

Public



STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

Richard F. Daines, M.D.
Commissioner

James W. Clyne, Jr.
Executive Deputy Commissioner

February 9, 2010

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Vivian Welton, R.P.A.

Redacted Address

Wolodymyr M. Starosolsky
W. M. Starosolsky & Associates P.C.
116 John Street, 17th Floor
New York, New York 10038

Daniel Guenzburger, Esq.
NYS Department of Health
Bureau of Professional Medical Conduct
90 Church Street – 4th Floor
New York, New York 10007

RE: In the Matter of Vivian Welton, R.P.A.

Dear Parties:

Enclosed please find the Determination and Order (No. 10-21) 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), (McKinney Supp. 2007) and §230-c subdivisions 1 through 5, (McKinney Supp. 2007), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the Respondent 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,

^

Redacted Signature

James F. Horan, Acting Director
Bureau of Adjudication

JFH:djh

Enclosure

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

COPY

BPMC NO. 10-21

IN THE MATTER
OF
VIVIAN WELTON, R.P.A.

DETERMINATION
AND
ORDER

A Notice of Hearing, and Statement of Charges both dated March 18, 2009 were served upon the Respondent **VIVIAN WELTON R.P.A.** **DAVID HARRIS M.D.** Chairperson, **PROSPERE REMY M.D.** and **GARRY SCHWALL M.B.A., R.P.A-C** duly designated members of the State Board of Professional Medical Conduct, served as the Hearing Committee in this matter pursuant to Section 230(10)(e) of the Public Health Law. Administrative Law Judge **KIMBERLY A. O'BRIEN ESQ.** served as the Administrative Officer.

The Department of Health appeared by **THOMAS CONWAY ESQ.**, General Counsel, by **FRANCIS RUDDY** and **DANIEL GUENZBURGER**, of Counsel. The Respondent **VIVIAN WELTON R.P.A.** appeared in person and by Counsel **WOLODYMYR STAROSOLSKY ESQ.**

Evidence was received and argument heard, and transcripts of these proceedings were made.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

PROCEDURAL HISTORY

Notice of Hearing & Statement of Charges	March 18, 2009
Pre Hearing Conferences	May 8, 2009 & June 30, 2009
Hearing Dates	May 27, 2009 ¹ , July 9, 2009, August 27, 2009
Witnesses for Petitioner	Lydia Shajenko M.D.
Witnesses for Respondent	Hisham Ahmed Elsherbiny, Vivian Welton R.P.A.
Final Hearing Transcript Received	September 16, 2009
Parties Briefs	October 22, 2009 ²
Deliberation Date	December 16, 2009

STATEMENT OF THE CASE

The State Board of Professional Medical Conduct is a duly authorized professional disciplinary agency of the State of New York pursuant to Section 230 et seq. of the Public Health Law of New York. This case was brought by the New York State Department of Health, Office of Professional Medical Conduct (hereinafter "Petitioner" or "Department") pursuant to Section 230 of the Public Health Law. Vivian Welton, R.P.A. (hereinafter "Respondent") is charged with fourteen specifications of misconduct as defined in Section 6530(24) of the Education Law of the State of New York (hereinafter Education Law) by practicing or offering to practice beyond the scope permitted by law, or accepting and performing professional responsibilities which the licensee knows or has reason to know that he or she is not competent to perform, or performing

¹ The Department did not oppose and the Hearing Committee granted the Respondent's request for an adjournment of the first day of hearing May 20, 2009.

² Respondent was granted an extension for the submission of the brief. Portions of the Respondent's brief addressed documents and issues not before the Hearing Panel and were redacted. The parties were provided with copies of the redacted portions of the Respondent's brief and copies of the redacted brief were forwarded to the hearing panel.

without adequate supervision professional services which the licensee is authorized to perform only under the supervision of a licensed professional, except in an emergency situation where a person's life or health is in danger. The Respondent denies all the factual allegations and fourteen specifications of misconduct set forth in the Notice of Hearing and Statement of Charges attached hereto and made part of this Decision and Order, and marked as Appendix 1.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Unless otherwise noted, all findings and conclusions set forth below are the unanimous determinations of the Hearing Committee. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. Numbers below in parentheses refer to exhibits (denoted by the prefix "Ex.") or transcript page numbers ("Tr."). These citations refer to evidence found persuasive by the Hearing Committee in arriving at a particular finding. Having heard argument and considered the documentary evidence presented, the Hearing Committee hereby makes the following findings of fact:

1. Vivian Welton R.P.A., the Respondent, was authorized to practice as a registered physician's assistant in New York State on or about August 31, 1987, by the issuance of license/ registration number 003343, by the New York State Education Department (Ex. 4).
2. On or about October 2006, neurologist Lydia Shajenko M.D. entered into a supervisory relationship with the Respondent (Tr. 32-34, 491-493). Dr. Shajenko met with the Respondent to discuss Respondent's scope of practice. Respondent demonstrated that she could competently perform a neurological evaluation, and they reviewed neurological consultation and evaluation procedures and exchanged contact information (Tr. 32-34, 38, Tr. 362-365, 433- 434, 491-493).

Occasionally, Respondent contacted Dr. Shajenko directly with questions about patient care or treatment (Tr. 34 - 36, 421, 427- 428, 434-435, 492-493).

3. From on or about October 2006 through April 2008, Respondent produced and forwarded her signature stamped patient evaluation reports to Dr. Shajenko. These reports were returned to the patient medical files hand signed or signature stamped with Dr. Shajenko's name (Tr. 369-384, 487, 490, Ex. 14-27).

CONCLUSIONS OF LAW

The governing law and regulations provide that the scope of a physician's assistant's practice is limited to what is assigned by a supervising physician and within the supervising physician's scope of practice. A physician's assistant must be continuously supervised, however, a physician's assistant is not required to be in the physical presence of the supervising physician when performing services (Education Law Section 6542, 10 NYCRR Section 94.2).

CONCLUSIONS

The Hearing Committee makes the following conclusions, pursuant to the foregoing Findings of Fact. All conclusions resulted from the unanimous vote of the Hearing Committee unless otherwise specified. The Hearing Committee did not sustain the factual allegations set forth in Paragraph A and A1- A14 of the Statement of Charges (Ex. 1). Petitioner has failed to demonstrate by a preponderance of the evidence that Respondent: knew or should have known about a change in supervision, was required to initiate direct contact with her supervising physician at certain intervals, provided care to patients A-N that was beyond the scope

authorized by the supervising physician or violated accepted standards of care. Accordingly, the Hearing Committee concluded that they must dismiss the charges of misconduct as defined by Education law Section 6530(24) for each of fourteen separate patients A-N (Appendix 1).

DISCUSSION

The Hearing Committee relied heavily on the testimony of Respondent and Dr. Lydia Shajenko, Respondent's supervising physician. The Committee gave great weight to the fact that Dr. Shajenko and Respondent agree about when the supervisory relationship began, the established scope of the Respondent's practice under Dr. Shajenko, and the direct contact they had with one another.

Initially, Respondent and Dr. Shajenko met to discuss the scope of Respondent's practice under Dr. Shajenko including performance of neurological evaluations, assessments and issuance of patient care evaluation reports. They did not discuss the duration of the established supervisory relationship. Occasionally, Respondent contacted Dr. Shajenko directly to discuss patient care and treatment issues.

The Committee was concerned that the Respondent and Dr. Shajenko did not have regular direct professional contact. However, the Respondent provided credible testimony about why she did not regularly initiate direct contact with Dr. Shajenko. Respondent stated that most of her patients had similar injuries and a standard range of presentations with similar recommendations and she would not contact Dr. Shajenko directly about routine matters (Tr. 434-435, 482-484). From on or about October 2006 through April 2008, the Respondent continually forwarded patient evaluation reports stamped with her signature to Dr. Shajenko. The Respondent testified that she used a signature stamp for convenience because she produced

numerous reports all requiring her signature (Tr. 370). The patient evaluation reports she forwarded to Dr. Shajenko were routinely returned to the patient medical file with Dr. Shajenko's handwritten or stamped signature including the reports for patients A-N. The Respondent did not question Dr. Shajenko's use of a signature stamp, assuming that she too had a number of reports to sign (Tr. 390-391). Respondent believed she was communicating with Dr. Shajenko through the ongoing and uninterrupted exchange of the patient evaluation reports and had an expectation that the supervising physician would notify her if there was a problem with her work and/or a change in the supervisory relationship (Tr. 385, 437). While the Hearing Committee would have liked to have seen regular direct communications between the Respondent and her supervising physician, under the circumstances it was not unreasonable that Respondent believed she was communicating with Dr. Shajenko through the continuous exchange of patient evaluation reports.

During October 2006 through February or March 2007, when Dr. Shajenko was being compensated for her supervision of Respondent, her regular communications with Respondent were through the exchange of the patient evaluation reports. While Dr. Shajenko offered testimony that she did not signature stamp the patient evaluation reports and alleged that other people had possession and use of her signature stamp, there is nothing in the record to suggest that the Respondent had any knowledge of the alleged inappropriate or unauthorized use of Dr. Shajenko's signature stamp. Dr. Shajenko's determination that she no longer supervised Respondent as of February or March of 2007 appeared to be greatly dependent upon when she stopped being compensated for supervising the Respondent. There is no question that beginning in October 2006 the Respondent was practicing under Dr. Shajenko's grant of authority and that Dr. Shajenko and Respondent did not discuss the duration of the supervisory relationship.

Accordingly the Hearing Committee believes that the Respondent had no reason to know of a change in the supervisory relationship, and it was incumbent upon Dr. Shajenko to inquire about any change she perceived in the nature of her contact with the Respondent and supervisory responsibilities.

The Hearing Committee has carefully considered all of the evidence in the record, and unanimously concluded that the Department failed to prove any of the charges by a preponderance of the evidence. Accordingly, the Hearing Committee determined that they must dismiss all specifications and charges of misconduct against the Respondent of acting beyond or outside of the authorized scope of practice as it relates to the treatment of patients A-N.

DETERMINATION AS TO PENALTY

The Hearing Committee, pursuant to the Findings of Fact and Conclusions set forth above, determined that all charges and specifications of misconduct raised against the Respondent should be dismissed. Accordingly, the Committee determined that no action should be taken against the Respondent's license to practice as a physician's assistant in New York State.

ORDER

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

1. The First through Fourteenth Specifications of misconduct set forth in the Statement of Charges (Appendix 1) are **NOT SUSTAINED;**
2. The charges against the Respondent are **DISMISSED;**

APPENDIX I

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

IN THE MATTER
OF
VIVIAN WELTON, R.P.A.

NOTICE
OF
HEARING

TO: Vivian Welton, R.P.A.

Redacted Address

PLEASE TAKE NOTICE:

A hearing will be held pursuant to the provisions of N.Y. Pub. Health Law §230 and N.Y. State Admin. Proc. Act §§301-307 and 401. The hearing will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct on **Wednesday, May 20, 2009, at 10:00 a.m., at the Offices of the New York State Department of Health, 90 Church Street, 4th floor, New York, New York 10007**, and at such other adjourned dates, times and places as the committee may direct.

At the hearing, evidence will be received concerning the allegations set forth in the Statement of Charges, which is attached. A stenographic record of the hearing will be made and the witnesses at the hearing will be sworn and examined. You shall appear in person at the hearing and may be represented by counsel who shall be an attorney admitted to practice in New York state. You have the right to produce witnesses and evidence on your behalf, to issue or have subpoenas issued on your behalf in order to require the production of witnesses and documents, and you may cross-examine witnesses and examine evidence produced against you. A summary of the Department of Health Hearing Rules is enclosed.



**YOU ARE HEREBY ADVISED THAT THE ATTACHED CHARGES WILL BE MADE
PUBLIC FIVE BUSINESS DAYS AFTER THEY ARE SERVED.**

Department attorney: Initial here _____

The hearing will proceed whether or not you appear at the hearing. Please note that requests for adjournments must be made in writing and by telephone to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. SEAN D. O'BRIEN, DIRECTOR, BUREAU OF ADJUDICATION, (henceforth "Bureau of Adjudication"), (Telephone: (518-402-0748), upon notice to the attorney for the Department of Health whose name appears below, and at least five days prior to the scheduled hearing date. Adjournment requests are not routinely granted as scheduled dates are considered dates certain. Claims of court engagement will require detailed Affidavits of Actual Engagement. Claims of illness will require medical documentation.

Pursuant to the provisions of N.Y. Pub. Health Law §230(10)(c), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less than ten days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health whose name appears below. Pursuant to §301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide at no charge a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person. Pursuant to the terms of N.Y. State Admin. Proc. Act §401 and 10 N.Y.C.R.R. §51.8(b), the Petitioner hereby demands disclosure of the evidence that the Respondent intends to introduce at the hearing, including the names of witnesses, a list of and copies of documentary evidence and a description of physical or other evidence which cannot be

photocopied.

At the conclusion of the hearing, the committee shall make findings of fact, conclusions concerning the charges sustained or dismissed, and in the event any of the charges are sustained, a determination of the penalty to be imposed or appropriate action to be taken. Such determination may be reviewed by the Administrative Review Board for Professional Medical Conduct.

THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE BE REVOKED OR SUSPENDED, AND/OR THAT YOU BE FINED OR SUBJECT TO OTHER SANCTIONS SET OUT IN NEW YORK PUBLIC HEALTH LAW §§230-a. YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: New York, New York
March 18, 2009

Redacted Signature

Roy Nemerson
Deputy Counsel
Bureau of Professional
Medical Conduct

Inquiries should be directed to: Francis Ruddy
Assistant Counsel
Bureau of Professional Medical Conduct
90 Church Street, 4th floor
New York, New York 10007
212-417-4450

IN THE MATTER
OF
VIVIAN WELTON, R.P.A.

STATEMENT
OF
CHARGES

Vivian Welton, R.P.A., the Respondent, was authorized to practice as a registered physician assistant in New York State on or about August 31, 1987, by the issuance of license number 003343 by the New York State Education Department.

FACTUAL ALLEGATIONS

- A. From on or about September 28, 2007 through on or about April 8, 2008, Respondent practiced beyond the scope permitted by law, when she evaluated, treated and/or performed procedures, to wit, initial comprehensive neurological consultations evaluations, on the following patients at Valley Medical Care, P.C., 71 South Central Avenue, Valley Stream, New York, without adequate supervision by the identified supervising physician:
1. Patient A (patients are identified in Exhibit A) on or about September 28, 2007.
 2. Patient B on or about October 26, 2007.
 3. Patient C on or about October 26, 2007.
 4. Patient D on or about November 29, 2007.
 5. Patient E on or about November 29, 2007.
 6. Patient F on or about November 29, 2007.
 7. Patient G on or about November 29, 2007.
 8. Patient H on or about March 18, 2008.



9. Patient I on or about March 18, 2008.
10. Patient J on or about March 18, 2008.
11. Patient K on or about March 18, 2008.
12. Patient L on or about April 8, 2008.
13. Patient M on or about April 8, 2008.
14. Patient N on or about April 8, 2008.

SPECIFICATION OF CHARGES
FIRST THROUGH FOURTEENTH SPECIFICATIONS
PRACTICING BEYOND THE SCOPE PERMITTED BY LAW

Respondent is charged with committing professional misconduct as defined by N.Y. Education Law §6530(24) by practicing or offering to practice beyond the scope permitted by law, or accepting and performing professional responsibilities which the licensee knows or has reason to know that he or she is not competent to perform, or performing without adequate supervision professional services which the licensee is authorized to perform only under the supervision of a licensed professional, except in an emergency situation where a person's life or health is in danger, as alleged in the facts of:

1. Paragraphs A and A1 as to Patient A.
2. Paragraphs A and A2 as to Patient B.
3. Paragraphs A and A3 as to Patient C.
4. Paragraphs A and A4 as to Patient D.
5. Paragraphs A and A5 as to Patient E.
6. Paragraphs A and A6 as to Patient F.
7. Paragraphs A and A7 as to Patient G.
8. Paragraphs A and A8 as to Patient H.

9. Paragraphs A and A9 as to Patient I.
10. Paragraphs A and A10 as to Patient J.
11. Paragraphs A and A11 as to Patient K.
12. Paragraphs A and A12 as to Patient L.
13. Paragraphs A and A13 as to Patient M.
14. Paragraphs A and A14 as to Patient N.

DATE: March 18, 2009
New York, New York

Redacted Signature

Roy Nemerson
Deputy Counsel
Bureau of Professional Medical Conduct