

HEALTH PROFESSIONS APPEAL AND REVIEW BOARD

PRESENT:

Phyllis Gordon, Designated Vice-Chair, Presiding
David Scrimshaw, Board Member
Beth Downing, Board Member

Review held on November 14, 2012 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:

KATHERINE ISLES, MD

Applicant

and

LARISA KAZNACHEY

Respondent

Appearances:

For the Applicant:	C. Jeffrey Freedlander, Counsel
The Respondent:	Larisa Kaznachey
Agent for the Respondent:	Tina Lubman
For the College of Physicians and Surgeons of Ontario:	Cameron Vale (by teleconference)
Interpreter:	André Chichkin

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 Physicians and Surgeons of Ontario to issue a caution to Dr. Katherine Isles regarding her inadequate and inaccurate report and to further recommend that the Applicant review the College policy, "Third Party Reports".

2. This decision arises from a request made to the Health Professions Appeal and Review Board (the Board) by Katherine Isles, MD (the Applicant) to review a decision of the Inquiries, Complaints and Reports Committee (the Committee) of the College of Physicians and Surgeons of Ontario (the College). The decision concerned a complaint from Larisa Kaznachey (the Respondent) regarding the conduct and actions of the Applicant. The Committee investigated the complaint and decided to issue a caution and recommendation to the Applicant as noted above.

II. BACKGROUND

3. The Respondent sustained injuries in a motor vehicle collision on November 1, 2010. The State Farm Mutual Automobile Insurance Company subsequently retained the Applicant, an occupational medicine physician, to conduct an independent medical examination (IME) by undertaking a paper review to determine whether the Respondent required further psychological assessment as a result of the motor vehicle collision.
4. The Applicant completed the report on May 5, 2011, in which she concluded that the Respondent did not require a psychological assessment as a result of her motor vehicle accident injuries.

The Complaint

5. The Respondent complained that the Applicant failed to provide an accurate opinion of her claim for psychological services to the Respondent's insurer; for example, the Applicant provided an opinion that may be outside of her expertise, since she opined regarding psychological services but is an occupational medicine specialist.

The Committee's Investigation and Decision

6. The information obtained by the Committee in its investigation of this matter included:
 - letter of complaint from the Respondent and subsequent communications;

- letter of response from the Applicant;
 - patient records from the Applicant;
 - State Farm Insurance file for the Respondent;
 - Ontario Regulation 289/10 made under the *Insurance Act*;
 - excerpts from *Ontario Psychological Association Guidelines for Assessment and Treatment in Auto Insurance Claims*; and
 - College Policy on Third Party Reports #3-09: *Reports by Treating Physicians and Independent Medical Examiners* (the Policy).
7. The Committee investigated the complaint and agreed that occupational medicine physicians do perform psychological impact assessments and that the Applicant had the qualifications required to make a determination as to whether the Respondent was eligible for a psychological assessment as a result of the motor vehicle collision. It noted that occupational medicine physicians deal with various health issues with an emphasis on musculoskeletal injuries and deal with mental health issues. The Committee noted the Applicant's submission that she has an interest in and has trained in psychiatry and psychiatric/psychological issues and that assessments are a regular part of her practice.
8. The Committee, however, noted that the Applicant's report contained inaccuracies with respect to the details of what happened at the time of the collision. The report indicates that the Respondent was backing out of her driveway and was hit by an oncoming car, while the information before the Committee indicated that the Respondent was hit by a car backing out of a driveway. The report omitted the fact that the police were called, the car was damaged to the extent that it had to be towed away and was written off, which the Committee wrote, "speaks to the extent of the motor vehicle accident".
9. Further, the Committee found that the Applicant failed to address important information that supported a claim for psychological services. It wrote that the Applicant "commented that the physiotherapist did not mention psychological issues, but she failed to mention that [the Respondent's] family physician felt that a referral for psychological services was

indicated” and that it appeared she had “completely disregarded this referral from the family physician.” The Committee stated that the Applicant “completely disregarded the results of the Beck Depression Inventory and Beck Anxiety Inventory, which showed severe depression and anxiety, respectively. Without performing a psychological assessment of [the Respondent], it would be difficult to assess whether or not these conditions pre-existed the accident.”

10. The Committee determined the appropriate disposition was to caution the Applicant regarding “her inadequate and inaccurate report” and to recommend that the Applicant review the College policy, *Third Party Reports*.

III. REQUEST FOR REVIEW

11. Dissatisfied with the decision of the Committee, in a letter dated May 30, 2012, the Applicant requested that the Board review the Committee’s decision.

IV. POWERS OF THE BOARD

12. 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.
13. 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

14. 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.

Adequacy of the Investigation

15. An adequate investigation does not need to be exhaustive. Rather, the Committee must seek to obtain the essential information relevant to making an informed decision regarding the issues raised in the complaint.
16. At the Review, Counsel for the Applicant submitted that the investigation was generally adequate. The agent for the Respondent submitted that the investigation was thorough and adequate.
17. The Board has reviewed the Record and notes that the documentation listed above (paragraph 6) was before the Committee, providing it with the essential information required for its consideration of the complaint. The Board was not referred to any additional essential information not before the Committee. The Board concludes that the investigation into the complaint was adequate.

Reasonableness of the Decision

18. 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.

19. Counsel for the Applicant submitted that the decision was unreasonable and unfair. He submitted that the complaint was only concerned about the Applicant's qualifications to undertake the report, and that having determined that the Applicant was qualified, the Committee should not have considered the report itself or it should have given notice to the Applicant that it intended to do so, providing her the opportunity to respond to the issues that it addressed in its decision. He further submitted that, having determined that the Applicant had the requisite expertise, her report was not to be "second-guessed" by the Committee. He submitted that the Applicant's mandate was set out in the insurer's letter to her.
20. In Counsel's review of the Committee's comments about the report, he noted that the Respondent had provided two versions of how the accident had occurred, that is, which car was backing out of the driveway. He submitted that the earlier signed statement about what had occurred was adopted by the Applicant and the later version was referenced by the Committee, and it was thus wrong for the Committee to refer to the Applicant's version as inaccurate.
21. Counsel suggested that the Committee was wrong to attach any importance to what it called "missing" details from the report, such as whether the police were called, the amount of damage and whether the car was towed. He submitted that these are economic matters, do not necessarily demonstrate the severity of the accident, and are not related to whether the Respondent required psychological services.
22. Counsel submitted that the Beck inventories are subjective tests, where the subject self-scores, and the tests do not constitute independent or objective evidence. As the Applicant had been asked by the insurer to provide an objective opinion of whether the recommended assessment was required, she should not have been expected to refer to the psychologist's report or the Beck inventories referred to by the Committee, as they were non-objective in nature.

23. Counsel submitted that the report fell within the College's Policy although he did not elaborate. In response to a Board question as to whether it was comprehensive, he submitted it was, as it answered the questions put by the insurer.
24. Counsel submitted that the Respondent should have raised her concerns with the report under the mediation and arbitration processes provided under the *Insurance Act* and that the College is the wrong forum for the determination of her concerns. He submitted that having determined the Applicant was properly qualified, the Committee should defer to her expertise: if the College engages in the review of third party assessment undertaken by qualified health professionals, it will deter physicians from conducting assessments.
25. The Respondent's agent submitted that the Applicant had prepared three reports for the insurer reviewing requests for medical services in which she recommended against each request. The Respondent accepted the Applicant's recommendation that the request for occupational therapy and the request for assistive devices be rejected, but not the recommendation that a psychological assessment was unnecessary, particularly as it was recommended by her family physician of many years. The Respondent's agent agreed that the Beck inventories were a subjective measure, but pointed out that the psychologist's brief interview, where they were used, was only an initial screening step intended to see if the Respondent's symptoms of dizziness, nausea, restlessness, and driving anxiety necessitated further investigation and at what cost. The psychologist recommended funding of just under \$2,000 to evaluate the extent of the Respondent's impairment with objective psychological tests.
26. The Respondent's agent addressed the two versions of the mechanism of the accident, submitting that the Applicant should have raised the conflicting information in the file if she noticed it, and could have investigated it further under the *Statutory Accident Benefits Schedule* through an interview process provided under that scheme.
27. The Respondent's agent reviewed the three different document reviews conducted by the Applicant, which were all in the Record of Investigation (the Record). She submitted that,

on three occasions, the Applicant would have been able to review the disability certificate in which the Respondent's family physician referred to the Respondent's adjustment reaction with anxiety and depressed mood. Likewise, she would have seen the treating chiropractor's report which noted sleep disorder, adjustment disorder and depression, as well as the referral from the Respondent's family physician to a therapist. The Respondent's agent submitted that the Applicant totally disregarded the views of the Respondent's family physician. The Respondent advised the Board that her family physician had been her family physician since her arrival in Canada, thirteen years earlier.

28. The Respondent's agent submitted that the Applicant's reports show bias as she responded to the three different OCF-18 Treatment and Assessment Plans regarding the Respondent in identical terms, even though they were prepared by different health professionals and sought different services. The first was the Respondent's chiropractor's referral for a functional evaluation. At that time, the Applicant had sixteen documents to review. The second request was for goods and services (assistive devices), prepared by Dr. Zakrzewski of Toronto Central Diagnostics, with three additional documents to review, for a total of nineteen. Even though there were thirty-eight documents for the Applicant to review with the third OCF-18 seeking a psychological assessment, her language and her recommendation were the same.
29. The Respondent's agent submitted that in each brief opinion the Applicant wrote for the insurer, she referred to only a physiotherapy report of November 11, 2010 from which she quoted. Then, in all three reports, the Applicant concluded: "Therefore, based on the documentation available for review, there was no evidence that [the Respondent] requires a ... assessment as a result of the motor vehicle accident in question and, therefore, the OCF-18 dated ... is not reasonable and necessary." The Respondent's agent submitted that the Committee's decision was reasonable when it found the Applicant's report to be inadequate and inaccurate.

30. The Board has reviewed the initial complaint of the Respondent (received by the College on September 12, 2011) and the Committee's letter of concerns (October 18, 2011) confirmed by the Respondent and then forwarded to the Applicant. While the primary focus of the complaint was whether a psychologist rather than a physician should have conducted the assessment, the Board does not find the complaint limited to this issue.
31. The concern set out to the Applicant was that she had "failed to provide an accurate opinion of [the Respondent's] claim for psychological services to [the Respondent's] insurer, for example, she provided an opinion that may be outside of her expertise, as she opined regarding psychological services as an Occupational Medicine specialist." The Board finds that the accuracy of the opinion is the central issue and the appropriate expertise was an example of the concern.
32. The Board notes that the Applicant appears to have understood this. In her response to the Committee (December 7, 2011), she focused on the qualifications issue, but addressed the concern about the report itself. The Applicant wrote:
- I reviewed all documentation provided by the referring source. According to the file, [the Respondent] was involved in a low-speed passenger-side impact. She did not require immediate medical attention and had follow-up consistent with minor injuries. There is no indication of prior emotional issues. In my opinion, the documentation did not provide sufficient evidence that [the Respondent] required a psychological assessment as a result of her MVA injuries.
33. The Board does not agree with the submission that the Respondent is in the wrong forum, even though she might have had personal remedies under the insurance regime. The issues under the *Code* differ; the central issue being whether the Applicant's conduct met professional standards, which, in this instance, are set out in the Policy.
34. The Board has reviewed the Policy and finds the Committee's assessment that the Applicant failed to comply with it is reasonable. The Committee concluded its analysis as follows:

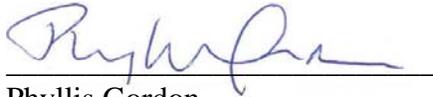
Accordingly, it appears to the Committee that [the Respondent's] report was both inaccurate and inadequate. It seems that she failed to comply with the College policy, "Third Party Reports," which notes that when providing a third party report physicians must "take reasonable steps to ensure that they have obtained and reviewed all available clinical notes, records and opinions relating to the patient or examinee that could impact the findings of the report ..." Moreover, the policy also states that physicians "should ensure to the best of their abilities that the information contained in the third party report is accurate."

35. In her May 5, 2011 report, the Applicant referred only to a physiotherapy report written shortly after the accident and did not discuss any of the other 37 documents in the file, including the opinions of the Respondent's physician and other health professionals that an assessment was required. She then wrote: "based on the documentation available for review, there was *no evidence* that [the Respondent] requires a psychological assessment ..." (Board's emphasis). The Board concludes that in light of this, the Committee's conclusion that the Applicant failed to comply with the obligation "to take reasonable steps to ensure that they have obtained and reviewed all available clinical notes records and opinions" was reasonable.
36. Likewise, the Board finds that the Committee's view regarding accuracy is reasonable as the Applicant made no effort to clarify the inconsistency regarding how the accident occurred. The Board does not find that the Committee's reference to missing details regarding the apparent severity of the accident is misplaced as it is indicative of the absence of almost any factual content in the report.
37. The Board finds that that the Committee's decision to issue a caution is reasonable. The Board notes that a caution is not a sanction. It is remedial in nature.

VI. DECISION

38. Pursuant to section 35(1) of the *Health Professions Procedural Code*, Schedule 2 to the *Regulated Health Professions Act, 1991*, the Board confirms the Committee's decision to issue a caution to the Applicant regarding her inadequate and inaccurate report and to further recommend that the Applicant review the College policy, *Third Party Reports*.

ISSUED January 11, 2013



Phyllis Gordon



David Scrimshaw



Beth Downing