



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York

Mark R. Chassin, M.D., M.P.P., M.P.H.
Commissioner

February 11, 1993

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Simon Wapnick, M.D.
243 Juniper Circle East
Lawrence, New York 11559

William L. Wood, Jr., Esq.
Wood & Scher
The Harwood Building
Scarsdale, New York 10583

Dianne Abeloff, Esq.
New York State Department of Health
Bureau of Professional Medical Conduct
5 Penn Plaza - Sixth Floor
New York, New York 10001-1810

RE: In the Matter of Simon Wapnick, M.D.

Dear Dr. Wapnick, Mr. Wood and Ms. Abeloff:

Enclosed please find the Determination and Order (No. ARB-92-97) 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required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate.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
Corning Tower - Fourth Floor (Room 438)
Empire State Plaza
Albany, New York 12237

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

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IN THE MATTER : ADMINISTRATIVE
OF : REVIEW BOARD
SIMON WAPNICK, M.D. : DETERMINATION
: AND ORDER
: ORDER NO. ARB-92-97
-----X

A quorum of the Administrative Review Board for Professional Medical Conduct (hereinafter the "Review Board"), consisting of ROBERT M. BRIBER, MARYCLAIRE B. SHERWIN, EDWARD C. SINNOTT, M.D. and WILLIAM A. STEWART, M.D.¹ held deliberations on January 20, 1993 to review the Professional Medical Conduct Hearing Committee's (hereinafter the "Hearing Committee") November 2, 1992 Determination and Order finding Dr. Simon Wapnick guilty of professional misconduct and placing him on five years probation. Dr. Wapnick and the Department of Health both requested the review through Notices of Review which the Board received on November 9, 1992 and November 12, 1992 respectively. JAMES F. HORAN, ESQ. served as Administrative Officer to the Review Board. T. Lawrence Tabak, Esq. submitted a brief to the Review Board on behalf of Dr. Wapnick on December 9, 1992 and Diane Abeloff, Esq. submitted a brief and filed a response with the Review Board on behalf of the Department of Health on December 3, 1992 and December 18, 1992 respectively.

¹ At the time at which the Administrative Review Board met to deliberate this case, only four members of the five member Administrative Review Board that was created pursuant to Chapter 606 of the Laws of 1991 had been confirmed.

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 than 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)].

Very truly yours,

Tyrone T. Butler, nam
Tyrone T. Butler, Director
Bureau of Adjudication

TTB:nam
Enclosure

cc: Hon. Dean G. Skelos

SCOPE OF REVIEW

New York Public Health Law (PHL) §230(10)(i), §230-c(1) and §230-c(4)(b) provide that the Review Board shall review:

- whether or not a hearing committee determination and penalty are consistent with the hearing committee's findings of fact and conclusions of law; and
- whether or not the penalty is appropriate and within the scope of penalties permitted by PHL §230-a.

Public Health Law §230-c(4)(b) permits the Review Board to remand a case to the Hearing Committee for further consideration.

Public Health Law §230-c(4)(c) provides that the Review Board's Determinations shall be based upon a majority concurrence of the Review Board.

HEARING COMMITTEE DETERMINATION

The Office of Professional Medical Conduct had charged Dr. Wapnick with gross negligence, gross incompetence, negligence on more than one occasion and incompetence on more than one occasion, arising from the care which Dr. Wapnick provided to six patients who were designated as Patients A through F. The Hearing Committee sustained the charges of:

- negligence on more than one occasion involving the care rendered to Patients A, B, C, D & E;
- incompetence on more than one occasion involving the care rendered to Patients A, B, C, D & E;
- gross incompetence arising from the care rendered to Patients B, C, D & E; and

- gross negligence involving the care rendered to Patients B, D & E.

At page 15 of the Hearing Committee's Determination and Order, the Hearing Committee indicated that they were sustaining the specification charging Dr. Wapnick with gross negligence in caring for Patient A, but on page 20 of the Determination and Order, the Committee concluded that Dr. Wapnick's negligence in caring for Patient A did not rise to the level of gross negligence.

The Hearing Committee found that the Respondent demonstrated a pattern of carelessness and inattention to detail in his care of five of the six patients involved in these charges. The Committee found that the failure to exercise reasonable care rose to the level of gross negligence in three cases and gross incompetence on four occasions. The Committee found that the Respondent was not competent to practice the profession in the absence of a significant period of monitoring and rehabilitation, but the Committee found that the Respondent was a candidate for rehabilitation. The Committee revoked the Respondent's license to practice, but stayed the revocation and placed the Respondent on probation and required that the Respondent obtain a monitoring physician at every hospital where the Respondent maintains surgical privileges. The monitoring physician is to render second opinions on all the Respondent's surgical cases and supervise the Respondent during surgery. The Hearing Committee noted that successful compliance by the Respondent, with the terms of probation, should provide the Respondent with the necessary skills

and judgement to practice medicine safely and effectively.

REQUESTS FOR REVIEW

The Department of Health has asked the Review Board to overturn the Hearing Committee's Determination to place the Respondent on probation. The Department argues that monitoring the Respondent's surgical practice is not a proper penalty due to the poor care that the Respondent provided in these cases. The Department asks that the Review Board revoke the Respondent's license. The Department also urges the Review Board to correct a typographical error in the Determination on page 15, in which the Hearing Committee appeared to sustain a finding of gross negligence against the Respondent concerning the care provided to Patient A.

The Respondent contends that the preponderance of the evidence does not support the Hearing Committee's findings because the Committee failed to give credence to the testimony of all the witnesses at the hearing. The Respondent disputes the findings that are at odds with the hearing testimony of the Respondent and his expert witness and disputes the Committee's findings based upon the patients' hospital charts rather than overwhelming opinion testimony in the Respondent's favor. The Respondent argues that he was denied due process because the Committee substituted its judgement without regard to the allegations and specifications set out in the Statement of Charges.

As to the penalty, the Respondent argues that the

Hearing Committee's imposition of a monitor on the Respondent's practice is onerous and inappropriate. The Respondent argues that monitoring would impose a hardship upon the Respondent that would make the practice of medicine and surgery difficult if not impossible.

RESPONDENT'S CHANGE OF COUNSEL

On January 6, 1993, William L. Wood, Esq. advised our Administrative Officer that Mr. Wood had substituted for Lawrence Tabak, Esq. as counsel for Dr. Wapnick. Mr. Wood requested an adjournment of the scheduled January 20, 1993 Deliberation in this case, so that Mr. Wood could decide whether to make an additional submission to the Board on Dr. Wapnick's behalf. The Department opposed Mr. Wood's request. Our Administrative Officer Mr. Horan did not adjourn the scheduled deliberation and did not allow the Respondent to make an additional submission because:

1. the Respondent had an ample opportunity to make all the submissions permitted under PHL 230-c through his prior counsel; and
2. the statute does not permit an adjournment of a scheduled deliberation or the submission of additional papers by the parties due to the change of a party's counsel during the course of an appeal.

REVIEW BOARD DETERMINATION

The Review Board has considered the entire record below and the briefs which counsel have submitted.

The Respondent's objections to the Hearing Committee Determination which are based on a denial of due process are beyond the Board's scope of review and should be raised in a different forum.

The Review Board votes unanimously to sustain the Hearing Committee's Determination finding Dr. Wapnick guilty of professional misconduct, except that we amend the Determination at Page 15 to correct a typographical error.

At Page 15, the Determination states that the Hearing Committee sustained the Second Specification in the Statement of Charges, gross negligence, based on the allegations sustained in the Statement of Charges paragraphs A, A.2 and A.3. We believe that the Committee meant to state that the basis for sustaining the Second Specification were the facts that were sustained from paragraphs B and B.1, rather than A, A.2 and A.3. The Second Specification in the Statement of Charges cites to paragraphs B and B.1, relating to the care rendered to Patient B, rather than A, A.2 & A.3. Paragraphs A, A.2 and A.3 involve the First Specification, concerning Patient A's care. The Hearing Committee voted not to sustain the First Specification in a separate finding on page 16 of the Determination. At page 27 of the Hearing Committee Determination, the Committee indicates that they sustained a Specification of gross negligence relating to

Patient B rather than Patient A. The Specification relating to Patient B would have to be the Second Specification from the Statement of Charges. The finding on Page 15, which sustains the Second Specification, therefore, should properly refer to the allegations in Paragraphs B and B.1., which deal with the care which the Respondent provided to Patient B.

The Review Board sustains the remainder of the Hearing Committee's Determination that the Respondent was guilty of gross incompetence, gross negligence and negligence and incompetence on more than occasion. The Determination is consistent with the Committee's findings and conclusions and is supported by the evidence from the hearing.

The Committee sustains the Hearing Committee's Determination to revoke Dr. Wapnick's license to practice medicine, but we vote unanimously to overturn the Committee's stay of the revocation.

The Hearing Committee found that the Respondent demonstrated a pattern of carelessness and inattention to detail with five of the six cases reviewed during the hearing. The Committee found further that the Respondent's failure to exercise the care that a reasonable physician would exercise rose to the level of gross negligence in three cases and that the Respondent demonstrated gross incompetence in his management of four of the cases (Hearing Committee Determination p. 28). The Committee found that the Respondent's carelessness resulted in errors which would not have been made by a reasonably prudent surgeon. The

Committee found that the Respondent's treatment of the patients, combined with his testimony at the hearing, demonstrated a lack of the basic knowledge necessary to meet minimally acceptable standards of practice (Hearing Committee Determination p.19).

The Review Board concludes that the Hearing Committee's Determination to revoke the Respondent's license to practice medicine is consistent with these above mentioned findings and conclusions and is an appropriate penalty under PHL §230-a. The Review Board concludes, in addition, that the Hearing Committee's Determination to stay the revocation and impose probation and monitoring on the Respondent's license is not consistent with the Hearing Committee's findings and conclusions that the Respondent was guilty of gross negligence and gross incompetence.

The Hearing Committee stated that they found the Respondent to be a candidate for rehabilitation, but the Committee cited nothing from the record to support that conclusion (Hearing Committee Determination p.29). We find that conclusion to be unsupported by the record and inconsistent with the Hearing Committee's finding that the Respondent demonstrated a lack of the basic skill and knowledge necessary to meet minimally acceptable standards of practice (Hearing Committee Determination p.19).

The Review Board found that the Respondent, in his testimony at the hearing, was not forthcoming in acknowledging the mistakes he made in the surgical care and after care for the patients involved in this case. Throughout his testimony, the Respondent insisted that he had provided proper care and he stated

that he would follow the same exact procedures if he had these cases to do over again.

The Review Board can find nothing in the record in general or the Respondent's testimony in particular to indicate that the Respondent can be rehabilitated. The Respondent has already received four years of specialty training to prepare him as a surgeon, but the Hearing Committee found him to lack the basic skills and knowledge necessary to meet minimally accepted standards of practice. The Review Board considered limiting the Respondent's license to prohibit him from performing surgery, as an alternative to revocation, but we see no indication from the record that the Respondent would be any better qualified to practice general medicine other than surgery (see Hearing Committee Determination relating to after care for Patients B, p.21; C, p.22; and D, P.23).

The Review Board wishes to note for the record, that if the Respondent ever becomes a candidate for restoration of his license from the Education Department, we recommend to the Restoration Committee that if they consider restoring the Respondent's license, that license should be restricted so that the Respondent is not permitted to practice surgery.

ORDER

NOW, based upon this Determination, the Review Board issues the following **ORDER**:

1. The October 19, 1992 Determination and Order of the Hearing Committee on Professional Medical Conduct finding Simon Wapnick, M.D. guilty of gross negligence, gross incompetence, incompetence on more than one occasion and negligence on more than one occasion is hereby sustained, except that the Hearing Committee's finding sustaining the Second Specification from the Statement of Charges, gross negligence in treating Patient B, is amended as noted in this Determination.
2. The Hearing Committee's Determination and Order revoking Dr. Wapnick's license to practice medicine in the State of New York is hereby sustained. The Hearing Committee's Determination and Order staying the revocation of Dr. Wapnick's license is overturned. The Respondent's license to practice medicine in the State of New York is revoked.

ROBERT M. BRIBER

MARYCLAIRE B. SHERWIN

EDWARD C. SINNOTT, M.D.

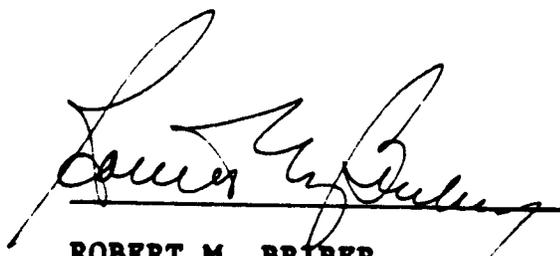
WILLIAM A. STEWART, M.D.

IN THE MATTER OF SIMON WAPNICK, M.D.

ROBERT M. BRIBER, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Simon Wapnick, M.D.

DATED: Albany, New York

2/4, 1993



ROBERT M. BRIBER

IN THE MATTER OF SIMON WAPNICK, M.D.

MARYCLAIRE B. SHERWIN, a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Simon Wapnick, M.D.

DATED: Albany, New York
February 9, 1993

Maryclaire B. Sherwin

MARYCLAIRE B. SHERWIN

IN THE MATTER OF SIMON WAPNICK, M.D.

EDWARD C. SINNOTT, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Simon Wapnick, M.D.

DATED: Albany, New York

February 3, 1993

A handwritten signature in cursive script, appearing to read "Edward C. Sinnott", written over a horizontal line.

EDWARD C. SINNOTT, M.D.

IN THE MATTER OF SIMON WAPNICK, M.D.

WILLIAM A. STEWART, M.D., a member of the Administrative Review Board for Professional Medical Conduct, concurs in the Determination and Order in the Matter of Simon Wapnick, M.D.

DATED: Albany, New York

February 3, 1993

William A. Stewart M.D.

WILLIAM A. STEWART, M.D.