DECISION NO. 2012-HPA-152(a)

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 COMPLAINANT

AND: The College of Physicians and Surgeons of BC COLLEGE

AND: A Physician REGISTRANT

BEFORE: Michael Mark, Panel Chair REVIEW BOARD

DATE: Conducted by way of written submissions concluding on March 18, 2013

APPEARING: For the Complainant: Self-represented

For the College: Sarah Hellmann, Counsel

For the Registrant: Self-represented

I DECISION

[1] Upon considering the Application and for the reasons that follow, I find that the investigation was adequate and that the disposition was reasonable, and I order the disposition be confirmed.

II BACKGROUND FACTS

[2] On October 26, 2008, the Complainant injured his left knee at work and, consequently, he made a claim through WorkSafe BC. A preliminary step in the application for WorkSafe BC benefits is an initial assessment of the injury which was conducted by the Registrant on December 17, 2008. At this time, the Registrant was a medical consultant for WorkSafe BC participating in a Medical Assessment and Rehabilitation Program and associated with a rehabilitation clinic (the “clinic”). It is this medical examination and assessment with which the Complainant takes issue, and he believes it was the cause of a sequence of events leading to inappropriate treatment and response from WorkSafe BC. After this assessment, a rehabilitation program was implemented and ultimately the
Complainant was deemed fit to return to his full work duties as of March 16, 2009. That decision was reviewed and upheld by WorkSafe BC.

[3] The examination occurring on December 17, 2008 was the only contact between the Complainant and the Registrant and, apparently, the Complainant was accompanied by his girlfriend, Ms. B at the clinic and during the examination. On this date, the Complainant was asked to complete a questionnaire as part of a psychological screen known as the Distress Risk Assessment Method (DRAM) before meeting with the Registrant. This form is comprised of approximately 45 questions which provided 4 choices as a range of response. Once the form is completed, it is submitted to the receptionist at the clinic for review by the Registrant in completing the Discharge Report recommending the Return to Work and Medical Planning program.

[4] The DRAM form is of considerable relevance as the Complainant maintains that he only filled in between 5-10 of the questions, leaving the balance blank. However, a redacted copy of the form of the questionnaire was obtained from the clinic by the Complainant through a request under the Personal Information Protection Act. The document so obtained revealed that almost all of the questions were answered. According to the Complainant, the DRAM form was falsified and completed by the Registrant or possibly by an employee of the clinic. The Complainant points to this form as the basis of an inaccurate assessment and a failure in the treatment plan set out by the Registrant in his Discharge Report. In 2010 and 2011, several physicians diagnosed Complex Regional Pain Syndrome (CRPS) in explanation of the continuing problems that the Complainant suffered since his accident in late 2008.

[5] It appears that the Complainant places the responsibility for his ongoing medical problems on the Registrant for having made a misdiagnosis and recommending an improper treatment plan based upon the allegedly falsified psychological screening test. In support of this general assertion, he obtained a statement from Ms. B to corroborate his allegation that he only partially filled in the DRAM questionnaire. In addition, Ms. B could attest to the fact that the Registrant said to her that the "physiotherapist was an idiot" and that "the pain is in [the Complainant's] head." Ms. B provided a signed letter to the College setting out her recollection of the events she saw and heard that day. She recollects the Registrant saying he "gets it"; and words to the effect that it is no big deal if the Complainant gets hurt away from work when he fails to carry a needed sting kit while in the woods, but there is a big fuss if the Complainant gets hurt at work. The Complainant offered to provide a sworn affidavit from Ms. B in addition to the signed statement; but such an affidavit was neither requested by the College nor provided by the Complainant.

[6] The Registrant, on the other hand, denies that he either falsified the DRAM questionnaire or made the alleged comments which he agrees would be inappropriate. As to the questionnaire, when responding to the allegations to the College, the Registrant pointed out that the procedure followed in conducting the assessment does not permit him to review or possess the questionnaire or the raw data for the medical interview. Therefore, it is impossible for him to have tampered with the document. Moreover, he states with certainty that although he has no recollection of the assessment he has never made such an inappropriate comment in 34 years of practice.
III COMPLAINT AND INVESTIGATION

[7] The complaint to the College was launched on September 9, 2011 and enclosed with it were 14 appendices in support. The complaint focuses on the alleged falsification of the DRAM questionnaire with tangential reference to the alleged comment “the physiotherapist is wrong, the pain is in [the Complainant’s] head”. A reading of the complaint as a whole reveals the gravamen of his concern which was that the Registrant erroneously emphasized psychological factors leading to an incorrect rehabilitation program and a neglect of the underlying medical issue. My impression is that the Complainant is not so much aggrieved about the language allegedly employed by the Registrant as much as the fact that it indicates a bias in his medical judgment toward psychological factors rather than traumatic or physiological causes. The Complainant attached the Registrant’s Discharge Report along with a detailed itemized list of 18 corrections and clarifications of errors that he believed were pertinent. Also included were documents related to a successful complaint against a psychiatrist for an incorrect diagnosis of Bipolar Disorder Type II, and other medical opinions from May, 2011 onward confirming a diagnosis of chronic regional pain disorder in relation to the left knee.

[8] The Inquiry Committee reviewed the Complainant’s documentation and obtained further evidence in the course of the investigation. The record before the Inquiry Committee included the response from the Registrant along with his entire file pertaining to the medical assessment (including a client satisfaction questionnaire completed by the Complainant which will be discussed later), a letter from Dr. A who was one of the physicians to diagnose complex regional pain syndrome, records from the Hospital, and the Complainant’s responses to the letters from the Registrant and Dr. A.

[9] The investigation was delayed and the College gave notice of this fact to the Complainant as required by letter dated June 4, 2012, which also advised him of his rights for a review of the investigation under the Act. The investigation was suspended pending the Complainant’s decision on whether he would seek a review as a consequence of the delay, but no such application was made and the investigation resumed. A disposition was rendered by letter to the Complainant dated July 9, 2012.

[10] The College found no basis for regulatory criticism of the Registrant’s conduct in his assessment. In coming to that conclusion, the College addressed the steps taken in making his diagnosis which included taking an appropriate history, performing standard assessments, and formulating a plausible working diagnosis with recommendations that logically flowed from the working diagnosis. It was determined that the Registrant’s opinion involved a matter of clinical judgment for which he was qualified and in the exercise of which he met the requisite standard of care. The college also noted that CRPS develops over time and the Registrant’s opinion in December, 2008 was based upon criteria observed at the time; over a period of month or years, those criteria were observed by other physicians, leading to the diagnosis.

[11] The College also addressed the comment that “it’s all in [the Complainant’s] head” and it found that whether such was said cannot be "definitively adjudicated". The College was of the view that given her close relationship with the Complainant, her statement cannot be treated as "entirely unbiased".
IV THE APPLICATION FOR REVIEW

A. The Role of the Review Board

[12] The jurisdiction of this Review Board on an application for review is limited by legislation. Pursuant to section 50.6 of the Act, upon a review the Review Board may make an order:

(a) confirming the disposition of the Inquiry Committee;
(b) directing the inquiry committee to make a disposition that could have been made by the Inquiry Committee in the matter, or
(c) sending the matter back to the Inquiry Committee for reconsideration with directions.

[13] The authority to make any of the prescribed dispositions arises only after a mandatory consideration of both the adequacy of the investigation or the reasonableness of the disposition, or both. The review is conducted on the record and the Review Board ought to intervene only when the investigation or the disposition fails to meet the statutory standard. The Review Board does not rehear the evidence to make findings of facts or to draw conclusions or inferences that may differ from the Inquiry Committee. The Review Board considers the adequacy of the investigation and whether the disposition was reasonable. If the investigation was adequate, and the disposition falls within a reasonable range of outcomes, it is unassailable.

[14] The College correctly points out that the adequacy of an investigation will vary depending on the circumstances of each case based upon an assessment of the factors at play, including:

(a) the seriousness of the harm alleged;
(b) the complexity of the investigation;
(c) the availability of evidence; and
(d) the resources available to the college.

[15] An adequate investigation is not necessarily a perfect one. An investigation need not have turned every stone or have followed every path to its conclusion so long as the key information is sufficiently considered. Conversely, an investigation cannot be said to have been adequate if it failed to make inquiries that are logically justified based on the factors enumerated above; nor is a disposition adequate if key evidence is either ignored or given insufficient weight or consideration. An investigation is adequate only if the Inquiry Committee sufficiently reviews the record and makes inquiries to obtain key information.

[16] In considering the reasonableness of a disposition, the law requires deference to administrative decision makers that have acquired expertise. So long as the disposition falls within a range of outcomes that in the context of the record is sufficiently justified, transparent and intelligible, it should be sustained (see Review Board Decision No. 2009-HPA-0001(a)-0004(a) at para 92).

[17] The Supreme Court of Canada describes the concept of reasonableness in the context of an administrative review in this passage: (Dunsmuir v. New Brunswick 2008 SCC 9 at paras. 47 and 49).
Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime”: D. J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

B. The Complainant’s position

In the complaint filed with the Review Board on August 12, 2012, the Complainant impugns the disposition for the following reasons (paraphrased):

(a) The College delayed the handling of his complaint;

(b) The College did not take his complaint seriously and it did not sufficiently review the medical evidence in the record;

(c) Employees of the College mislead him about the status and handling of his complaint; and

(d) The College reduced his complaint to a consideration of whether the Registrant provided an acceptable standard of care and whether the Registrant was qualified to come to his conclusions.

The complaint also sets out requests for remedies which are also paraphrased as follows:

(a) disciplinary action against the Registrant;

(b) reversal of the disposition;

(c) an acknowledgement and apology from the College for mismanagement and time delays in handling the Complaint;
(d) a press release on the College website detailing his complaint;
(e) support from the Complainant's MLA to investigate mishandling of his complaints;
(f) legislative changes regarding the use of DRAM questionnaires; and
(g) abolition or reform of the College and regulation of physicians in the public interest.

[20] I pause to note here that except for the allegation that the College did not take his complaint seriously or sufficiently review the record, there is little in the complaint about the adequacy of the investigation, or the reasonableness of the disposition. In addition, the Review Board lacks jurisdiction to grant any of the remedies sought by the Complainant as detailed in the previous paragraph. However, the requirements to review the adequacy of the investigation and the reasonableness of the disposition are mandatory and shall be undertaken here.

[21] The submissions of the Complainant do little to illuminate the allegations made in the complaint. The Complainant submits that:

(a) the investigation was delayed;
(b) the contents of the record are "in poor standing" and the evidence was not adequately reviewed;
(c) the college summary of the evidence contains inaccuracies and misrepresentations;
(d) the complaint was reviewed by a physician and then referred to the College;
(e) the disposition permitted falsification of the DRAM questionnaire which does not promote an acceptable standard of conduct.

[22] Most of the balance of the Complainant's submission addresses the appropriateness of the Registrant's medical treatment rather than the investigation conducted by the College or the disposition it made on July 9, 2012. As will be discussed below, it is important that the Complainant does not make any submission in relation to the inappropriate comments alleged to have been made in the examination. The Complainant did not make a Reply submission to the Statement of Points filed by the College herein.

C. Position of the College

[23] The College submits that the standard of review for adequacy is "reasonableness" and that the Review Board ought to extend deference to the College in its assessment of the probative value of the evidence as well as the extent of the investigation required. The College points out the following steps that were taken to obtain key information in assessing the standard of care provided by the Registrant:

(a) a response to the complaint was obtained from the Registrant;
(b) information from another treating physician was obtained and reviewed;
(c) a copy of all physician responses were provided to the Complainant for review and response; and
(d) a full review of all responses was made prior to making the disposition.
The College argues that the Registrant provided a reasonable and logical response to the allegation of falsifying the DRAM questionnaire and they impugn the statement of Ms. B as a biased account of the interaction between the patient and physician. The College submits that the disposition is reasonable in that it falls within the range of possible outcomes, it is sufficiently justified, transparent and intelligible; and the reasons used to support the conclusion can withstand scrutiny. In conclusion, they seek an order confirming the disposition.

D. Position of the Registrant

The Registrant made no separate submission on his own behalf stating that he is unable to further clarify points already made by the College in its submission, nor is he able to provide further factual information.

V ISSUES

(1) Was the investigation conducted by the College adequate?

(2) Was the disposition of the College dismissing the complaint reasonable?

VI DISCUSSION

E. Issue 1: Was the investigation conducted by the College Adequate:

The Complainant makes two essential submissions on the adequacy of the investigation. Firstly, that the investigation was unduly delayed, and secondly that the College did not take the complaint seriously and it did not sufficiently review the record.

As to the delay, the Complainant is correct that the College did not meet the timelines imposed by the Act or the regulations made thereunder. As required by section 50.55(4) of the Act, the College gave notice of the delay by letter June 4, 2012 and it suspended its investigation for 30 days pending the Complainant's decision as to whether he would apply to the Review Board for a review of the investigation pursuant to section 50.57 of the Act. The Complainant elected not to exercise his right to apply for a review of the investigation and, accordingly, the Inquiry Committee concluded the investigation and rendered the disposition on July 9, 2012.

Apart from noting a delay, the Complainant did not proffer any evidence or make any submission on how or why the delay occurred, or what statements were made to him in relation to the delay. There is no submission as to how the delay affected, if at all, the adequacy of the investigation or the reasonableness of the disposition, nor can I see any potential to offer any remedy given that a disposition has been made, albeit slightly later than contemplated. If the Complainant had serious concerns about delay he could have made an application for a review of the investigation in accordance with the provisions of the Act. However, that application itself would have resulted in further delay as the College was able to render a disposition 35 days after the notice provided to the Complainant. In the result, I find that the delay had no impact on either the adequacy of the investigation or the reasonableness of the disposition.

I have also considered the investigation conducted by the College in relation to the complaint, and on the whole I find that in the circumstances of this case, the investigation was adequate. The complaint arises from the single appointment occurring on December 17, 2008 which is very well documented in the Discharge Report prepared by the
Registrant which is just over 4 pages in length. The report is a detailed statement setting out the diagnosis made, the history of the accident and progress made since, the current medical conditions, medications taken, past medical history, physical examination, psychological screen and the impression of the Registrant. The College submits and I agree that I must give deference to the expertise of the Inquiry Committee in assessing the appropriateness of the medical assessment performed by the Registrant. In support of this, the College cites the following passage from McKee v. Health Professions Appeal and Review Board, [2009] O.J. 4112 (“McKee”) at paragraph 30:

The Complaints Committee is a specialized tribunal. The investigative power given to it is discretionary in nature. In assessing the reasonableness of investigations conducted by Human Rights Commissions, this court has held that deference must be given to the administrative decision makers to assess the probative value of the evidence and to decide the extent of the investigations required.

[30] While McKee is not binding and it involves a different statutory scheme, it is persuasive in its characterization of the deference that ought to be given to the expert administrative decision maker. In making the disposition, it is my view that the College closely reviewed the actions taken by the Registrant and considered carefully whether there was a misdiagnosis based upon the observations made by the Registrant. The College also considered the diagnosis and opinion of Dr. A who later diagnosed CRPS. I am not in a position to assess the diagnosis and conclusions made by the Registrant and I am bound to give deference to College in matters within their expertise. I must only satisfy myself that the complaint was adequately investigated as it relates to the appropriateness of the medical care provided by the Registrant. The Inquiry Committee thoroughly reviewed the complaint and went on to seek a response from the Registrant. They also reviewed the Discharge Report and sought the input from another treating physician. All of this was presented to the Complainant for his reply which he provided, and his response forms part of the record. In the circumstances of this case, it is my view that the investigation as to the standard of medical care was adequate.

[31] Central to the complaint is the allegation that the DRAM questionnaire was falsified by the Registrant. While this issue is related to the standard of medical care provided, it relates to a specific allegation of impropriety on the part of the Registrant. The College had before it a number of pieces of evidence to consider. Firstly, it considered the Complainant's statement that he did not complete the DRAM questionnaire notwithstanding that a nearly completed form was discovered through the Access to Information legislation. Secondly, it had a signed letter from the Complainant's girlfriend, who was present with the Complainant before and during the examination. She corroborates the allegation that the questionnaire was not completed and she also bears witness to the inappropriate comments allegedly made by the Registrant. Thirdly, the Inquiry Committee obtained a statement from the Registrant explaining the procedure for creation and use of the questionnaire which would prevent him from having the form in his possession at any time. Finally, it had the Complainant's response to the Registrant's explanation in which it is asserted that the Registrant should be responsible for employees of the clinic if they altered the document. This is a concession by the Complainant that he has no direct evidence of tampering with the document by the Registrant and he comes to that conclusion by inference. There does not appear to be any key pieces of information absent from the record which ought to have been considered and in my view, the investigation of this aspect of the complaint was adequate.
[32] I pause to note here that the College gave little or no weight to the statement provided by Ms. B because she was considered biased given her relationship to the Complainant. A question may arise as to whether the investigation was adequate given that there appears to have been no attempt to assess the veracity of her statement. It appears that the statement was simply dismissed out of hand. The reasonableness of the disposition might also be questioned in the absence of any attempt at verification of Ms. B’s evidence.

[33] A line of authority suggests that there is some duty to make a provisional assessment of the facts. Member Hobbs addresses this issue in Review Board Decision No. 2010-HPA-0003(a) at paras. [23]-[25]:

The question as to what an Inquiry Committee might do in the face of conflicting evidence is an important one, as it speaks to the Review Board’s role when complainants point to such conflicts on reviews.

On one hand, it is true that the Inquiry Committee is not the Discipline Committee. The Inquiry Committee is not tasked with the type of ultimate fact-finding that would happen after a Citation was issued a hearing held before the Discipline Committee. At the same time, it may not be fully accurate to describe the Inquiry Committee as being solely a “screening” body that has no mandate to critically examine conflicting evidence. For one thing, in the Act, the Inquiry Committee does have its own independent power to take or suggest action adverse to the member without issuing a Citation. It cannot do that without some provisional assessment of the facts. For another, it is difficult to see how the Inquiry Committee can decide meaningfully whether to issue a Citation without forming some provisional assessment of what took place, including whether evidence needs to be more fully fleshed via the Citation and discipline process. In this latter regard, an analogy might be drawn to the role of Crown Counsel. While the Crown does not find facts—that is the ultimate role of the Court—it must critically examine the evidence to determine whether there is a substantial likelihood of conviction. To merely say “we cannot lay charges because there is conflicting evidence” would be wholly inadequate in many cases. While not being a final conclusion, a meaningful, albeit provisional, assessment of the evidence is required.

It follows that there may be cases where an adequate investigation requires a College investigation to look into evidentiary conflicts in more detail given the nature of the complaint and all the circumstances of the investigation. There may also be cases where it would not be a reasonable outcome for an Inquiry Committee to dismiss certain complaints merely by stating “it is one person’s word against another’s”. The Review Board must apply the statutory tests carefully and sensitively, based on the record in each case.

[34] I am inclined to agree with member Hobbs that it is necessary for the Inquiry Committee to make some provisional assessment of the facts in its role as investigator. Indeed, the Inquiry Committee made that assessment in this case by finding bias and giving the statement little or no weight. However, the positions taken by the parties are diametrically opposed. On the one hand, the Registrant has no independent recollection of the examination and he relied exclusively on his records. On the other hand, the Registrant and Ms. B. offer two firsthand accounts ostensibly based upon their specific recollection of events. Because there was a concern of bias in the statement of a corroborating witness, it is my view that an adequate investigation may have necessitated further inquiries about the statement which are proportionate to its significance in the circumstances of the case. The statement is important as it corroborates the Complainant’s version of events, memory and recollection of the event.
The Inquiry Committee could have accepted the offer of receiving a sworn statement with very little effort. The formality and solemnity of a sworn statement would verify authenticity and may deter prevarication and enhance credibility. Alternatively, the Inquiry Committee could have attempted to interview the witness and determine the status of the relationship, the influence of the Complainant, the accuracy of the statement or even its authenticity. All of this could be accomplished with relative ease. While there may be no power to compel testimony, the failure of a witness to cooperate in a brief interview or to provide an affidavit that was previously offered would be informative and helpful in making a provisional assessment of credibility. If no provisional assessment is made, conflicting stories would simply stymie an investigation and leave the investigator to arbitrarily choose one story over another or to do nothing at all. Neither of those alternatives is consistent with the concept of reasonableness.

However, the nature of the review before me is to some extent defined by the parties. As I noted earlier, the gravamen of the complaint is that there was a misdiagnosis and an improper treatment plan as a consequence of a falsified DRAM questionnaire. Neither the complaint to the Review Board nor the submissions of the Complainant in this review make any significant reference to the inappropriate statements alleged to have been made. In submitting additional documents to the Review Board, the Complainant makes brief reference to the witness statement and that "this document is imperative and offering validation of my complaints" (emphasis added). Therefore, it seems to me that the alleged statements are relevant only as a part of the consideration of the standard of care provided which, as I have found, was adequately investigated. In this respect, I note that the record before the Inquiry Committee contained a "Client Satisfaction Questionnaire" which was completed by the Complainant on the date of the examination, December 17, 2008, and the highest satisfaction rating was reported without any reference to the alleged statements. This is incongruous with the allegation of offensive and inappropriate comments having been made and that questionnaire would have been considered by the Inquiry Committee in making the disposition.

If the gravamen of the complaint was a poor bedside manner evidenced by the alleged statements, then more emphasis would have or should have been made on the corroborative evidence of the third party witness. Such is not the case here. The statements form part of the context of a complaint related to the standard of care and the Inquiry Committee conducted an adequate investigation of the substance of the complaint.

F. Issue 2: Was the disposition of the College dismissing the complaint reasonable?

The role of the Review Board is "not to step into the shoes of the Inquiry Committee, but rather to determine whether the Inquiry Committee’s disposition falls within the range of acceptable and rational solutions, and is, viewed in the context of the whole record, sufficiently justified, transparent and intelligible to be sustained" (see Review Board Decision No. 2009-HPA-0001(a) - 0004(a), at para. [92]). I have found that the investigation was reasonable and that the Inquiry Committee reviewed all of the key pieces of information in assessing the standard of care provided to the Complainant. The decision was, in my view, sufficiently justified and intelligible in that the evidence reasonably

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Notes: I should note here that the Complainant offered to provide his girlfriend’s statement in the form of an affidavit. In reading the disposition letter, I noted the College’s comment that they had received an “affidavit” from her subsequent to the making of the Complaint. Upon my inquiry, I learned that no affidavit was in fact received by the College and, apparently, the documents that they received and relied upon was merely a signed statement which was not in affidavit form. The disposition letter was in error on this point.
supported the conclusion. The evidence was intelligibly and logically marshaled resulting in transparency of the disposition. Briefly stated, the disposition was reasonable.

VII ORDER

[39] I confirm the Inquiry Committee’s disposition contained in their letter to the Registrant dated July 9, 2012.

“Michael Mark"  

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Michael Mark, Panel Chair  
Health Professions Review Board  

August 15, 2013