibit 1] contains first a list of factual allegations and then a list of specifications of misconduct. The specifications connect the factual allegations to the misconduct definitions under EL § 6530. The same factual allegation may be the basis of multiple specifications of misconduct. For example, a physician who knowingly misrepresents facts in a medical record could be guilty of fraud in practice [6530(2)], engaging in conduct that evidences moral unfitness [6530(20)] and failing to maintain accurate records [6530(32)]. In this case, the Committee followed the wording of § 230(7) and applied the definition of the word "specifications" consistent with the use of that word in the statements of charges. The Third Department rulings in Colvin and Selkin, however, limit the imposition of fines under EL § 230(7) to each factual instance of misconduct.

The parties' review briefs limited their arguments to considering only whether this case involved two, four or six factual instances of misconduct. The ARB holds that the imposition of a fine under § 230(7) involves an additional consideration beyond determining the number of

factual instances of misconduct. Neither BPMC Committees nor the ARB impose fines routinely for professional misconduct. The usual practice by the ARB limits the imposition of a fine to cases in which a physician has used his or her license fraudulently to seek and/or obtain unjust enrichment, Galin v. DeBuono, 259 A.D.2d 788, 686 N.Y.S.2d 190 (3<sup>rd</sup> Dept. 1991).

The ARB concludes that the sanction in this case should include a fine, because the Respondent used his License in an attempt to obtain unjust enrichment through fraudulent billing. The ARB finds four factual instances in this case in which the Respondent billed fraudulently. The Respondent billed knowing and intentionally for surgery on Patient A and for procedures on Patients F, G and H which the Respondent did not perform. The ARB imposes a \$10,000.00 fine in each fraudulent billing, for a fine to total \$40,000.00. The ARB overturns the Committee decision to impose an additional \$80,000.00 in fines because some of those fines represented multiple fines for the same conduct and some fines arose from conduct such as negligence or bad record keeping. Although the negligence and bad record keeping in this case constitute professional misconduct, we find a monetary sanction inappropriate as a penalty for that misconduct.

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.
3. The ARB reduces the fine the Committee imposed from \$120,000.00 to \$40,000.00.

Peter S. Koenig, Sr.  
Datta G. Wagle, M.D.  
Linda Prescott Wilson  
John A. D'Anna, M.D.  
Richard D. Milone, M.D.

In the Matter of Harshad Bhatt, M.D.

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

Dated: June 20, 2013

REDACTED

  
Peter S. Koenig, Sr.

\$40,000.00.

Peter S. Koenig, Sr.  
Datta G. Wagle, M.D.  
Linda Prescott Wilson  
John A. D'Anna, M.D.  
Richard D. Milone, M.D.

In the Matter of Harshad Bhatt, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the Matter of Dr. Bhatt.

Dated: 21 June, 2013

REDACTED

Linda Prescott Wilson

In the Matter of Harshad Bhatt, M.D.

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

Dated: \_\_\_\_\_, 2013

\_\_\_\_\_  
Peter S. Koenig, Sr.

In the Matter of Harshad Bhatt, M.D.

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

Dated: JUNE 24, 2013

REDACTED

John A. D'Anna, M.D.

In the Matter of Harshad Bhatt, M.D.

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

Dated: 6/21, 2013

REDACTED

  
Datta G. Wagle, M.D.

In the Matter of Harshad Bhatt, M.D.

Richard D. Milone, an ARB Member concurs in the Determination and Order in the

Matter of Dr. Bhatt.

Dated: June 18, 2013

REDACTED

Richard D. Milone, M.D.