



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

PUBLIC

Dennis P. Whalen
Executive Deputy Commissioner

June 13, 2002

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Anthony Benigno, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2509
Albany, New York 12237-0032

Mark G. Farrell, Esq.
4455 Transit Road – Suite 2C
Williamsville, New York 14221

Mark D. Fisher, M.D.
57 Euclid Avenue
Kenmore, New York 14217

RE: In the Matter of Mark D. Fisher, M.D.

CORRECTED DECISION

Dear Parties:

Enclosed please find the corrected and revised Determination and Order (No. 02-192) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), and §230-c subdivisions 1 through 5, (McKinney Supp. 1992), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,



Tyrone T. Butler, Director
Bureau of Adjudication

TTB:cah
Enclosure

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

IN THE MATTER
OF
MARK D. FISHER, M.D.

DETERMINATION
AND
ORDER

BPMC # 02-192

COPY

WILLIAM K. MAJOR, M.D., Chairperson, **JAGDISH TRIVEDI, M.D.** and **MR. MICHAEL WALKER**, duly designated members of the State Board for Professional Medical Conduct appointed by the Commissioner of Health of the State of New York pursuant to Section 230(1) of the Public Health Law, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. **JEFFREY ARMON, ESQ.**, served as Administrative Officer for the Hearing Committee. After consideration of the entire record, the Hearing Committee submits this Determination.

SUMMARY OF PROCEEDINGS

Notice of Hearing/Statement of Charges:	January 9, 2002
Dates of Hearing:	April 3, May 6, 2002, 2002
Department of Health appeared by:	DONALD P. BERENS, JR., ESQ. General Counsel, NYS Department of Health BY: ANTHONY BENIGNO, ESQ. NYS Department of Health Coming Tower, Room 2509 Albany, New York 12237
Representative for Respondent :	MARK G. FARRELL, ESQ. 4455 Transit Road, Suite 2C Williamsville, New York 14221
Witness for the Department of Health:	Robert L. Mick, M.D.
Witnesses for the Respondent:	Timothy Kent Welsh Jack C. Anchin, Ph.D. Robert B. Whitney, M.D. Mark D. Fisher, M.D. (Respondent)
Deliberations held:	May 6, 2002

NOTE: Numbers in parenthesis refer to transcript pages or exhibits, and they denote evidence that the Hearing Committee found persuasive in determining a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the evidence cited. All Hearing Committee findings were unanimous unless otherwise specified.

Petitioner's Exhibits are designated by Numbers.

Respondent's exhibits are designated by Letters.

T = Transcript

A copy of the Statement of Charges (Ex. 1) is attached to this Determination and Order as Appendix II.

FINDINGS OF FACT

1. The Respondent was authorized to practice medicine in New York State on July 11, 1997 by the issuance of license number 207389 by the New York State Education Department. (Ex. 3)

2. By a Non-Disciplinary Order of Conditions, effective February 1, 2001 and entered into with the New York State Board for Professional Medical Conduct, Respondent, among other conditions, agreed to remain drug and alcohol free for a period of five years. (Ex. 9)

3. On or about July 8, 2001, Respondent snorted a few lines of cocaine while at a party. On or about July 10, 2001 Respondent smoked about \$20 of crack cocaine. (Ex. 4, 5, 7)

4. On July 11, 2001, Respondent submitted a urine sample for analysis which tested positive for cocaine. (Ex. 4, 5, 7)

5. Respondent has habitually used cocaine, a narcotic, since on or before December, 1997 and has developed cocaine dependency. (Ex. 4, 5, 7)

6. Pursuant to the Order of Conditions, Respondent agreed to provide written authorization for the Committee on Physician's Health (CPH) to provide to the Director of the OPMC any/all information or documentation requested by the OPMC to determine whether he remained compliant with the terms of said Order. In a letter dated December 19, 2001 to the OPMC, the CPH would not confirm or deny any information as to whether it had an open case regarding the Respondent. Respondent either failed to provide the written authorization or revoked it subsequent to having provided said authorization. (Ex. 6)

7. Respondent has been employed as a hospitalist with the Kaleida Health System in Buffalo, New York since approximately April, 2000. (Ex. 4, 7, D; T. 276-7)

CONCLUSIONS OF LAW

The following conclusions were made pursuant to the Findings of Fact listed above. All conclusions resulted from a unanimous vote of the Hearing Committee.

Respondent failed to file a written answer to the Statement of Charges. In accordance with the provisions of Public Health Law Section 230 (10) (c), the Department's motion to have all charges and allegations be deemed admitted was granted. The Hearing Committee therefore determined that all Factual Allegations and Specifications of Charges of professional misconduct **BE SUSTAINED**.

DISCUSSION AND DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions of Law set forth above, unanimously determined that Respondent's license to practice medicine in New York be suspended for a five year period, with such suspension stayed. During the period of the stayed suspension, Respondent shall be placed on probation and made subject to all conditions set forth in Appendix I of this Determination and Order. Such conditions include requirements that he remain drug and alcohol free, continue to comply with all components of his treatment regimen and practice medicine

only when monitored by an approved physician. This decision was made following due consideration of the full spectrum of penalties available pursuant to statute, including license revocation, suspension and/or probation, censure and reprimand, and the imposition of monetary penalties.

The Factual Allegations in this matter were not in dispute. Respondent admitted to having relapsed over a three day period in July, 2001 and attributed it to a number of work and family related factors which significantly increased his personal stress and contributed to the relapse. He testified that he had been abstinent for about three years and had begun to take his recovery for granted during a period leading up to July, 2001. He decreased the frequency of attendance at self-help meetings as well as his meetings with his therapist. Subsequent to the use episode, he has increased his attendance at self-help meetings and regularly participates in individual and group therapy. He receives treatment from a chemical dependency counselor and a psychotherapist, both of whom testified as to their belief that the Respondent has greater understanding of his addiction. The two witnesses also indicated that Respondent, thus far, has demonstrated great motivation to succeed in his recovery efforts.

The position of the Department was that Respondent had been given the opportunity to continue practicing medicine pursuant to the Nondisciplinary Order of Conditions and that, by violating the requirement that he remain drug and alcohol free, he forfeited that opportunity. The Department provided reference to a number of decisions by the Board which determined to revoke the licenses of physicians who were found to have violated their conditions of probation. The Committee had no doubt that licensure revocation was an option; however the members of the Committee strongly believed that the appropriate penalty should be based on an individualized, case-by-case assessment of the particular facts at hand. To suggest otherwise would diminish the responsibilities of the members of the Committee. The inflexible approach by the Department made no consideration of Respondent's actions since the relapse, the resources available to assist in recovery or the assessment of the professionals personally treating him. The Committee felt those factors had to be considered in fashioning an appropriate penalty.

The Department's own expert witness, Dr. Robert Mick, board certified in addiction psychiatry and serving as Medical Director for Addiction Services with the Unity Health System in Rochester,

stated that his review of the recovery history, evaluations and interviews of Respondent by the practice monitor, the psychologist and the OPMC investigator led him to feel that the Respondent “was on the right path to recovery”. Dr. Mick also testified that he would consider hiring Respondent as a hospitalist, with appropriate monitoring and limitation of hours of employment.

The Committee relied on the expertise of Dr. Mick, as well as on the opinions of Respondent’s witnesses, in its determination and in the development of terms of probation that the members believed would provide adequate safeguards to the public. The statement by Dr. Robert Whitney was considered particularly relevant. Dr. Whitney, certified and currently engaged full time in the specialty of addiction medicine, testified that the whole point of encouraging people to seek and maintain recovery would be undermined if any use episode or relapse would result in an automatic prohibition from performing certain activities in the future. The consequence would be that people would hide their addictions even further rather than seek treatment. The Committee noted testimony that recovery is not always in a straight line and that a relapse can occur as a symptom of the chronic disease of addiction. The monitoring and support system in place in conjunction with the insight developed by Respondent in addressing his addiction were relevant points which were relied upon in arriving at the conclusion that he could safely continue to practice.

Included in the Terms of Probation are requirements that Respondent continue to attend and participate in self-help meetings, continue in treatment with a psychotherapist, continue to be monitored by a sobriety monitor and practice medicine only when monitored by an approved practice monitor. Each of the treating and monitoring professionals are required to submit reports to OPMC concerning Respondent’s progress and compliance with the Terms of Probation. Additionally, Respondent’s hours of employment are limited to a maximum of 45 per week. This requirement has the objective of reducing the potential for the stressful conditions which contributed to the relapse. The Committee believed these multiple components would provide a system of support to assist Respondent in his recovery while ensuring that the public’s safety is adequately protected.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED THAT:**

1. The Specifications of Charges as set forth in the Statement of Charges (Ex. 1) are **SUSTAINED;** and

2. The license of Respondent to practice medicine in New York State be hereby **SUSPENDED** for a period of five (5) years, said suspension to be **STAYED;** and

3. Respondent shall be placed on **PROBATION** during the period of the stayed suspension of his license, and he shall comply with all Terms of Probation as set forth in Appendix I, attached hereto and made a part of this Determination and Order; and

4. This Order shall be effective upon service on the Respondent or his attorney by personal service or by certified or registered mail.

DATED: Troy, New York

June 11, 2002

William K. Major, M.D.

WILLIAM K. MAJOR, M.D., Chairperson

JAGDISH M. TRIVEDI, M.D.

MR. MICHAEL WALKER

TO:

Anthony Benigno, Esq.
New York State Department of Health
Bureau of Professional Medical Conduct
Corning Tower, Room 2509
Empire State Plaza
Albany, New York 12237-0032

Mark G. Farrell, Esq.
4455 Transit Road, Suite 2C
Williamsville, New York 14221

Mark D. Fisher, M.D.
57 Euclid Avenue
Kenmore, New York 14217

APPENDIX I

TERMS OF PROBATION

1. Respondent shall conduct himself at all times in a manner befitting his professional status, and shall conform fully to the moral and professional standards of conduct imposed by law and by his profession.

2. Respondent shall comply with all federal, state and local laws, rules and regulations governing the practice of medicine in New York State.

3. Respondent shall submit written notification to the Board addressed to the Director, Office of Professional Medical Conduct ("OPMC"), Hedley Park Place, 433 River Street, 4th Floor, Troy, New York 12180, regarding any change in employment, practice, addresses, (residence or professional) telephone numbers, and facility affiliations within or without New York State, within 30 days of such change.

4. Respondent shall submit written notification to OPMC of any and all investigations, charges, convictions or disciplinary actions taken by any local, state or federal agency, institution or facility, within 30 days of each charge or action.

5. Within 30 days of the effective date of this Order, Respondent shall submit written proof to the Director of the OPMC at the address indicated above that he has paid all registration fees due and is currently registered to practice medicine as a physician with the New York State Education Department.

6. Respondent shall limit his hours of medical practice to a maximum of forty five (45) hours per week.

7. Respondent shall remain free from alcohol and all other mood altering substances other than those prescribed for Respondent's treatment by a licensed physician aware of Respondent's history. Respondent shall not self-prescribe any medications.

8. Respondent shall continue participation in self help groups such as, but not limited to, Alcoholics Anonymous, Narcotics Anonymous and Caduceus.

9. Respondent shall practice only when monitored by qualified health care professional monitors proposed by Respondent and approved, in writing, by the Director of OPMC. Monitors shall not be family members or personal friends, or be in professional relationships which would pose a conflict with monitoring responsibilities. Respondent shall ensure that the monitors are familiar with Respondent's chemical dependency and with the terms of this Order. Respondent shall cause the monitors to report any deviation from compliance with the terms of this Order to OPMC and to submit required reports on a timely basis.

a. Respondent shall continue in treatment with a qualified health care professional (**Psychotherapist**) for the duration of the period of probation. Respondent shall submit the name of a proposed successor within seven (7) days of becoming aware that his approved Psychotherapist is no longer able or willing to serve in that capacity.

i. The Psychotherapist shall submit a proposed treatment plan and a report to the OPMC every three (3) months certifying Respondent's compliance with the treatment plan and describing in detail any failure to comply.

ii. The Psychotherapist shall report within 24 hours to the OPMC if Respondent displays any significant pattern of absences or discontinuation of recommended treatment or any symptoms of suspected or actual relapse.

b. The Respondent will be monitored for sobriety by a qualified health care professional (**Sobriety Monitor**) and shall comply with the sobriety monitoring requirements set forth in the Terms of Probation for so long as he retains a New York State license to practice medicine and engages in the practice of medicine in New York State. The Sobriety Monitor's responsibilities shall include assessment of self-help group attendance and 12 step progress, as required by Paragraph 7, above, evaluation of compliance with the terms or conditions in the Order and ordering urines for drug/alcohol assay.

- i. Respondent shall submit the name of a proposed successor within seven (7) days of learning that the approved Sobriety Monitor is no longer willing or able to serve.

- ii. The Respondent will meet with the Sobriety Monitor on a regular basis and will submit to random, unannounced observed screens of blood, breath and/or urine for the presence of drugs/alcohol at the direction of the Sobriety Monitor who will report to the Office of Professional Medical Conduct immediately if a test is refused by Respondent, is positive for any unauthorized substance or if there is any other deviation from compliance with the Terms of Probation. This monitoring will be on a random, seven-day a week, twenty-four hour a day basis. The Respondent will report for a urine drug screen, blood and/or breathalyzer test within four (4) hours of being contacted by the Monitor.

- iii. The Respondent will authorize the Sobriety Monitor to submit to the Office of Professional Medical Conduct quarterly reports certifying Respondent's compliance with the Terms of Probation. Respondent's failure to comply with any of the terms must be reported within 24 hours to the Office of Professional Medical Conduct. The reports will include forensically valid results of all drug/alcohol monitoring tests to be performed at a frequency of no less than six (6) screens per month for the first twelve (12) months of the period of probation, then at a frequency of no less than two (2) screens per month for the remainder of the period of probation, in a schedule proposed by the Sobriety Monitor and approved by the OPMC. The report shall also include an assessment of self-help group attendance and 12 step progress.

- iv. Respondent shall continue to submit to random, unannounced observed screens of blood, breath and/or urine, in accordance with a schedule proposed by the Sobriety Monitor and approved by the OPMC, for so long as he retains a New York State license to

practice medicine and engages in the practice of medicine in New York State. Respondent shall cause the Sobriety Monitor to continue to submit reports verifying his compliance with this requirement and the requirement that he remain free from alcohol and all other mood altering substances.

c. Respondent shall practice medicine only when monitored in his medical practice by a licensed physician (**Practice Monitor**), board certified in an appropriate specialty as determined by the Director of the OPMC. Respondent shall make available to the Practice Monitor any and all records or access to the practice requested by the monitor, including on-site observation.

i. The Practice Monitor shall visit Respondent's medical practice at each location, on a random unannounced basis at least monthly and shall examine a selection of records maintained by Respondent, including office and patient records and prescribing information. 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 such standards or refusal to cooperate with the Practice Monitor shall be reported within 24 hours to OPMC.

ii. Respondent shall cause the Practice Monitor to submit quarterly reports to the OPMC regarding the quality of Respondent's medical practice, including the evaluation and treatment of patients, his physical and mental condition, time and attendance or any unexplained absences from work, prescribing practices and compliance or failure to comply with any Term of Probation, including Respondent's adherence to limitations of his hours of employment.

10. All expenses, including but not limited to those of complying with these Terms of Probation and the Determination and Order, shall be the sole responsibility of the Respondent.

11. Respondent shall comply with all terms, conditions, restrictions, and penalties to which he is subject pursuant to the Order of the Board. A violation of any of these terms of probation shall be considered professional misconduct. On receipt of evidence of non-compliance or any other violation of the Terms of Probation, a violation of probation proceeding and/or such other proceedings as may be warranted, may be initiated against Respondent pursuant to New York Public Health Law §230(19) or any other applicable laws.

APPENDIX II

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

IN THE MATTER
OF
MARK D. FISHER, M.D.

STATEMENT
OF
CHARGES

Mark D. Fisher, M.D., the Respondent, was authorized to practice medicine in New York State on or about July 11, 1997, by the issuance of license number 207389 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. Effective on or about February 1, 2001, the New York State Board for Professional Medical Conduct issued an Order of Conditions pursuant to New York State Public Health Law §230, attached hereto and made a part hereof as Exhibit 1, wherein Mark D. Fisher, M.D., Respondent, among other things, agreed to remain drug and alcohol free (paragraph 7) for a period of five years.
- B. On or about July 8, 2001, Respondent snorted a few lines of cocaine while at a party. On or about July 10, 2001, Respondent smoked about \$20 worth of crack cocaine.
- C. On July 11, 2001, Respondent submitted a urine sample for analysis which tested positive for cocaine.
- D. Since on or before December of 1997 Respondent has habitually used cocaine, a narcotic. He has developed cocaine dependency.
- E. Pursuant to the Order of Conditions, paragraph 9, Respondent agreed to provide a written authorization for the Committee for Physician's Health (CPH) to provide to the Director of OPMC with any/all information or documentation requested by OPMC to determine whether he is in compliance with the contract. In a letter dated December 19, 2001 CPH would not confirm or deny any information on

whether they had an open case regarding the Respondent. Thus, Respondent either failed to provide the authorization or revoked it subsequent to providing the authorization.

FIRST THROUGH SECOND SPECIFICATIONS
HAVING VIOLATED A CONDITION IMPOSED ON LICENSEE
PURSUANT TO PHL SECTION 230

Respondent is charged with professional misconduct under N.Y. Education Law §6530(29) by reason of his having violated a condition imposed upon him pursuant to Section 230 of the Public Health Law, in that Petitioner charges:

1. The facts in paragraphs A, B and C.
2. The facts in paragraphs A and E.

THIRD SPECIFICATION
BEING A HABITUAL USER OR HAVING A
PSYCHIATRIC CONDITION WHICH IMPAIRS
THE ABILITY TO PRACTICE

Respondent is charged with committing professional misconduct as defined in N.Y. Educ. Law §6530(8) by being a habitual abuser of alcohol, or being dependent on or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects, or having a psychiatric condition which impairs the licensee's ability to practice as alleged in the facts of the following:

2. The facts in paragraphs A, B, C and D.

DATED: January 9, 2002
Albany, New York


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