DECISION NO. 2011-HPA-190(b); 2011-HPA-231(b)  
(Grouped File: 2012-HPA-G06)

In the matter of an application under section 50.6 of the Health Professions Act, R.S.B.C. 1996, c. 183, as amended, (the “Act”) for review of a complaint disposition made by an inquiry committee

BETWEEN: The Complainant

AND: The College of Physiotherapists of BC

AND: A Physiotherapist

BEFORE: Lorianna Bennett, Panel Chair

DATE: Conducted by way of written submissions concluding on November 9, 2012

APPEARING: For the Complainant: Self-represented

For the College: Anthony G.V Tobin, Counsel

For the Registrant: Scott Marcinkow, Counsel

I INTRODUCTION

[1] This matter relates to two interrelated complaints filed by the Complainant regarding the physiotherapy treatment she received from the Registrant and a support staff member employed by the Registrant. The Complainant complained to the College that the treatment she received caused harm to her right leg. After investigating, the College’s Inquiry Committee dismissed both complaints. The Complainant applies to the Review Board for a review of those dispositions.

II ISSUES

[2] The issues I must decide regarding the Registrant are:

(a) Did the Inquiry Committee adequately investigate each complaint?

(b) Was the Inquiry Committee’s decision to dismiss each complaint reasonable?
III BACKGROUND FACTS

[3] There is no dispute that the Complainant sought and received physiotherapy treatment from the Registrant on several occasions in June/July 2008 because of a work related injury. It is also clear that part of the treatment was by way of a Self Conductive Neuro Adaptive Resonator (“SCENAR”) device. The Complainant received SCENAR treatment from both the Registrant and from the Registrant’s support staff under the supervision of the Registrant.

[4] In her first complaint dated September 1, 2010, the Complainant alleges that the SCENAR device used on her by the Registrant was not licensed by Health Canada and not listed as a medical device approved by the Canadian Standards Association. As a result, she says she sustained damage from her right knee down to her right foot.

[5] In her second complaint, dated October 20, 2010, the Complainant alleges that the Registrant hired a non-licensed physiotherapist to use the SCENAR device and perform treatments on her when the Registrant was not in the office.

[6] The Inquiry Committee completed its investigation and review of the two complaints and in each case under the authority found in s.33(1) and s.36(6)(c) of the Act requested the Registrant pursuant to s.36(1)(d) to:

(a) Consent and undertake not to repeat the conduct to which the matter relates which is the failure to comply with the College Practice Standard Number 3;

(b) Consent to obtain informed patient consent for each treatment provided by the Registrant or her support staff and to document this consent in the patient’s record;

(c) Consent to obtain informed consent of each and every patient for the provision to that patient of any physical therapy treatment by the Registrant’s support staff and to document this consent in the patient’s records; and

(d) Consent to a six month follow up and pay the costs of this follow up inspection.

[7] The Complainant was dissatisfied with the two College dispositions and applied to the Review Board for a review of each disposition.

[8] In her first application for review, dated November 1, 2011, the Complainant says the following with respect to her review application:

I request that the Inquiry Committee’s disposition be changed regarding [Registrant’s] conduct and competency with her use of the Scenar device because of the following reasons:

The Scenar device is not used by other Physical Therapists in B.C. or Canada as a form of treatment for any conditions.

The Scenar device is not CSA approved.

The Scenar device is not legal to be sold in Canada since 2005 as per Health Canada ruling. Please investigate the reason why and disclose your findings.
There is no evidence that supports the use of the Scenar device as an effective and safe form of treatment.

The CPT’s decision only enforces what is already required from a Physical Therapist in the matter of college Bylaw section 56.

Relief being sought

[Registrant] was negligent in the performance of her duties as a Physical Therapist in this matter and should have her license revoked or suspended. I request that the Scenar device no longer be used as a form of therapy/treatment by [Registrant] to prevent injury to other clients. None of my questions were answered during the past year or more of the College’s inquiry into my complaint. ...

[9] The Complainant then references a detailed enclosure that outlines her preferred disposition. Specifically, she asks:

(a) That the Registrant “...undertake not to repeat the conduct to which the matter relates, and specifically that the Registrant no longer use the Scenar in her physiotherapy practice as it is not licensed by Health Canada or approved by the Canadian Standards Association preventing other patients from being injured;

(b) ...that the Committee of Physiotherapy and/or [Registrant] provide compensation for all treatments or therapy to aide my recovery from the severe damaged caused by the Scenar;

(c) ...that [Registrant] provide the Committee of Physiotherapy a record of all clients that received Scenar treatment at her clinic and their mailing addresses; I request the Committee send out a copy of the results of this complaint to such clients;

(d) ...a facilitated meeting with [Registrant] and one or more representatives of the Committee of Physiotherapy. In such meeting, I request [Registrant] to disclose all information about the Scenar and where she had her training;

(e) acknowledgement that the treatments administered with the Scenar from [Registrant] and [Registrant’s support staff] are responsible for my injuries;

(f) ...the Committee to cancel [Registrant’s] registration;

(g) ...that Committee of Physiotherapy ...research and provide answers to the below questions:

   i) Is the Scenar used by any other physiotherapists in B.C.?

   ii) Are there any similar devices in use by any other physiotherapists in B.C.?

   iii) Are there any case studies on the Scenar device?

   iv) Why is the Scenar device not licensed to be sold in Canada?

   v) Why is the Scenar device not listed with the Canadian Standards Association?

   vi) Does [Registrant] have a current class 2 license to use the Scenar device?
vii) Find out who administered the Scenar on me on Fridays when [Registrant] was absent...was [she] a licensed physiotherapist? I request that the individual [support staff] be in attendance at the meeting and disclose her training.

[10] With respect to her second application for review, dated November 9, 2011, the Complainant says she believes the Inquiry Committee’s disposition should be changed for the following reasons:

(a) It does not adequately address the magnitude of misconduct demonstrated by [the Registrant] and her support staff and the violation of all sections of the College Practice Standard Number 3;
(b) It does not provide appropriate reprimand for the above misconduct;
(c) It does not provide investigation and evidence of the support staff training and competency;
(d) It does not address the use of the Scenar device by the support staff; and
(e) [Registrant] was not in attendance or on site (day off) during the administration of the Scenar device or other treatments by support staff on a number of occasions.

[11] In terms of the relief she is seeking in respect of the second complaint, the Complainant says she is seeking:

(a) investigation and disclosure referencing the Scenar device and the training and competency with the use of this device by support staff;
(b) that [Registrant] is obligated to accept any interdisciplinary actions, reprimands and corrective measures imposed by the Review Board; and
(c) a facilitated meeting with [Registrant] and the Review Board for both complaints.

[12] By way of a written decision dated March 30, 2012, Review Board Chair English combined the two applications for review for the purpose of this review hearing.

IV THE REVIEW BOARD’S ROLE ON APPLICATIONS FOR REVIEW

[13] The Review Board’s powers on a review are set out in s. 50.6(8) of the Act which states that the Review Board may do one of the following on completion of a review of an Inquiry Committee disposition:

(a) confirm the Inquiry Committee’s disposition;
(b) direct the Inquiry Committee to make a disposition that could have been made by the inquiry Committee in the matter; or
(c) send the matter back to the Inquiry Committee to reconsider the matter with specific directions.

[14] In order for the Review Board to either direct the Inquiry Committee to make a different disposition or send the matter back to the Inquiry Committee to reconsider the matter, the Review Board must first make a finding that the Inquiry Committee’s investigation was inadequate or the disposition unreasonable. These limits to the Review Board’s jurisdiction are set out in s. 50.6(5) of the Act which reads:
On receipt of an application under subsection (1), the review board must conduct a review of the disposition and must consider one or both of the following:

(a) the adequacy of the investigation conducted respecting the complaint; and

(b) the reasonableness of the disposition.

Section 50.6(6) adds that the review is conducted on the record, meaning that it is not a trial de novo, or new trial of the original complaint to the college.

V ISSUE 1: ADEQUACY OF THE INVESTIGATION

The role of the Review Board in assessing the adequacy of an investigation is to determine whether the Inquiry Committee’s investigation provided it with sufficient information to assess the particular complaint. It is not the role of the Review Board to reinvestigate the complaint or to substitute its decision for that of the Inquiry Committee.

The standard which the Review Board must apply when considering what is “reasonable” or “adequate” has been previously addressed in several Review Board decisions, and more specifically in Review Board Decision No. 2009-HPA-000(a)-0004(a) para [89]:

The Legislature’s choice of the words “reasonable” and “adequate” make clear that the Legislature has not tasked the Review Board with the role of determining whether the Inquiry Committee has made the “ideal” disposition or conducted the “perfect” investigation. A disposition will only be unreasonable and an investigation will only be inadequate if it falls below the appropriate standard of review.

Applying the Review Board’s role to the facts of this case, what I must consider is whether the Inquiry Committee took reasonable steps to investigate and obtain key information from relevant sources. In other words, I will consider:

(a) Has the Inquiry Committee conducted an investigation with a degree of due diligence whereby the Inquiry Committee has considered and attempted to obtain evidence from the Registrant that is the subject of the complaint?

(b) Has the Inquiry Committee considered and attempted to obtain evidence from relevant collateral sources, and in particular evidence that is directly relevant to the subject Registrant and the particular complaint?

In this case, the Complainant suggests that the Inquiry Committee did not properly investigate her concerns and/or address her questions in relation to the Registrant, her support staff member, and the use and licensing of the SCENAR device by both.

Both the College and the Registrant take the position that the investigation was adequately conducted.

In respect of both complaints, the Inquiry Committee identified and elaborated on the various steps it took in the investigative process.
VI INVESTIGATION OF FIRST COMPLAINT

[22] After conducting a preliminary review of the complaint on November 15, 2010, the Inquiry Committee appointed an Inspector under section 27 of the Act to investigate the complaint.

[23] In its letter dated January 21, 2011, the Inquiry Committee provided the inspector with various documents relating to the complaints namely:

   (a) Copy of a one page letter of complaint from the Complainant dated September 2, 2010 with attachment;
   (b) Copy of a two page letter from the Registrar to the Complainant dated September 20, 2010;
   (c) Copy of a two page letter from the Registrar to the Registrant dated September 20, 2010 advising the Registrant of the complaint;
   (d) Copy of a one page memo from the Registrant to the Inquiry Committee dated September 17, 2010 assessing the complaint;
   (e) Copy of a two page letter from the Respondent to the Registrar dated October 4, 2010. This letter encloses chart notes and general information about the Registrant’s SCENAR device and associated safety standards for SCENAR devices;
   (f) Copy of a six page physical therapy clinical record;
   (g) Copy of a five page Frequently Asked Questions internet document;
   (h) Copy of a one page signed Authorization for Release of Information form;
   (i) Copy of a one page letter from the Registrar to the Complainant dated January 5, 2011 advising that an Inspector has been appointed; and
   (j) Copy of a one page letter from the Registrar to the Registrant dated January 5, 2011 advising that an Inspector has been appointed.

[24] The Inquiry Committee then asked the inspector to take the following steps as part of its interview process:

   (a) interview the Complainant;
   (b) photograph the device;
   (c) obtain evidence as to whether or not it meets CSA, UL or CE safety and quality standards for medical products;
   (d) obtain a copy of the servicing record of the machine;
   (e) inquire as to what training the physical therapist has had for the machine; and
   (f) ask the physical therapist for a transcript of the clinical record identifying who made each clinical entry.

[25] Finally, the Inquiry Committee asked that the inspector provide her report on or before February 18, 2011.
[26] The Inspector provided a report dated February 26, 2011. The report, with attachments, is in excess of 190 pages. In her report, the investigator outlines the numerous steps that were part of the investigative process and included the steps she was requested to complete by the Inquiry Committee. The report included lengthy transcripts from her interview with the Complainant, various records from her review of safety standards for SCENAR devices, various emails pertaining to safety inquiries and correspondence with the Registrant.

[27] In summary, the report confirmed in large part what the Registrant explained in her October 4, 2010 letter with respect to the safety standards for SCENAR devices.

VII INVESTIGATION OF SECOND COMPLAINT

[28] As with the first complaint, the Inquiry Committee again assigned an inspector (the same inspector) to investigate. By way of a letter dated January 21, 2011, the Inquiry Committee provided the investigator with various documents relating to the complaints namely:

(a) Copy of a one page letter of complaint from the Complainant dated October 20, 2010;

(b) Copy of a two page letter from the Registrar to the Complainant dated November 8, 2010 acknowledging the complaint;

(c) Copy of a two page letter from the Registrar to the Registrant dated November 8, 2010 advising the Registrant of the complaint;

(d) Copy of a one page memo from the Registrar to the Inquiry Committee dated November 8, 2010 assessing the complaint;

(e) Copy of a five page physical therapy clinical record;

(f) Copy of a one page letter from the Registrar to the Complainant dated January 10, 2011 advising that an inspector has been appointed; and

(g) Copy of a one page letter from the Registrar to the Registrant dated January 10, 2011 advising that an Inspector has been appointed.

[29] The Inquiry Committee then went on to request that the Inspector determine the support staff worker’s qualifications, what training she has had to administer the SCENAR and her professional affiliations. The Inquiry Committee asked for a response by February 18, 2011.

[30] By way of a letter dated February 18, 2011, the investigator enclosed her report and related findings. As with the first report, she outlined the various steps she took in her investigation which steps included those requested by the Inquiry Committee, and she explained her results. That report, with attachments, is 167 pages long and includes much overlap from her first report.

[31] Following receipt of the report, the Inquiry Committee then posed four additional questions relating to the complaint and the Registrant responded by a letter dated April 26, 2011. In her letter, the Registrant explained her process for having patients sign an informed consent form, her process for assessing patients and discussing treatment
options with them, her process for involving her assistant in treatment and explaining that involvement to patients, and she summarized her support staff’s training.

[32] The Inquiry Committee met on September 2, 2011 and the decision from the Inquiry Committee expressly states that it considered the following evidence:

(a) The Complainant’s letter of complaint;
(b) The Registrar’s assessment of the complaint;
(c) Correspondence between the College and the Complainant;
(d) Correspondence between the College and the Registrant;
(e) The Inspector’s report;
(f) The Complainant’s clinical record; and
(g) The Registrant’s response to the complaint.

[33] In light of the steps taken with respect to the two interrelated complaints, I find that the Inquiry Committee obtained sufficient information to allow it to reasonably assess the complaints. As such I find that the investigations were adequate and that they did not fall below an acceptable standard of review.

[34] In reaching this conclusion, I appreciate that the Complainant is likely still of the view that investigative steps were missed or that questions/concerns were left unanswered. However, I reiterate that a “perfect” investigation is not mandated nor is it the threshold for any Inquiry Committee investigation.

VIII ISSUE 2: REASONABLENESS OF DISPOSITION

[35] The role of the Review Board in assessing the reasonableness of the Inquiry Committee’s disposition of a complaint is to determine whether it falls within the range of defensible outcomes based on the evidence it had before it. A disposition will be reasonable if it addresses the major points in issue in relation to the facts before it.

[36] Put another way, the Review Board’s role is to decide whether the disposition can be reasonably supported on the evidence. It is not this Board’s role to decide whether the Inquiry Committee’s decision was right or wrong.

[37] In this case, the Inquiry Committee found there was cause to take action against the Registrant under sections 33 and 36 of the Act and requested the Registrant to undertake and consent to the following four steps:

(a) Consent and undertake not to repeat the conduct to which the matter relates which is the failure to comply with the College Practice Standard Number 3;
(b) Consent to obtain informed patient consent for each treatment provided by the Registrant or her support staff and to document this consent in the patient’s record;
(c) Consent to obtain informed consent of each and every patient for the provision to that patient of any physical therapy treatment by the Registrant’s support staff and to document this consent in the patient’s records; and

(d) Consent to a six month follow up and pay the costs of this follow up inspection.

[38] The dispositions, in my view, address the major points in issues and can rationally be supported on the evidence. Further, the dispositions fall within a rational and defensible range of outcomes. Accordingly, I dismiss the Complainant’s applications.

IX ORDER

[39] For the reasons given above, I confirm the dispositions of the Inquiry Committee as I find the investigations were adequate and the dispositions reasonable.

[40] In making these decisions I have considered all of the information and submissions whether or not specifically reiterated herein.

“Lorianna Bennett”

Lorianna Bennett, Panel Chair
Health Professions Review Board

February 28, 2013