

**HEALTH PROFESSIONS APPEAL AND REVIEW BOARD**

PRESENT:

Thomas Kelly, Vice-Chair, Presiding  
Celia Denov, Board Member  
Christopher King, Board Member

Review held on April 2, 2014 at Toronto, Ontario

**IN THE MATTER OF A COMPLAINT REVIEW UNDER SECTION 29(1)** of the *Health Professions Procedural Code*, Schedule 2 to the *Regulated Health Professions Act, 1991*, Statutes of Ontario, 1991, c.18, as amended

**B E T W E E N:**

**DANIEL HORBAN, OT**

Applicant  
Respondent by cross-review

and

**SARAH HARDY**

Respondent  
Applicant by cross-review

Appearances:

The Applicant:  
For the Applicant:  
The Respondent:  
For the College of Occupational Therapists  
of Ontario:

Daniel Horban, OT  
Aaron Murray, Counsel  
Sarah Hardy  
Gillian Slaughter, Manager, Investigations  
and Resolutions

**DECISION AND REASONS**

**I. DECISION**

1. It is the decision of the Health Professions Appeal and Review Board to confirm the decision of the Inquiries, Complaints and Reports Committee of the College of Occupational Therapists of Ontario to:
  - (i) issue a caution to Daniel Horban, OT, to attend before a panel of the Inquiries, Complaints and Reports Committee for a verbal caution regarding his obligations as a regulated health care professional to accurately report on a client's functional presentation, to adequately inquire about, review and consider the impact of a client's cognitive deficits in his assessment, and to use appropriate language and tone in his reports;
  - (ii) to provide guidance to Daniel Horban, OT by:
    - (a) recommending that he try to strike a better balance, and to ensure that he thoroughly reviews and analyzes the reports of his client's practitioners which relate to psychological and cognitive health, and not merely physical health and;
    - (b) encouraging him to carefully review, and where appropriate, to cite healthcare practitioners reports that raise salient points which do not support his point of view.
2. This decision arises from a request made to the Health Professions Appeal and Review Board (the Board) by Daniel Horban, OT (the Applicant and Respondent by cross-review) to review a decision of the Inquiries, Complaints and Reports Committee (the Committee) of the College of Occupational Therapists of Ontario (the College). The decision concerned a complaint made by Sarah Hardy, (the Respondent and Applicant by cross-review) regarding the conduct and actions of the Applicant.
3. The Committee investigated the complaint and decided as described above.

## **II. BACKGROUND**

4. On May 3, 2009, the Respondent's mother (the patient) was in a motor vehicle accident.

5. On April 24, 2012, the Applicant, in his capacity as Occupational Therapist, performed an In-Home Occupational Therapy Assessment of the patient. The purpose of the assessment was to determine whether the patient was entitled to Attendant Care Benefits and if so, if the benefits were being paid in the appropriate amount. The assessment was requested by an independent insurance claims manager and adjuster.
6. Following the review of materials from other health care practitioners, the assessment and administration of a test to the patient, the Applicant wrote a report to the patient's insurer.
7. The assessment and resulting report forms the basis of the Respondent's complaint.

### **The Complaint and the Response**

8. The Respondent complained that the Applicant:
  - made false claims and inaccurate statements in his assessment report about the patient;
  - misused the reports of other healthcare professionals;
  - is incompetent because he failed to ask appropriate questions during the assessment and has poor observational skills; and
  - is biased in his report in favour of the insurance company that hired him.
9. The Applicant responded to and refuted each of the Respondent's specific allegations.
10. He noted that his assessment and report were conducted as an Insurer Examination in the motor vehicle accident sector. He referred the Committee to the provisions of Form 53 of the *Courts of Justice Act* which noted that an assessment be "*fair, objective and nonpartisan*". In addition, he referred the Committee to Standard 3.B, Standard 3.B-1 and Standard 4.A of the Standards for Occupational Therapy Assessment of the College

of Occupational Therapists of Ontario, which he believed to be the most pertinent in the patient's situation.

11. He submitted that he has always, and continues to practice professionally, meeting all relevant Guidelines for Practice and Standards for Practice as outlined by the College of Occupational Therapists of Ontario and by adhering to all relevant legislation.
12. It was his opinion that he completed an impartial, unbiased, professional assessment which met all relevant Guidelines.

### **The Committee's Decision**

13. The Committee investigated the complaint and decided to:
  - (i) issue a caution to the Applicant to attend before a panel of the Committee for a verbal caution regarding his obligations as a regulated health care professional to accurately report on a client's functional presentation, to adequately inquire about, review and consider the impact of a client's cognitive deficits in his assessment, and to use appropriate language and tone in his reports;
  - (ii) to provide guidance to the Applicant by:
    - (a) recommending that he try to strike a better balance, and to ensure that he thoroughly reviews and analyzes the reports of his client's practitioners which relate to psychological and cognitive health, and not merely physical health and;
    - (b) encouraging the Applicant to carefully review, and where appropriate, to cite healthcare practitioner's reports that raise salient points which do not support his point of view.

### **III. REQUEST FOR REVIEW**

14. Dissatisfied with the decision of the Committee, in a letter dated July 17, 2013, the Applicant requested that the Board review the Committee's decision. The Respondent, dissatisfied with the Committee's decision, in a letter dated August 25, 2013 also requested that the Board review the Committee's decision.

### **IV. POWERS OF THE BOARD**

15. After conducting a review of a decision of the Committee, the Board may do one or more of the following:
  - a) confirm all or part of the Committee's decision;
  - b) make recommendations to the Committee;
  - c) require the Committee to exercise any of its powers other than to request a Registrar's investigation.
16. The Board cannot recommend or require the Committee to do things outside its jurisdiction, such as make a finding of misconduct or incompetence against the member, or require the referral of allegations to a discipline hearing that would not, if proved, constitute either professional misconduct or incompetence.

### **V. ANALYSIS AND REASONS**

17. Pursuant to section 33(1) of the *Health Professions Procedural Code* (the *Code*), being Schedule 2 to the *Regulated Health Professions Act, 1991*, the mandate of the Board in a complaint review is to consider either the adequacy of the Committee's investigation, the reasonableness of its decision, or both.
18. The Applicant's Counsel and the Respondent made submissions at the review.

## **Adequacy of the Investigation**

19. In reviewing the adequacy of the Committee's investigation, the function of the Board is to examine the information and documentation obtained during the course of the investigation, which is then considered by the Committee. An investigation need not be exhaustive, but in order to be considered adequate, information that is sufficient and relevant so as to allow the Committee to fulfill its statutory function must be obtained. If it is clear that there is other information that, if obtained, could have changed the outcome of the Committee's decision, then the investigation might not be considered adequate.
20. The Board has considered the submissions of the parties, examined the Record of Investigation (the Record), reviewed the Committee's decision, and has determined that the Committee's investigation was adequate for the following reasons.
21. After reviewing the Record, the Board finds that the Committee's investigation covers the complaint and events in question and includes the relevant documentation required to review the Applicant's conduct and actions. Specifically, the Board notes that the Committee's investigation included:
  - the complaint by the Respondent dated August 14, 2012;
  - reply by the Applicant to the Respondent's complaint dated August 23, 2012 with enclosures including his Independent In Home Occupational Therapy Assessment dated April 24, 2012 and corresponding Form I;
  - additional letter dated September 5, 2012 enclosing materials received from the Respondent;
  - letter of response to the Respondent's additional letter and materials from the Applicant dated September 26, 2012;
  - additional information sent to the College by the Respondent on September 28, 2012;
  - the Applicant's conduct history with the Committee.

22. The Applicant's Counsel submitted that his challenge with the adequacy of the investigation is that the Committee failed to review and consider much of the information before it and did not involve a submission that the Committee should have had more documentation before it.
23. With respect, the Board finds that the submission that the Committee failed to review and consider much of the information before it is actually a submission regarding the reasonableness of the Committee's decision and is not a submission relating to adequacy. Adequacy of the investigation requires a consideration of what information the Committee obtained in its investigation. Reasonableness of the decision requires a consideration of what the Committee did with that information and why it came to its decision. The Applicant's Counsel's submissions are that the Committee did not look at certain of the information that it obtained, which is a reasonableness argument. The Board will thus deal with the Applicant's Counsel's submissions in this regard under the reasonableness section of this decision.
24. The Board concludes that the Committee collected and considered the relevant information to assess the complaint. The complaint concerned a single interaction between the Applicant and the patient, being the assessment of the patient and the resulting report. The Committee obtained the report in question and allowed the parties opportunities to present their points of view and to respond to the other party's points of view. Neither party submitted that the Committee failed to obtain any necessary information.
25. There is no indication of further information that might reasonably be expected to have affected the decision, should the Committee have acquired it. Accordingly, the Board finds that the Committee's investigation was adequate.

## **Reasonableness of the Decision**

26. In considering the reasonableness of the Committee's decision, the question for the Board is not whether it would arrive at the same decision as the Committee, but whether the Committee's decision can reasonably be supported by the information before it and can withstand a somewhat probing examination. In doing so, the Board considers whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law.
27. The Applicant's Counsel submitted that, for the most part, the Committee took no issue with the conduct or report of the Applicant and chose to take no further disciplinary action. He submitted that the Committee's decision to caution the Applicant came about because the Committee did not review or consider some of the information before it.
28. The Respondent submitted that the decision should stand and in fact should be stronger, that the aggressive and rude attitude by the Applicant "pushed her mother down". She submitted that the Applicant, in his response, did not address many of the issues but simply redirected the issues.
29. After considering the parties' submissions, examining the Record, and reviewing the Committee's decision, the Board concludes for the following reasons that the decision is reasonable.
30. The Board notes that the Committee reviewed in detail and reasonably relied on the information in the Record to support its conclusions regarding the reasonableness and appropriateness of the Applicant's conduct and actions.
31. The Board notes that the Committee performs a screening function to determine what, if any action it should take regarding a complaint. It conducts a paper review of the written information gathered in the investigation. It cannot make findings of professional misconduct or incompetence. If the Committee has concerns that specific allegations



may, if proven, demonstrate professional misconduct or incompetence, it can refer the complaint to the Discipline Committee, which does conduct hearings with sworn evidence. If the matter is not referred to the Discipline Committee, the Committee has discretion to choose from a broad range of remedial dispositions to address any areas of concern about an individual OTs practice.

32. As a result of its consideration of the information obtained in its investigation, the Committee had a number of concerns and determined to issue a verbal caution to the Applicant in a number of areas and to provide guidance to him in other areas.
33. For consistency, the Board's analysis of the Committee's conclusions and decisions follows, using the Committee's categorization of the multiple issues/concerns.

#### **Concern One**

##### ***The Applicant made false claims and inaccurate statements in his assessment report about the patient***

34. The Committee considered the following three specific areas in connection with this concern:
  - i) the Applicant's Use of "Expectations";
  - ii) the statement that the patient declined to partake in tests; and
  - iii) the cognitive assessment of the patient.

##### ***Use of "Expectations"***

35. The Committee noted the Applicant's use of "Expectations" in his report wherein he wrote he, "would have expected the client capable of participating fully in formal physical testing" and that he "would have expected the client capable of demonstrating great functional abilities at this stage ... ."

36. The Committee stated, “to write of one’s ‘expectations’ in an in-home occupational assessment is to use strong language, and must, of necessity, be accompanied by strong evidence supporting the statement.”
37. In the absence of such strong evidence, the Committee asserted that the Applicant should have been more reserved or circumspect in the tone of his report. In the opinion of the Committee, a more client-centered approach is one which does not express such expectations about client outcomes.
38. The Committee noted the Applicant’s conduct history before this Committee and that it has previously offered him guidance with respect to the fact that tone and overall presentation of findings can affect interpretation of such findings and to be mindful of verbal and non-verbal communication. It stated that the similarity between the current complaint and prior matters before the Committee was of concern and it decided to issue a verbal caution to the Applicant about the use of appropriate language and tone in his reports.
39. The Applicant’s Counsel submitted that there was “strong evidence” to support the Applicant’s comments and that the Committee failed to provide any indication of what it would consider “strong evidence” nor did it acknowledge any of the evidence the Applicant had to support his comments.
40. The Committee noted that it closely reviewed the In Home Occupational Therapy Assessment made by the Applicant; the multiple submissions of the Applicant and the Respondent; and had regard to the Occupational Therapy Report, dated May 28 2012 written by Ms. Sarah Rustin, the patient’s treating occupational therapist, about her attendance at the assessment of the patient by the Applicant on April 24, 2012.
41. The Board notes that the Committee reviewed the Respondent’s complaint and the Applicant’s response in connection with this concern. It is not incumbent upon the

Committee to detail each piece of information in its decision which enabled it to come to its conclusion.

42. The Board adopts the reasoning of the Supreme Court of Canada case, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 in which Abella J. stated as follows:

Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

43. This decision stands for the proposition that reasons need not include all the arguments or details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result. This proposition applies equally to the reasons given by administrative tribunals.
44. The Board finds the Committee's conclusion in this regard to be reasonable as it is a decision which falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law.
45. In addition, the Board finds reasonable the Committee's decision to caution the Applicant due to its concerns. Among the array of educative or remedial dispositions available to the Committee, the decision to caution is one of the available dispositions. A caution is advisory and intended to be remedial; it is not a sanction. The *Code* requires the Committee to consider the Applicant's conduct history and, as noted by the Committee, it had previously offered him guidance with respect to the fact that tone and overall

presentation of findings can affect interpretation of such findings and to be mindful of verbal and nonverbal communication. The Committee reasonably took this fact into consideration in determining to issue a verbal caution.

***Declining to partake in tests and Cognitive Assessment***

46. The Committee considered that the Respondent asserted that the patient did not decline to partake in tests but simply sought rests, whereas the Applicant disagreed.
47. The Committee considered the information contained in the report of the patient's treating occupational therapist, who was present for the Applicant's assessment and who disagrees with the Applicant's position in this regard.
48. The Committee concluded that the patient did not decline to participate in all range of motion testing as reported by the Applicant, based on the information before it from the patient, the Respondent and the patient's treating occupational therapist.
49. The Committee thus found that there was evidence before it that the Applicant's report contained inaccuracies with regard to the issue of declining to partake in tests.
50. The Committee then considered the issue of cognitive assessment and concluded that the patient demonstrated significant cognitive deficits on the Montréal Cognitive Assessment test (MOCA) related to visual spatial and executive function, naming, memory, attention, language, orientation and delayed recall. The Committee concluded these are serious concerns which appear to have been heavily discounted by the Applicant.
51. The Committee further found that the Applicant appeared to have ignored the emotional social sequelae that the patient seems to have experienced as a consequence of her motor vehicle accident. In particular, the Committee noted that the Applicant made little reference to the patient's diagnosis of post-traumatic stress disorder as well as the grief she experienced as a consequence of the loss of her husband in the accident.

52. The Committee concluded that it had significant concerns about the Applicant's assessment of the patient as it related to her cognitive presentation and the consequence to her function.
53. In the Committee's opinion, there was sufficient information before the Committee demonstrating the presence of inaccurate statements in the Applicant's report.
54. For these reasons, the Committee decided to issue a verbal caution to the Applicant about the importance of accurately and completely reporting on the patient's functional presentation, as well as his obligation to adequately inquire about, review and consider the impact of the patient's cognitive deficits in his assessment.
55. The Applicant's Counsel submitted, that several specific pieces of information in the Record substantiated that there was "strong" evidence and questioned the Committee's conclusion that there was an "absence of strong evidence" when the Committee stated its conclusions regarding the "expectations" issue.
56. In addition, he submitted that the Committee did not fully consider the information in the Record regarding the Applicant's cognitive assessment of the patient. He pointed out that the Committee referenced "page 54" of the Applicant's report, when, in fact, there was no page 54, and pointed out a number of other references to the patient's cognitive difficulties contained in the Assessment report.
57. The Board acknowledges that the Committee erred when it referred to "page 54" because it does not exist. But the Board finds that inadvertent incorrect reference or the fact that there are other specific references to the patient's cognitive state and functioning in the Applicant's report do not invalidate the Committee's conclusions regarding the Applicant's cognitive assessment of the patient.

58. The Committee, in performing its screening function, came to the conclusion that it had concerns regarding the Applicant's conduct and actions pertaining to these two issues, and determined to caution the Applicant to address its concerns.
59. The Board finds that the Committee provided sufficient reasons to support its conclusion that there was sufficient information before it demonstrating the presence of inaccurate statements in the Applicant's report and its conclusion meets the *Dunsmuir* test, in that it is a decision which falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law.
60. The Board further finds the Committee's decision to issue a verbal caution to address its concerns in this regard to be reasonable as the caution is one of the dispositions available to the Committee, it addresses the Committee's concerns, and provides guidance to the Applicant in his future practice.

## **Concern two**

### ***The Applicant misused the reports of other healthcare providers***

61. The Committee concluded that it does not believe the Applicant is in a position to make an assessment as to the honesty of the other healthcare provider reports. It noted that, as required by standard 2B of the *Standards for Occupational Therapy Assessments*, he can review the reports, compare them to the information he obtained during the assessment, and make a reasonable effort to ensure currency and accuracy of information collected from other sources. It further noted that he is not obliged to determine if the report of another health practitioner has false information. Accordingly, the Committee determined it would take no further action in response to this concern.
62. However, the Committee was concerned that the Applicant quoted largely from the practitioners whose opinions coincided with his own. The Committee noted that it appears that the Applicant sought evidentiary support from a select few practitioners to reinforce his decision and disregarded evidence from practitioners whose opinions he did

not share. The Committee decided to recommend to the Applicant that he try to strike a better balance, and to ensure that he thoroughly reviews and analyzes the reports of his client's practitioners which relate to psychological and cognitive health, not merely physical health. Moreover, the Committee encouraged the Applicant to carefully review, and where appropriate, to cite other health care practitioners' reports that raise salient points which do not support his point of view. Other than offering this guidance to the Applicant, the Committee determined it would take no further action in response to this concern.

63. The Board finds these determinations by the Committee to be reasonable. They were within the realm of the Committee's expertise. There is no persuasive information in the Record or advanced at the Review to demonstrate that the Committee's opinions on these points are inappropriately applied or that the rationale was unsupported.

### **Concern Three**

***The Applicant is incompetent because he failed to ask appropriate questions during the assessment and has poor observational skills.***

64. The Committee agreed with the Applicant's statement that the patient's shower bars are not assistive devices and that there is no information before it that the Applicant's observations and reporting of the patient sitting tolerances were due to a lack of observational skills.
65. Accordingly, the Committee made no finding that the Applicant lacks observational skills.
66. Regarding the Respondent's submission that the Applicant failed to make adequate inquiries about the patient's ability to take public transit, the Committee was of the opinion that the Applicant did not sufficiently probe into the patient's transportation and travel concerns. The Committee found that he did not inquire about her ability or inability

to take public transit but relied instead on the information in the physician's report to draw the conclusion that public transit was an option for the patient.

67. The Committee determined that this fact, combined with the Applicant's failure to make further inquiries about the patient's cognitive impairments (as discussed previously), led the Committee to agree that the Applicant failed to ask appropriate questions of the patient during the assessment.
68. The Committee noted that occupational therapists are required to use safe tools and assessment methods together with adequate information for the analysis of the patient's occupational performance issues in relation to the request for service.
69. The Committee stressed the importance of gathering adequate subjective and objective information from the client as accurately as possible. For the reasons as stated, the Committee determined to issue a verbal caution to the Applicant in response to this concern.
70. In addition, the Board finds these determinations by the Committee to be reasonable. They were within the realm of the Committee's expertise. There is no persuasive information in the Record or advanced at the Review to demonstrate that the Committee's opinions on these points are inappropriately applied or that the rationale was unsupported.
71. The Board finds the Committee's decision to issue a verbal caution as a result of its concerns to be reasonable as the decision to issue a verbal caution is one of the dispositions available to the Committee amongst its array of dispositions. It is advisory and intended to be remedial; it is not a sanction.



## **Concern Four**

*The Applicant's report is biased in favour of the insurance company that hired him.*

72. The Committee determined that there was no information before the Committee that indicated that the Applicant was biased in favor of the referral source, the insurer. It noted that inaccuracies in the report are not evidence of bias, nor are differences of opinion between occupational therapists.
73. For this reason, the Committee took no further action with respect to this concern.
74. The Board finds the Committee's conclusion regarding this issue to be reasonable as it is based on information in the Record and the Committee's expertise. There was no persuasive information in the Record or advanced at the Review to demonstrate that the Committee's opinion on this point was inappropriately applied or that its rationale was unsupported.

## **Conclusion**

75. For the reasons as stated, the Board finds the Committee's investigation to be adequate and its decision to be reasonable.

## **VI. DECISION**

76. Pursuant to section 35(1) of the *Code*, the Board confirms the Committee's decision to:
- (i) issue a caution to the Applicant to attend before a panel of the Committee for a verbal caution regarding his obligations as a regulated health care professional to accurately report on a client's functional presentation, to adequately inquire about, review and consider the impact of a client's cognitive deficits in his assessment, and to use appropriate language and tone in his reports;

- (ii) to provide guidance to the Applicant by:
  - (a) recommending that he try to strike a better balance, and to ensure that he thoroughly reviews and analyzes the reports of his client's practitioners which relate to psychological and cognitive health, and not merely physical health and;
  - (b) encouraging the Applicant to carefully review, and where appropriate, to cite healthcare practitioners reports that raise salient points which do not support his point of view.

ISSUED August 6, 2014



---

Thomas Kelly



---

Celia Denov



---

Christopher King