DECISION NO. 2012-HPA-231(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

AND: The College of Physicians and Surgeons of BC

AND: A Physician

BEFORE: Marilyn Clark, Panel Chair

COMPLAINANT

COLLEGE

REGISTRANT

REVIEW BOARD

DATE: Conducted by way of written submissions concluding on July 26, 2013

APPEARING: For the Complainant: Self-represented

For the College: Sarah Hellmann, Counsel

For the Registrant: Lindsay Johnson, Counsel

DECISION ON COMPLAINT APPLICATION FOR REVIEW

I DECISION

[1] Upon considering the application made by the Complainant under s. 50.6 of the Act, it is my decision that the investigation conducted by the Inquiry Committee is inadequate. I am returning the file to the Inquiry Committee with directions.

II INTRODUCTION

[2] The Complainant states that while at work on March 18, 2011, he suffered the impact of two very loud noises, one minute apart, in his left ear through a walkie-talkie. He experienced immediate excruciating pain in his left ear.

[3] On May 16, 2011, the Registrant, an Otolaryngologist (ear, nose and throat doctor), diagnosed left-sided tinnitus in the Complainant but did not relate the diagnosis to the workplace incident. On that day, he wrote to referring Physician A, in reference to the buzzing in the Complainant’s left ear: “He has had no history of occupational noise exposure nor is there any family history of hearing loss.”
Audiometric testing on July 12, 2011, confirmed high frequency hearing loss in both ears, although the left ear was more severely affected.

WorkSafe BC rejected the Complainant’s workplace injury claim. The Complainant lays the blame for that rejection on the Registrant. The Complainant believes the Registrant misdiagnosed him by not connecting the tinnitus with the workplace noise exposure.

The Complainant wants WorkSafe BC to provide medical care for his tinnitus.

### III APPLICABLE STATUTORY PROVISIONS

Section 50.6 of the Act outlines the scope of a review by the Review Board.

#### 50.6

1. A complainant may apply to the review board for a review of a disposition described in section 50.53(1)(c).

   ... 

5. 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;

   (b) the reasonableness of the disposition.

6. A review under this section is a review on the record.

   ... 

8. On completion of its review under this section, 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.

### IV ISSUE

Under that legislation, it is my duty to consider:

1. The adequacy of the College’s investigation, and

   2. The reasonableness of the disposition.

### V BACKGROUND

The Complainant states that he had just reported as a casual employee to a television production set when two extremely loud noises, a minute apart, assaulted his left ear. Three weeks later ringing in his left ear began, diagnosed as tinnitus.

Several weeks later, on referral, the Complainant visited the Registrant who did not relate the loud noises of March 18, 2011 to the ringing in his ears. As stated above, in
his letter to Physician A, he wrote: “He has had no history of occupational noise exposure nor is there any family history of hearing loss.” The Registrant did indicate the Complainant would have to have testing done and that happened on July 12, 2011.

[11] The Registrant saw the Complainant for a second time on August 19, 2011, and at that time the Registrant stated in a letter to Physician B, who appears to be in partnership with Physician A, that:

Although [the Complainant] has had a history of occupational noise exposure in the past, there is no possible explanation for his unilateral left-sided tinnitus except for the fact he has increased hearing loss on the left. It is conceivable that acoustic trauma to his left resulted in his hearing asymmetry and persistent tinnitus.

[12] A second Otolaryngologist, on referral from Physician B, saw the Complainant on September 15, 2011. It was his view that

The patient’s description of onset of tinnitus three weeks after what sounds like a two (sic) very short but extremely loud blasts in his left ear suggests to me a relationship between the tinnitus and the blasts of noise. It is always impossible to be absolutely sure unless the tinnitus comes on immediately at the time of insult. The development of tinnitus in the absence of any other satisfactory explanation and or previous tinnitus particularly with the onset of worse hearing on the side which incurred the noise and the characteristic frequency for noise damage in my opinion means that is more than fortuitous that the tinnitus has occurred on this side following this trauma.

[13] The Complainant’s complaint, dated September 19, 2011, received by the College on September 21, 2011, stated:

I would like to see [the Registrant] re-educated about TINITUS (MY AILMENT) & re-educated about how to treat/act around his patients. For one thing [the Registrant] needs to talk to his patients & listen what they say. Since my 1st appointment with [the Registrant] lasted 90 sec and my 2nd appointment lasted about 110 seconds, it’s all the more important [the Registrant] listen exactly to what patient says, every word & sentence, since doesn’t seem to be time for discussion.

[14] On October 7, 2011, the Complaint was referred to the Inquiry Committee with the following comment and recommendation from the Registrar:

Allegation of misdiagnosis of tinnitus attributed to taking too little time in assessing the patient. If admitted or proven, unlikely to result in more than a reprimand. Does not satisfy the letter of criteria for IC referral of non-serious matters (complexity, previous action, particularly adverse outcome, or potential for investigation under 33[4]), but the College has received a non-sustained prior complaint identifying similar concerns. Therefore, assigned to IC stream, 32(2).

[15] In the Registrant’s response to the College dated December 16, 2011, he wrote as follows:

…it is conceivable increased hearing impairment on the left could be the result of acoustic trauma, and this in turn will explain increased hearing impairment on the left as well as his unilateral left-sided tinnitus.
[16] The Complainant was and is extremely upset by the Registrant’s apparent inability to listen to his patient. What information was relayed to the Registrant in their first meeting on May 16, 2011 is unknown. The Complainant left the appointment in anger after what he estimated to be 90 seconds. The Registrant, upon receipt of the letter from the College advising him of the complaint, stated that he did not recall the Complainant so, in responding, he had to rely on the office chart. He writes “At that time, he gave no history of occupational noise exposure”. The Registrant claims it was only upon receipt of a note from the Complainant apologizing for getting upset during that first appointment that he became aware that “he had exposure to loud noise in the left ear on March 18, 2011”.

[17] With regard to the Complainant’s belief that the Registrant was responsible for his WorkSafe BC claim being denied, the Registrant writes “It would be impossible for me to formulate an opinion without him undergoing proper audiometric assessment, which was performed at [urban] Hospital in July. Unfortunately by this time his claim for compensation had already been rejected by WorkSafe BC”.

[18] There is no evidence of contact between WorkSafe BC and the Registrant but we do not know if WorkSafe had obtained a copy of the Registrant’s letter to Physician A dated May 16, 2011. In that letter, as we know, the Registrant stated that the Complainant “has had no history of occupational noise exposure nor is there any family history of hearing loss.” The College did not request health records from either Physician A or Physician B. As a result the College would not know whether either of them had been in contact with WorkSafe BC. Nor would the College know whether they transmitted to WorkSafe BC the Registrant’s assessment, as stated in his May 16 letter, that “He has had no history of occupational noise exposure”.

[19] The Complainant believes that the Registrant misdiagnosed him when he didn’t immediately connect the tinnitus to the workplace incident. The Complainant accuses the Registrant of not listening to him, thus not connecting the tinnitus to the workplace incident. The Complainant claims the Registrant spent only 90 seconds with him at the first appointment and 110 seconds on the second appointment. In fact, the Complainant got upset with the Registrant and left the first appointment prematurely. (Subsequently, the Complainant wrote the Registrant and apologized for his sudden departure.)

VI ANALYSIS

A. Adequacy of the Investigation

[20] The Inquiry Committee had for review the complaint dated September 19, 2011, along with additional correspondence from the Complainant dated September 21, October 11 and November 18, 2011.

[21] The Inquiry Committee had a response from the Registrant, including his office file which did not include any file notes from either of the Complainant’s visits or the results of the audiology assessment he ordered. The response included copies of the letters he had written to Physicians A and B and a copy of the letter of apology from the Complainant. It is hard to imagine how he was able to reconstruct his encounter with the Complainant as there were no file notes included in the Record.
I am not satisfied that the investigation was adequate. There were two referring physicians, neither of whom was asked to submit their records. It is also surprising to me that the Registrant could not recall the Complainant even though the Complainant apparently left the first appointment in anger and then wrote a letter of apology for doing so, an action that might have made him somewhat indelible in the Registrant’s memory. The Complainant was also seen by the Registrant on a second occasion following receipt of the audiometric testing results.

The record reveals that the Registrant initially reported to Physician A that the Complainant had no previous occupational exposure that would affect his hearing. What is not known is whether or not that report had any effect on WorkSafe BC’s rejection of the Complainant’s claim. If it did then there may well be substance to the Complainant’s assertion that the Registrant does not listen to his patients. The College ought to be concerned if this is the case.

The Record is incomplete by reason of not having information from Physician A or Physician B or even, for that matter, from WorkSafe BC to determine if there was any link between the WorkSafe BC claim rejection and the Registrant’s letter commenting there was no history of occupational noise exposure. The investigation was inadequate.

The Complaint was referred to the Inquiry Committee even though it did not satisfy the Inquiry Committee criteria for referral because there had been a previous unsustained complaint against the Registrant. This, in my opinion, is another very good reason to perform a more thorough investigation.

B. Reasonableness of the disposition

The Inquiry Committee determined they could find no basis for regulatory criticism of the Registrant. In response they wrote:

The Inquiry Committee carefully considered your complaint, noting that you felt [the Registrant] had spent inadequate time with you, listened poorly, and caused WorkSafe BC to deny your claim for compensation.

The Committee considered that you left the consultation with [the Registrant] early and abruptly, as outlined in your letter addressed to [the Registrant] apologizing for this fact. The Committee was unable to ascertain how much time [the Registrant] spent with you during the consultation, but noted that he did record a standard medical history and focused physical examination, arranged for comprehensive audiometric testing at [urban] Hospital and later noted that the tinnitus could have been related to occupational noise.

The Committee noted that [the Registrant] was not responsible for the rejection of your WorkSafe BC claim, since your claim was rejected prior to your visit to [the Registrant] and attendance at [urban] Hospital. In addition, the Committee received no documentation that would indicate [the Registrant] had any communication with WorkSafe BC regarding your claim.

A review by the Review Board is based solely on the Record. The Record is inadequate to determine that the Registrant’s conduct was above reproach without responses from, and the records of, Physicians A and B. Such responses would have completed the Record and may have absolved the Registrant’s conduct. What we have in the Record does not.
[28] As provided in paragraph (8)(c) of s. 50.6 of the Act I am directing the Inquiry Committee to have the two referring physicians provide their office records as they relate to the Complainant including any communication they had with WorkSafe BC. Once the Inquiry Committee has reviewed that documentation, I direct that they take a second look to determine whether or not there are grounds for regulatory criticism of the Registrant.

VII CONCLUSION

[29] Physician A, in describing how distressing tinnitus can be, wrote:

Tinnitus is an extremely distressing symptom, particularly when it is intrusive and over my career I have had three people commit suicide because of tinnitus. Two of them having it secondary to noise damage. Many people have tinnitus of mild degree and therefore when (sic) my own experience with patients being severely handicapped I make it a point always to have the patients feel that their complaint is being listened to by spending time with them, as unfortunately very often little can be done except validating their complaints by being concerned. I have found this to be an effective method of reassuring and hopefully helping patients come to terms with this unfortunate and often long term permanent disorder.

[30] Tinnitus can have an overwhelming impact on one’s life. Although I have found the investigation inadequate and have ordered that further steps be taken, it is my view that the only place where the Complainant might achieve real satisfaction is with an appeal of the decision of WorkSafe BC. If, as it appears, the tinnitus that he now has to live with is as a result of the workplace incident of March 18, 2011, the place to appeal is with the Review Division of WorkSafe BC. Neither the College nor I can alter the WorkSafe decision.

[31] In summary, I find the Inquiry Committee’s investigation inadequate and have directed, in paragraph [26], that they take further steps to determine whether or not there are grounds for regulatory criticism of the Registrant. Upon concluding their investigation, I direct the Inquiry Committee to advise the Complainant and the Registrant of their conclusions.

[32] In making this decision, I have considered all of the information and submissions whether or not specifically reiterated herein.

“Marilyn Clark”

Marilyn Clark, Panel Chair
Health Professions Review Board

November 15, 2013