

DISCIPLINE COMMITTEE OF THE COLLEGE OF KINESIOLOGISTS OF ONTARIO

IN THE MATTER of the *Regulated Health Professions Act*, 1991, S.O. 1991, c.18, as amended, and the regulations thereunder, as amended;

AND IN THE MATTER of the *Kinesiology Act*, 2007, S.O. 2007, c. 10, Schedule 0, as amended, and the regulations thereunder, as amended;

AND IN THE MATTER of allegations of professional misconduct/incompetence before the Discipline Committee of the College of Kinesiologists of Ontario as referred by the Inquiries, Complaints and Reports Committee against **Moira Swain**;

BETWEEN:)
)
)
COLLEGE OF KINESIOLOGISTS) **Jordan Glick**
OF ONTARIO) for the College of Kinesiologists

)
-and-)) **Eric Bruce**
) Attending for the College of
) Kinesiologists

)
MOIRA SWAIN) **S. J. Chip Petrillo**
Registration Number 19003) for the Member

)
) **Moira Swain**
) In attendance

)
)
) **Cynthia Kuehl**
) Independent Legal Counsel

) **Heard: January 24, 2020**
) **Decision Released: February 20, 2020**
) **Written Decision Date: February 19, 2020**

Panel Members:

Mary Pat Moore, Chair, Public Council Member
Teresa Bendo, Public Council Member
Jennifer Pereira, R. Kin., Professional Council Member
Katie St. Denis, R. Kin., Professional Council Member
Pamela Paquette, R. Kin., Member at Large

DECISION AND REASONS FOR DECISION

I. INTRODUCTION

[1] This matter was heard by a panel of the Discipline Committee (“the Panel”) on January 24, 2020.

[2] The hearing proceeded by an Agreed Statement of Facts. The College and Moira Swain (“the Member”) also proposed a Joint Submission As To Order.

II. ALLEGATIONS

[3] The allegations against the member are set out in the Notice of Hearing dated November 25, 2019 contained in the Hearing Brief of Documents(Exhibit #1, Tab 1).

[4] The allegations in the Notice of Hearing involve paragraph 6 (submitting false and/or misleadings claims to Sun Life insurance company that listed PS as the treatment provider and included PS’s registration number, created false and/or misleading invoices that listed PS as the treatment provider and included PS’s registration number, and failed to ensure that fees charged accurately reflected the services provided, and paragraph 7 (failed to keep proper patient records for three patients).

[5] Specifically, it is alleged in paragraph 8 of the Notice of Hearing that the Member engaged in professional misconduct pursuant to the following paragraphs of section 51(1) (c) of the *Health Professions Procedural Code* (“Code”), being Schedule 2 to the

Regulated Health Professions Procedural Code, and in particular, the following subsections of Ontario Regulations 316/12 under the *Kinesiology Act, 2007*:

1 (1): contravening, by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession;

1 (18): issuing an invoice, bill, or receipt for services that the member knows or ought to know is false or misleading;

1 (25): failing to keep records in accordance with the standards of the profession, signing or issuing in her professional capacity, a document that the member knows or ought to know contains false or misleading information;

1 (26): signing or issuing, in her professional capacity, a document that the member knew or ought to have known contains false or misleading information;

1 (27): falsifying a record relating to the member's practice; and

1 (50): engaging in conduct or performing an act relevant to the practice of the profession, that having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

[6] The Member admitted the allegations set out in the Notice of Hearing as described in the Agreed Statement of Facts (Exhibit #2, Tab 4).

IV. AGREED STATEMENT OF FACTS

[7] Counsel for the College advised the Panel that the parties were presenting an Agreed Statement of Facts (ASF) for the Panel's consideration which provides as follows:

The Member

1. At all material times, Ms. Moira Swain (the "**Member**") was a registered member of the College and an employee of the Athlete's Zone (the "**Clinic**") in Mississauga, Ontario. The Member engaged in the practice of kinesiology at the Clinic.

2. PS is a registered member of the College of Physiotherapists of Ontario. From March 2013 to June 2013, PS worked as a physiotherapist at the Clinic. Since 2013, PS has not worked at the Clinic in any capacity and has not treated any patients at the Clinic.
3. From July 2016 to December 2018, the Clinic submitted claims to Sun Life Assurance Company of Canada ("**Sun Life**") under PS's name and registration number. For each of these claims, an invoice was created which listed PS as the treating physiotherapist and contained his registration number.
4. Ms. Swain filled out and submitted claims to Sun Life using PS's name and registration for three clients, notwithstanding that she was the one who provided treatment. If she were to testify, Ms. Swain would state that she was directed to insert PS's name and registration number by the owner of the Clinic and was under the mistaken belief that PS permitted the use of his name and registration for the benefit of clients.
5. With respect to the three clients identified above, the Member acknowledges that she:
 - a. Submitted false and/or misleading claims under PS's name and registration number;
 - b. Created false and misleading invoices that listed PS as the treatment provider and included PS's registration number; and,
 - c. Failed to ensure that fees charged accurately reflected the services provided.
6. The Member additionally acknowledges that with respect to the 3 patients, the Member failed to keep proper patient records in accordance with the standards of practice and legislation in that she failed to:

- a. Record the date and purpose of each professional contact with the patient;
- b. Record reasonable information about each examination, assessment, and/or reassessment;
- c. Record reasonable information about each treatment performed; and,
- d. Create or retain a patient record.

Acknowledgement of Professional Misconduct

7. As a result of the conduct described above, the Member acknowledges that she engaged in professional misconduct in that she violated section 51(1)(c) of the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991*, and in particular, the following subsections of Ontario Regulation 316/12 under the *Kinesiology Act, 2007*:
 - a. 1(1): Contravening, by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession;
 - b. 1(18): Issuing an invoice, bill or receipt for services that the member knew or ought to have known is false or misleading;
 - c. 1(25): Failing to keep records in accordance with the standards of the profession;
 - d. 1(26): Signing or issuing, in her professional capacity, a document that the member knew or ought to have known contains false or misleading information;
 - e. 1(27): Falsifying a record relating to the member's practice; and

- f. 1(50): Engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

Further Acknowledgements

8. The Member understands the nature of the allegations that have been made against her.
9. The Member understands that, by voluntarily admitting to these allegations, she waives her right to require the College to otherwise prove the case against her.
10. The Member understands that the Discipline Panel can accept that the facts herein constitute professional misconduct.
11. The Member understands that the Panel's decision and reasons may be published, including the facts contained herein along with her name.
12. The Member understands that any agreement between her and the College does not bind the Discipline Panel.
13. The Member acknowledges that she has had the opportunity to seek independent legal advice and retain counsel and that she has done so. She further acknowledges that she is entering into this Agreed Statement of Facts freely and voluntarily after consulting with her legal counsel.

V. PLEA INQUIRY

[8] The Discipline Committee Chair panel asked the member questions and the member replied. Her answers confirmed that her admissions were voluntary, informed, and unequivocal. (Exhibit #2)

VI. DECISIONS ON FINDINGS

[9] The panel finds that the Member committed the acts of professional misconduct as set out and admitted by the Member in the following paragraphs of the ASF:

°Paragraph 6 (submitted false and/or misleading claims to an insurance company that listed PS as the treatment provider and included PS's registration number, created false and/or misleading invoices that listed PS as the treatment provider and included PS's registration number and failed to ensure that fees charged accurately reflected the services provided) and

- ° paragraph 7 (failed to keep proper patient records for three patients, including, but not limited to, failing to record: the date and purpose of each professional contact with the patient, reasonable information about each examination, assessment, and/or reassessment; and/or reasonable information about each treatment performed plus failed to create or retain a patient record.

[10] With respect to the allegations that the Member engaged in conduct that having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable and unprofessional, the Panel finds the Member's conduct to be unprofessional.

VII. REASONS FOR FINDING

[11] The Panel considered the Agreed Statement of Facts and finds that the facts set out in that document, together with the Member's admissions, support findings of professional misconduct. Having reviewed the Notice of Hearing and the Agreed Statement of Facts, together with the attachments and including the

Member's admissions, and having heard the submissions of counsel and being satisfied that the Member's plea was voluntary, informed, and unequivocal, the Panel finds that the College discharged its onus to prove the allegations admitted to on a balance of probabilities.

[12] Finally with respect to the Panel's findings that the Member's conduct was disgraceful, dishonourable, and unprofessional, the Panel was satisfied that the Member's conduct was unprofessional. The Panel was satisfied that the Member's conduct was more than incompetent or careless.

The Member knew or ought to have known that breaching professional standards by completing false or misleading insurance forms and failing to keep records appropriately was a persistent disregard of professional standards. The Member's deceit and dishonesty in submitting false and misleading insurance forms demonstrated her inherent inability to discharge her duties. It is a mitigating fact that she was directed by the Clinic owner to insert PS's name and registration number. An additional mitigating fact is her mistaken belief that PS permitted the use of her/his name and registration for the benefit of clients. The Member's gullibility is a breach of professional standards. She has a duty to complete her records accurately.

VIII. JOINT SUBMISSIONS AS TO ORDER

[13] Counsel for the College advised the Panel that an agreement had been reached with respect to the order that was being proposed by the parties regarding the appropriate sanction and costs.

[14] The Joint Submission as to Order (JSO) (Exhibit #1, Tab 5), provides as follows:

The College of Kinesiologists of Ontario ("the College") and Moira Swain ("the Member") agree and jointly for the Discipline to make the following order (the "Order"):

1. Requiring the Member to appear before a Panel of the Discipline Committee to be reprimanded:
2. Directing the Registrar to suspend the Member's certificate of registration for a period of 8 months, 1 month of which shall be remitted if the terms, conditions and limitations imposed within paragraph 3 below are completed to the satisfaction of the Registrar within 7 months of making this Order:
3. Directing the Registrar to impose specified terms, conditions, or limitations, on the Member's certificate of registration, including:
 - (a) The member must successfully complete, with an unconditional pass, at her own expense and within 12 months of the date the Order is imposed, the ProBE Program on professional/problem-based ethics for health care professionals offered by the Centre for Personalized Education for Physicians; or
 - (b) In the alternative to paragraph 3(b), the Member must successfully complete another educational program as agreed with the College.
4. Directing the Member to pay the College's costs in the amount of \$1,000.00 within 7 days of the date the Order is imposed.
5. Directing that the finding and the Order of the Discipline Committee be published in detail or in summary with the name of the Member online and/or in print, including, but not limited to the official publications of the College and on the College's website.

Clarity Note

6. The Registrar is empowered, in her discretion, to grant a request for an extension of time to complete the remedial steps set out in paragraphs 3 (a) and 3 (b) if the Registrar is of the view that it would be in the interests of fairness to do so and that it would not be contrary to the College's mandate to serve and protect the public interest.

IX. SUBMISSIONS ON ORDER

Counsel for The College

[15] Counsel for the College submitted in support of the JSPC that:

- The Panel should consider the principles of general and specific deterrence, rehabilitation, and ensuring public confidence.
- Some of the mitigating factors that the Panel should consider include: this is her first time before a discipline panel; by her admissions, she likely shortened and reduced the costs of the hearing; she actually provided services to clients; and her beliefs were mistaken.
- With respect to aggravating factors, Counsel for the College asked the Panel to consider that: the conduct represents a pattern of behaviour (i.e., false claims were submitted for three patients); and she submitted claims improperly using the name and registration number of a member of another college i.e. the College of Physiotherapists of Ontario.
- Definitions of unprofessional, dishonourable, and disgraceful conduct were set out. Parties agree that her conduct departed from standard expected of a professional.
- In addition, Counsel for the College presented the Panel with a Brief of Legislation and Authorities (Exhibit #3) which contained the relevant legislation and four (4) Decisions from Discipline Committees of health regulatory colleges.

The Brief also contained *R v Anthony-Cook*, 2016, SCC 43 setting out the proper legal test for deciding whether it is appropriate to depart from joint submission.

- Counsel for the College submitted that the JSO addressed the principles above by sending a message to other Members of penalty awaiting them for professional misconduct and a specific deterrence to the Member for her misconduct and addresses her misconduct issues and rehabilitation.

Counsel for The Member

[16] Counsel for the Member submitted in support of the JSO that:

- The Member was co-operative and saved the College time and money.
- This is the Member's first time before the Discipline Committee.
- The Member's wrongdoing with respect to filling was due to her uncertainty and the direction of her employer. In hindsight, the Member recognizes that she was gullible with respect to Employer's direction to sign and submit forms for service using PS's name and registration number.
- Services were actually provided for invoices charged to the insurance company. There were no phantom clients.
- None of the revenue from the invoices to the insurance company went to the Member.
- The Member is remorseful. The parties agree that the member's conduct is unprofessional.
- Counsel for the Member submitted that the JSO addresses the assertions above by alerting other Members to the penalties for misconduct; by admitting misconduct, she saved the College of Kinesiology effort and the penalty is aimed at her unprofessional conduct.

Submission on Timing for Payment of Costs

Counsel for the College and Counsel for the Member agreed to extend the proposed time for payment of costs from 7 days to 120 days of the date the Order is imposed.

[17] The Panel accepted proposed payment of costs to 120 days of the date the Order is imposed.

X. THE PANEL'S ORDER

[18] The Panel accepts to JSPC presented by the parties and makes an order as follows:

1. Requiring the Member to appear before a Panel of the Discipline Committee to be reprimanded:
2. Directing the Registrar to suspend the Member's certificate of registration for a period of 8 months, 1 month of which shall be remitted if the terms, conditions and limitations imposed within paragraph 3 below are completed to the satisfaction of the Registrar within 7 months of making this Order:
3. Directing the Registrar to impose specified terms, conditions, or limitations, on the Member's certificate of registration, including:
 - (a) The member must successfully complete, with an unconditional pass, at her own expense and within 12 months of the date the Order is imposed, the ProBE Program on professional/problem-based ethics for health care professionals offered by the Centre for Personalized Education for Physicians; or
 - (b) In the alternative to paragraph 3(b), the Member must successfully complete another educational program as agreed with the College.
4. Directing the Member to pay the College's costs in the amount of \$1,000.00 within 120 days of the date the Order is imposed.

5. Directing that the finding and the Order of the Discipline Committee be published in detail or in summary with the name of the Member online and/or in print, including, but not limited to the official publications of the College and on the College's website.

Clarity Note

6. The Registrar is empowered, in her discretion, to grant a request for an extension of time to complete the remedial steps set out in paragraphs 3 (a) and 3 (b) if the Registrar is of the view that it would be in the interests of fairness to do so and that it would not be contrary to the College's mandate to serve and protect the public interest.

XI. REASONS FOR ORDER

[19] The Panel is aware that when presented with an Agreed Statement of Facts and a JSO, particularly when the agreement has been negotiated by experienced counsel, as is the case here, we are not to depart from such a joint submission "unless satisfied that the recommended disposition would be contrary to the public interest and would bring the administration of justice into disrepute." *R v Anthony-Cook*, 2016, SCC 43.

[20] In deciding the appropriate Order in this case, we remind ourselves that the primary purpose of these proceedings is protection of the public. In addition, we must consider both the interests of the profession as a whole as well as the particular circumstances of the member who was a junior employee.

[21] In considering the public interest, we are mindful that the public must have confidence in the profession's ability to regulate itself effectively and in a manner that protects the public.

[22] When we consider the interests of the profession, we recognize that this Discipline Committee owes a duty to enforce and maintain the high standards of practice that the public expects of our members and that members expect of themselves. In each case,

the Discipline Committee must consider the extent to which a message to the profession is required to make it clear that the conduct in question will not be tolerated.

[23] We must consider the unique and particular circumstances of Ms. Moira Swain. The order must be appropriate, fair, and reasonable to the Member's circumstances.

[24]. The Panel agreed the proposed Order was reasonable and appropriate having regard for the facts of the case. The Panel thinks that the Order adequately addressed the issues of public protection, sent a message of general deterrence to the membership, and provided specific deterrence to the Member.

[25] The Panel also considered the Order to be consistent with the need to deal sternly with regard to inappropriate business practices and views that by making this Order, the public's confidence in the College's ability to regulate its members should be maintained.

[26] The Panel considers that the Order gave due consideration to both the aggravating and mitigating circumstances in this case and by giving each factor the appropriate weight, struck an acceptable balance among the factors.

[27] In reaching our decision, the Panel considered the submissions of both the Member's counsel, as well as the College's counsel.

[28] After considering the submissions of both counsel and the advice provided by its Independent Legal Counsel, the Panel decided to deliver the Member's reprimand privately and following the hearing on January 24th, 2020.

I, Mary Pat Moore sign this Decision and Reasons for Decision as Chairperson of this Discipline Panel and on behalf of the panel members listed below:



Chairperson

February 19, 2020

Date

Teresa Bendo, Public Council Member
Jennifer Pereira, R. Kin., Professional Council Member
Katie St. Denis, R. Kin., Professional Council Member
Pamela Paquette, R. Kin., Member at Large

