

HEALTH PROFESSIONS APPEAL AND REVIEW BOARD

PRESENT:

James Beamish, Designated Vice-Chair, Presiding
Rob Steele, Board Member
Rabiz Foda, Board Member

Review held on June 26, 2013 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:

SCOTT SEIBERT

Applicant

and

GARSON CONN, MD

Respondent

Appearances:

The Applicant:	Scott Siebert (by teleconference)
For the Respondent:	Glynnis P.Burt, Counsel
For the College of Physicians and Surgeons of Ontario:	Tracey Baruch (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 caution the Respondent to be aware that patients with post-traumatic chronic pain and disability who attend for an IME, such as [the

Applicant], may feel vulnerable, may not appreciate his efforts at “small talk,” and that he should refrain from discussing systemic issues or details of his personal life.

2. This decision arises from a request made to the Health Professions Appeal and Review Board (the Board) by Scott Siebert (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 regarding the conduct and actions of Garson Conn, MD (the Respondent). The Committee investigated the complaint and decided to caution the Respondent as indicated above.

II. BACKGROUND

3. The Applicant was severely injured in a snowmobile accident on January 29, 2007. The Applicant suffered complex compound fractures in both legs which necessitated eight operations and left him with chronic pain.
4. The Respondent, an orthopaedic surgeon, conducted an independent medical assessment (IME) of the Applicant on June 29, 2011 as part of a multi-disciplinary assessment.

The Complaint and the Response

5. In a letter dated June 29, 2011, the Applicant recorded his concerns about the conduct and actions of the Respondent during the IME on that date. Those concerns were communicated to the College by a letter dated July 24, 2011 from the Applicant’s treating psychological associate. The Applicant subsequently confirmed his concerns about the conduct and actions of the Respondent as follows:
 - the Respondent made inappropriate remarks regarding the Applicant’s large muscles, physical strength, and stated that he was a “good looking young man”;

- the Respondent touched the Applicant’s penis and groin area inappropriately with the measuring tape and his finger while measuring the length of his lower extremities;
- the Respondent advised the Applicant that he was not qualified to use the term “nerve pain”;
- the Respondent refused to acknowledge that the Applicant was experiencing nerve pain until it was reiterated to him repeatedly by the Applicant;
- the Respondent advised the Applicant to “suck it up” and “toughen up” when he was recovering from eight extensive surgeries of his lower extremities; and
- the Respondent that stated insurance companies are being taken advantage of and should not have to pay out to people who make false claims in regard to their injuries.

6. The Respondent responded to the Applicant’s concerns as follows:

- he engaged in small talk with the Applicant in order to put him at ease; he regrets that his comments had the effect of making the Applicant uncomfortable;
- his comments about the Applicant’s physique were intended to give the Applicant optimism about his potential for healing;
- he explained that when he measured the Applicant’s leg length he holds one end of the tape measure at the umbilicus and the other at the ankle; he acknowledged that the tape measure may have touched the Applicant’s penis area but denied that his finger did so;
- he had a discussion with the Applicant about the nature of the Applicant’s pain in which he pointed out that all pain is “nerve pain”; he did not refuse to acknowledge that the Applicant was suffering from nerve pain;
- he did not recall telling the Applicant to “suck it up” or “toughen up” and noted that he does not use such language;
- he may have said something about insurance companies being taken advantage of as part of a general discussion with the Applicant but he did not suggest that the Applicant was making a false claim as evidenced by his report which confirmed that the Applicant suffered serious and extensive injuries; and

- he has given serious consideration to the Applicant's complaint and acknowledged that he has had previous complaints about his demeanour and ability to communicate well with patients; he has taken a communications course with Dr. Dawn Martin.

The Committee's Investigation and Decision

7. The Committee investigated the complaint and, in a decision dated September 5, 2012, decided to caution the Respondent with respect to his communications with patients as indicated above.
8. The Record of Investigation (the Record) before the Committee included the following documents and information:
 - the Applicant's letter of complaint;
 - memoranda of telephone conversations between the Applicant and the College investigator on September 13, November 9 and November 10, 2011 and January 6 and February 2, 2012;
 - the Respondent's response to the complaint as provided by his Counsel;
 - the IME report and the Respondent's notes of his assessment of the Applicant on June 29, 2011;
 - the Applicant's reply to the response of the Respondent;
 - a further communication from the Respondent's Counsel;
 - photographs of the Applicant's injuries; and
 - medical records for the Applicant with respect to his injuries and the treatment received.
9. The Committee accepted the Respondent's explanation that his comments about the Applicant's physique were intended to encourage the Applicant and noted that the Respondent's conclusions in his IME report made it clear that he was convinced that the Applicant had genuine problems.

10. Regarding the concern about inappropriate touching of the Applicant's groin area, the Committee noted that the Respondent conducted a very thorough examination of the Applicant which revealed for the first time the Applicant's leg length discrepancy. The Committee noted that repeat measurements were not surprising and that it was quite possible that the tape measure might have touched the patient's groin area during the course of measuring the Applicant's leg length. In addition, the Committee noted that there had been no prior complaints of this nature about the Respondent. The Committee further stated that it would have been prudent for the Respondent to have offered the Applicant a gown and the opportunity to disrobe.
11. Regarding the concerns about the discussion about "nerve pain", the Committee noted that there were differing accounts of what was said and stated that it was not able to come to a conclusion about this aspect of the complaint. In addition, the Committee noted that the Respondent's documentation supported that the Applicant was suffering leg pain.
12. Regarding the concern that the Respondent told the Applicant to "suck it up" and "toughen up", the Committee again noted that there were differing accounts of what was said and stated that it was not able to come to a conclusion about this aspect of the complaint.
13. Regarding the concern that the Respondent stated that insurance companies are being taken advantage of and should not have to pay out to people who make false claims, the Committee noted that it would have been much more prudent for the Respondent to have avoided a discussion of insurance fraud during an IME.
14. The Committee noted that there had been previous complaints about the Respondent's communications. The Committee accepted that the Respondent's contrition in this case was sincere and stated that it was pleased that he had entered into a communications course with Dr. Martin. Nevertheless, the Committee felt that the Respondent would benefit from reflection and education in the area of communications and decided to issue a written caution to the Respondent to be aware that patients with post-traumatic chronic

pain and disability who attend for an IME may not appreciate the Respondent's efforts at small talk and that the Respondent should refrain from discussing systemic issues or details of his personal life.

III. REQUEST FOR REVIEW

15. Dissatisfied with the decision of the Committee, in an email dated November 9, 2012, the Applicant requested that the Board review the Committee's decision.

IV. POWERS OF THE BOARD

16. 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.
17. 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

18. Pursuant to section 33(1) of the *Health Professions Procedural Code* (the *Code*), being Schedule 2 to the *Regulated Health Professions Act, 1991*, (the *Act*) 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.

19. 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

20. 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.
21. The Applicant did not allege that the Committee's investigation was inadequate. Counsel for the Respondent submitted that the Committee conducted an adequate investigation.
22. The Board notes that the Committee had before it the information listed in paragraph 8 above. The Board finds that the Committee had sufficient relevant information to permit it to assess all aspects the Applicant's complaint. 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

23. 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.
24. The Applicant submitted that the Committee's decision was unreasonable because the caution issued to the Respondent did not reflect the serious impact that the Respondent's conduct during the IME had on the Applicant and would not ensure that other patients

would not experience the same trauma. The Applicant submitted that the Committee should have imposed a requirement that the Respondent should not be permitted to conduct an IME without someone else being present.

25. Counsel for the Respondent submitted that the Committee addressed all aspects of the complaint and reached a reasonable decision regarding each of the Applicant's concerns. She noted that the Applicant acknowledged to the college investigator that he did not observe the Respondent's hand touch his groin area and that it could have been the tape measure which brushed his groin area.
26. Counsel for the Respondent submitted that it was reasonable for the Committee to have taken no action regarding those aspects of the complaint where there were differing accounts of what was said by the parties.
27. Counsel for the Respondent submitted that it was reasonable for the Committee to have decided to issue a written caution to the Respondent regarding his communications and noted that the Respondent himself took appropriate remedial action by way of the communications course with Dr. Martin.
28. Counsel for the Respondent submitted that the corrective action proposed by the Applicant amounted to a "term, condition or limitation" on the Respondent's practice which could only be imposed by the Discipline Committee and was not within the jurisdiction of the Committee.
29. The Board finds that the Committee reached a reasonable decision. The Committee's decision was supported by the information before it and was within a range of possible, acceptable outcomes in light of the facts and law.
30. Regarding the concern about the Respondent's comments about the Applicant's physique, it was reasonable for the Committee to have accepted the Respondent's explanation that his intention was to give the Applicant optimism in his recovery from his

injuries. This is supported by the IME report prepared by the Respondent which confirmed and validated the severity of the Applicant's injuries. The Committee's decision to take no action regarding this aspect of the complaint was reasonable.

31. Regarding the concern about inappropriate touching by the Respondent, it was reasonable for the Committee to have accepted the Respondent's explanation that he might have inadvertently brushed the Applicant's groin area with the tape measure while he was measuring for a leg length discrepancy and that he did not touch that area with his finger since his hands were at the umbilicus and the ankle. The Board notes that the Applicant acknowledged that he did not see the Respondent touch his groin area with his finger and that any contact could have been from the tape measure. The Board finds that the Committee's decision to take no action regarding this aspect of the complaint was reasonable.
32. Regarding the concerns about the Respondent's comments about "nerve pain", it was reasonable for the Committee to have accepted the Respondent's explanation that he told the Applicant that all pain is nerve pain. The Respondent's IME report validated the severity of the Applicant's injuries and his chronic pain. Subject to the Committee's findings regarding the Respondent's communications with patients, the Committee's decision to take no action regarding these aspects of the complaint was reasonable.
33. Regarding the alleged comments by the Respondent that the applicant should "suck it up" and "toughen up", the Board finds that it was reasonable for the Committee to take no action given the differing accounts of the parties as to what was said. In the absence of corroborative information, the Committee may not make findings of fact where there are disputed facts.
34. Although the Committee did not make findings about certain aspects of the Respondent's communications with the Applicant during the IME, the Committee was critical of the Respondent's communication skills including his comments about insurance fraud and his discussion of personal matters. The Committee noted previous complaints about the

Respondent's communications with patients. The Committee noted that the Respondent expressed regret that his comments offended the Applicant and that he enrolled in a communications course with an expert in that field. The Board finds that the Committee's decision to issue a written caution to the Respondent was reasonable in the circumstances. The Board notes that a caution is advisory and intended to be remedial; it is not a sanction. Although there are other dispositions which the Committee might have considered, the decision to issue a written caution to the Respondent was within a range of possible, acceptable outcomes given the facts and the law.

35. The Applicant submitted that the Committee should have imposed a requirement that the Respondent must have someone else present when he conducts an IME. This would amount to the imposition of a term, condition or limitation on the Respondent's certificate of registration and is not within the powers given to the Committee under section 26(1) of the *Act*. Such an order can only be made by the Discipline Committee under section 51(2) 3 of the *Act*. That being the case, the Board cannot recommend or direct the Committee to impose the requirement sought by the Applicant.

36. The Board may direct the Committee to refer the complaint to the Discipline Committee if the Board finds that the Committee's failure to do so was unreasonable. As noted above, the Board finds that the Committee's decision to issue a written caution to the Respondent was reasonable. The Board does not find that the Committee's failure to refer the Respondent to the Discipline Committee was unreasonable and will not direct the Committee to do so.

VI. DECISION

37. Pursuant to section 35(1) of the Code, the Board confirms the Committee’s decision to caution the Respondent to be aware that patients with post-traumatic chronic pain and disability who attend for an IME, such as [the Applicant], may feel vulnerable, may not appreciate his efforts at “small talk,” and that he should refrain from discussing systemic issues or details of his personal life.

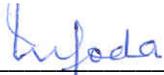
ISSUED July 24, 2013



James Beamish



Rob Steele



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