

HEALTH PROFESSIONS APPEAL AND REVIEW BOARD

PRESENT:

Thomas Kelly, Vice-Chair, Presiding
Sharon McKeown, Board Member
Rabiz Foda, Board Member

Review held on June 26, 2014 at London, 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:

MICHEL LACERTE, MD

Applicant

and

GHOLAM DEWARI

Respondent

Appearances:

The Applicant:	Michel Lacerte, MD
For the Applicant:	Lorraine Desjardins-Lacerte
For the Applicant:	Brian Foster, Counsel
The Respondent:	Gholam Dewari
For the Respondent:	Tasleem Dewari
Agent for the Respondent:	Daniel Doyon
For the College of Physicians and Surgeons of Ontario:	Katja Lutte (by teleconference)

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 require Dr. Michel Lacerte's attendance at the

College to be cautioned regarding his obligations as an independent medical examiner or third party assessor and particularly with respect to:

- assessing a patient without adequate, informed consent;
- treating an individual who was not a patient;
- failing to obtain written consent to discuss his findings with the employer of the individual being assessed; and
- failing to document the treatment provided.

2. This decision arises from a second request made to the Health Professions Appeal and Review Board (the Board) by Michel Lacerte, 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 by Gholam Dewari (the Respondent) regarding the conduct and actions of the Applicant.

II. BACKGROUND

3. This is the second review of this matter.
4. The Applicant is a physical medicine specialist who provides workplace health and safety services to Kaiser Aluminum and its employees. The Respondent is a unionized employee at Kaiser Aluminum who injured his left elbow in a work-place accident on June 5, 2009.
5. Pursuant to the Respondent's union collective bargaining agreement, he was compelled to attend for an examination by the Applicant to determine if he was capable of performing the duties and responsibilities of his assigned job.
6. The Applicant assessed the Respondent a total of four times between June 8, 2009 and August 17, 2009 and provided limited treatment, injections and prescriptions. The Applicant reported his findings to the Respondent's employer, made a number of

recommendations regarding the Respondent's capabilities to return to work, and prepared and filed a report with the Workplace Safety and Insurance Board (WSIB).

Procedural History

7. The Respondent initiated a complaint with the College in February 2010 concerning the Applicant's conduct. Specifically, the Respondent's concerns were that the Applicant:
 - a) breached patient confidentiality when he communicated the Respondent's confidential information to his employer, Kaiser Aluminum;
 - b) failed to provide an adequate report regarding the Respondent; for example, the Applicant wrote a "dubious" report that inappropriately suggested that the Respondent had psycho-emotional or motivational barriers to work; and
 - c) behaved in an unprofessional manner toward the Respondent; for example, on August 17, 2009, the Applicant spoke to him in an abusive and threatening manner.

8. The Committee initially investigated the complaint and decided, in a decision dated November 2010, to require the Applicant's attendance before the College to be cautioned regarding his obligations as an independent medical examiner or third party assessor, particularly with respect to:
 - assessing a patient without adequate, informed consent;
 - treating an individual who was not a patient;
 - failing to obtain written consent to discuss his findings with the employer of the individual being assessed; and
 - failing to document the treatment provided.

9. The Applicant requested a review of the Committee's decision before the Board. In a decision dated March 20, 2012, *ML v GD*, 2012 CanLII 14837 (ON HPARB), the Board found that the nature of the Applicant's relationship with the Respondent and the Respondent's employer did not render the Applicant a Third Party Assessor, in the classical sense.

10. The Board required the Committee to conduct a further and adequate investigation, given that the investigation conducted was fatally flawed by an incorrect identification/ categorization of the role of the Applicant in the conduct and actions complained about.
11. The Board required the Committee to further and adequately investigate this matter, including an examination of this complaint through the Occupational Health and Safety lens and including the consideration of the retention of an expert in the Occupational Health and Safety field to review the Applicant's actions.

The Committee's Decision

12. The Committee carried out further investigations that included further submissions from the parties and a report from an independent opinion provider (IOP).
13. In a decision dated August 21, 2013, the Committee decided to require the Applicant to attend at the College to be cautioned regarding his obligations as an independent medical examiner or third party assessor and particularly with respect to:
 - assessing a patient without adequate, informed consent;
 - treating an individual who was not a patient;
 - failing to obtain written consent to discuss his findings with the employer of the individual being assessed; and
 - failing to document the treatment provided.

III. REQUEST FOR REVIEW

14. In a letter dated November 22, 2013, the Applicant 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 the Discipline Committee 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 provided extensive submissions prior to the Review.
19. At the Review, the Applicant and the Respondent made submissions. Information was provided by the College Representative in answer to questions by the Board.
20. The Board has considered the submissions of the parties, examined the Record of Investigation (the Record), and reviewed the Committee's decision.

Adequacy of the Investigation

21. 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.

22. The Committee obtained the following documents:
 - (i) materials that the Committee considered in November 2010:
 - the Respondent's letter of complaint, received February 9, 2010, and further communications from the Respondent, including reports and records from other physicians;
 - the Applicant's response to the Respondent's concern, received May 18, 2010, and further communications from the Applicant;
 - the Respondent's Occupational Health Records, provided by the Applicant;
 - information from Ms. Darlene Duval, Kaiser Aluminum Human Resources Manager, received June 15, 2010;
 - information from Ms. Tammy Roy, the Applicant's transcriptionist, received July 8, 2010; and
 - information from Union President, Mr. Rickwood, obtained on September 20, 2010;

 - (ii) Materials gathered after the Board returned the matter to the Committee:
 - Committee decision, dated November 3, 2010;
 - Board decision, dated March 20, 2012;
 - communications from and to the Applicant;
 - communications from and to Counsel for Applicant, including the Collective Agreement and Mr. Peter Barton's December 11, 2010 Labour Arbitration Decision;

- College retainer letter sent to the Independent Opinion (IO) provider, dated August 15, 2012;
- the IO provider’s report, received November 15, 2012 with the following enclosures:

The IO provider’s Curriculum Vitae;

Royal College of Physicians and Surgeons of Canada, 2006 Objectives of Training in Occupational Medicine;

Workplace Safety and Insurance Board 2007 Employer-Requested Health Examinations Policy;

Ontario Occupational Health- and Safety Act R.S.O. 1990, Section 51(1); and

Regulation 834, Critical Injury Defined, 1991, 374-375;

- information and records from Mr. Daniel Leone, Counsel to Kaiser Aluminum;
- further information from Ms. Duval dated March 6, 2013, with enclosure;
- Member’s Dialogue article regarding *Third Party Reports*, Volume 7, Issue 4, 2011;
- the IO provider’s addendum report, received May 6, 2013;
- College Policy #8-02: *Third Party Reports*;
- College Policy #2-12: *Third Party Reports*;
- College Policy #4-05: *Consent to Medical Treatment*; and
- College Policy #8-05: *Confidentiality of Personal Health Information*.

23. The Applicant’s Counsel submitted that the Applicant is a “company doctor” and that the Committee is attempting to “put a square peg in a round hole” by considering that the Applicant is bound by the College’s *Third Party Reports* policy. He submitted that the Committee’s further investigation was flawed when it started with the premise that the Applicant is bound by this policy.

24. The Board does not agree. In its first decision the Board directed the Committee to consider retaining an independent expert in the field of Occupational Health and Safety. The Board notes that the Committee did obtain an independent expert opinion from a physician involved in the full time practice of Occupational Medicine and certified as a Specialist in Occupational Medicine.
25. The Committee noted that the Applicant and his Counsel had made many objections to the Committee's IOP and to his opinion. The Committee specifically dealt with many of those objections in its decision and stated that it remained satisfied that the IOP is an appropriately qualified choice of physician to comment on this case.
26. The Committee noted that the key question in dispute is the nature of the Applicant's role with respect to his assessment and treatment of the Respondent.
27. It noted that its 2010 decision was premised on its perspective that the Applicant was acting as a third-party assessor and that the Board, in its 2012 review of that decision, agreed with the Applicant's position that "the nature of [the Applicant's] relationship with [the Respondent] and [the Respondent's] employer does not render [the Applicant] a Third Party Assessor, in the classical sense."
28. The Committee noted that it respectfully disagreed with the Board's position, provided detail of the College's 2002 Policy, *Third Party Reports*, and stated that it is firmly of the view that the Applicant's role, in his assessment of the Respondent at the request of the employer, fell squarely into the definition "any person or organization other [than] physician and the patient."
29. The Committee noted that it follows that it is therefore of the view that the Applicant was obliged to abide by the rules then in place for a situation when a doctor and a patient interact at the behest of a third-party, as set out in Policy #8- 02.

30. The Committee further noted that it recognized the possibility of confusion of the roles (IME, company “treating” doctor, medical expert) and prior to issuing its most recent version of the policy (#12-02), the College consulted widely and various views emerged as to the scope of these roles, which were then discussed at College Council. It noted that in the policy that was eventually published, the College maintained the essential distinction between the IME and the treating physician. The College is of the view that it is generally not in the best interest of the patient when the treating physician acts as an independent medical examiner, and vice versa.
31. The Committee specifically rejected the argument that the *Third Party Reports Policy* is not relevant as the Applicant was providing Occupational Health and Safety services as Kaiser Aluminum’s company doctor. It noted that the IOP retained by the Committee also interpreted this policy as defining the Applicant’s role in this matter as that of a third-party assessor.
32. The Committee also considered a number of arguments made by the Applicant and his Counsel as to why the Applicant was not acting as a third-party assessor with respect to the Respondent.
33. The Board notes, as stated by the Committee, that the key question in dispute is the nature of the Applicant’s role with respect to his assessment and treatment of the Respondent.
34. In its previous 2012 decision, the Board found that the investigation was not adequate given that the investigation conducted was fatally flawed by an incorrect identification /categorization of the role of the Applicant in the conduct and actions about which the Respondent complained.
35. The Board required the Committee to further and adequately investigate this matter, including an examination of this complaint through the Occupational Health and Safety

lens and including the consideration of the retention of an expert in the Occupational Health and Safety field.

36. The Committee has done so. It has retained an expert in the Occupational Health and Safety field to assist it and has considered this complaint through that lens. While the Applicant vehemently does not agree with the conclusions of the IOP and the Committee, and specifically does not agree that he should be bound by the *Third Party Reports Policy*, the Committee has done what the Board directed it to do and has now performed an adequate investigation.
37. The Board finds that the Committee's investigation covered the events in question and yielded relevant documentation to assess the complaint regarding the Applicant's conduct and actions.
38. 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

39. 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.
40. 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.

41. 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.
42. For consistency, the Board's analysis of the Committee's conclusions and decisions follows, using the Committee's categorization of the multiple aspects of the complaint.

Concern b: The Applicant failed to provide an adequate report regarding the Respondent; for example, the Applicant wrote a "dubious" report that inappropriately suggested that the Respondent had psycho emotional or motivational barriers to work.

43. The Committee stated that it does not agree with the Respondent that the Applicant's reports were "dubious." The Committee was satisfied that the Applicant's opinions were reasonable and based on his review of health records, his assessment, and his clinical opinion.
44. The Committee's findings in this regard are based on its expertise. In this case, there is no information to indicate that the Committee's expertise was inappropriately applied. Hence, the Board finds the Committee's decision to take no action on this aspect of the complaint to be reasonable.

Concern c. The Applicant behaved in an unprofessional manner toward the Respondent; for example, on August 17, 2009, The Applicant spoke to him in an abusive and threatening manner.

45. The Committee determined that there was no information in the Record to support the Respondent's allegation that the Applicant was abusive and aggressive towards him.
46. The Committee noted that the Applicant has denied this claim and there is no information from any independent party to support the Respondent's recollection of the Applicant's behaviour towards him.

47. The Committee determined that it would not be reasonable for the Committee to take action against the Applicant on this point.
48. The Committee is not an adjudicative body and does not make findings of credibility *per se*. It is permitted to engage in some *limited* weighing of the facts to determine if there were reasonable grounds to believe misconduct has occurred.
49. The Board therefore finds reasonable the Committee's decision to take no further action where the alleged misconduct has been denied and there is no independent corroboration of the alleged misconduct.

Concern a. The Applicant breached patient confidentiality when he communicated the Respondent's confidential information to his employer, Kaiser Aluminum.

50. The Committee noted that the Respondent's employer required him to attend an appointment with the Applicant for the purposes of an assessment. It further noted that all parties involved, however, seemed to have had differing understandings about what constitutes appropriate conduct of such an assessment, and of the implications of the relationship of assessor to patient.
51. The Committee considered the information in the Record and concluded that it remained extremely troubled by the Applicant's apparent lack of understanding of his role as independent medical examiner or third party assessor.
52. The Committee noted that the Applicant conducted the appointments with the Respondent without obtaining the express consent and clarifying the purposes of the assessments; he communicated certain aspects of the Respondent's health information directly to the Respondent's employer also without the express consent of the Respondent; he provided medical treatment over several appointments to an individual whom he had been hired to assess by that individual's employer, creating a conflict of interest between his role as third party assessor and treating physician to the individual;

and he did not document the treatment provided to the Respondent nor the rationale for such treatment.

53. The Committee determined to issue a caution in person to the Applicant as he acted far beyond the scope of what is appropriate for an examiner or assessor, and appeared not to have an adequate understanding of the role of such a physician.
54. The Committee required the Applicant to attend the College to be cautioned regarding his obligations as an independent medical examiner or third party assessor and particularly with respect to:
 - assessing a patient without adequate, informed consent;
 - treating an individual who was not a patient;
 - failing to obtain written consent to discuss his findings with the employer of the individual being assessed; and
 - failing to document the treatment provided .
55. The Applicant and his Counsel made strong objections to the Committee's analysis of the Applicant's actions and submitted that he should not be judged by the *Third Party Policy* as he is a "company doctor" and practices in the Occupational Health and Safety Field and does not view himself as being subject to that policy.
56. The Board notes that this issue was addressed previously in this decision under 'Adequacy of the Investigation,' wherein the Board found that the Committee had retained an IOP practising in the occupational health field in order to have sufficient expertise to address the issues involved in this complaint.
57. As stated, the Committee, after considering the independent opinion, found that the Applicant is subject to the standards as set out in the *Third Party Policy*.

58. The Committee has considered the Applicant's conduct and actions with the lens of the *Third Party Policy* and the assistance of an IOP practising in the Occupational Health and Safety field.
59. The Committee has based its findings on information in the Record.
60. Notwithstanding the Applicant's strong objections, the Committee's decision is a decision that falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law and is thus reasonable.

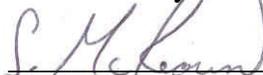
VI. DECISION

61. Pursuant to section 35(1) of the *Code*, the Board confirms the Committee's decision to require the Applicant to attend at the College to be cautioned regarding his obligations as an independent medical examiner or third party assessor and particularly with respect to:
- assessing a patient without adequate, informed consent;
 - treating an individual who was not a patient;
 - failing to obtain written consent to discuss his findings with the employer of the individual being assessed; and
 - failing to document the treatment provided.

ISSUED January 6, 2015



Thomas Kelly



Sharon McKeown



Rabiz Foda