COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF
A HEARING UNDER THE *HEALTH PROFESSIONS ACT*,
R.S.A. 2000, c. C-7

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. TARIQ ALSHAWABKEH

# DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

## I. INTRODUCTION

The Hearing Tribunal held a hearing into the conduct of Dr. Tariq Alshawabkeh on December 6 and 7, 2016. The members of the Hearing Tribunal were:

Dr. Stacy J. Davies of Calgary as Chair, Dr. Douglas Perry of Edmonton and Mr. Brian Popp of Edmonton (public member). Mr. Greg Sim acted as independent legal counsel for the Hearing Tribunal.

In attendance at the hearing was Mr. Craig Boyer, legal counsel for the College of Physicians & Surgeons of Alberta. Also present was Dr. Tariq Alshawabkeh and his legal counsel Ms. Barbara Stratton, Mr. Matthew Riskin and Ms. Emily Hole, articling student. Dr. Alshawabkeh's wife was also in attendance for the duration of the hearing.

## II. ALLEGATIONS

The parties entered an Amended Amended Notice of Hearing into evidence listing the following allegations:[1]

1. You did make inappropriate personal comments to your patient, HC, on September 19, 2015, in particular being overly complimentary about her name, appearance and her perfume;

2. You did inappropriately touch the shoulder and lower back of your patient, HC, an unaccompanied minor, on September 19, 2015;

3. You did fail to provide adequate draping and privacy for your patient, HC, on September 19, 2015;

4. You did fail to create an adequate chart record regarding your interaction with your patient, HC, on September 19, 2015, given the alleged history provided by your patient of depression, insomnia, asthma and migraines;

5. You did inappropriately prescribe 90 tablets of Zopiclone for your patient, HC, a minor, on September 19, 2015;

6. You did make inaccurate chart entries for the record of your patient, HC, regarding the visit on September 19, 2015, in particular, one or more of the following:

    a. you had not examined all cranial nerves 2 through 12 of your patient;

    b. you had not examined all of the skin of your patient;

[1] The complainant's name has been replaced with initials in this restatement of the allegations.

c. you had not fully examined the musculoskeletal system of your patient; and

d. ~~you had not placed your stethoscope on the skin of your patient while performing auscultation of the chest~~.

At the outset of the hearing Mr. Boyer confirmed that the Complaints Director would be proceeding on each of the allegations with the exception of allegation 6(d), which was withdrawn. Ms. Stratton advised that Dr. Alshawabkeh denied allegations 1, 2 and 3. Dr. Alshawabkeh admitted allegations 4 and 5. Finally, Dr. Alshawabkeh admitted that allegation 6(a), (b) and (c) were factually true but he denied that his conduct amounted to unprofessional conduct.

## III. PRELIMINARY MATTERS

Neither party objected to the composition of the Hearing Tribunal (the "Tribunal") or its jurisdiction to proceed with the hearing.

At the outset of the Complaints Director's case, Mr. Boyer advised the Tribunal that the complainant, HC would testify first and that she would like her testimony to be received in private due to the sensitive nature of her expected testimony. Ms. Stratton had no objection to the proposal to hold the portion of the hearing dealing with HC's testimony in private.

The Tribunal agreed that the hearing would be held in private during HC's testimony. The Tribunal noted that section 78(1)(a) of the *Health Professions Act* provides that the hearing is open to the public unless the Tribunal holds the hearing or part of the hearing in private on its own motion or on an application of any person. The grounds set out in section 78(1)(a) for holding part of a hearing in private include (iii), because not disclosing a person`s confidential personal, health, property or financial information outweighs the desirability of having the hearing open to the public.

The Tribunal considered the nature of the allegations against Dr. Alshawabkeh and the sensitive nature of HC's expected testimony. The Tribunal was satisfied that HC's testimony would be expected to include highly sensitive personal and health information and that maintaining the confidentiality of HC's personal and health information would outweigh the desirability of an open hearing. The Tribunal also noted that it had not been asked to hold the entire hearing in private. Holding only part of the hearing dealing with HC's testimony in private appropriately balanced her confidentiality with the value of open disciplinary proceedings at the College.

## IV. EVIDENCE – EXHIBITS

The parties entered the following agreed exhibits:

1. Notice of Hearing dated July 14, 2016
2. Amended Notice of Hearing dated October 6, 2016
3. Amended Amended Notice of Hearing dated November 22, 2016
4. Complaint by SM on behalf of HC dated September 22, 2015 and received September 30, 2015
5. Patient chart for HC
6. Alberta Health Care billing for Dr. Alshawabkeh
7. Letter of response for Dr. Alshawabkeh dated November 6, 2015 with enclosure including typed notes by Tracy Chouinard and screen shot of clinic appointment detail
8. Dr. Caffaro memo dated January 19, 2016
9. Expert opinion of Dr. Michelle Fairgrieve-Park dated May 9, 2016
10. Curriculum Vitae of Dr. Michelle Fairgrieve-Park
11. Two video clips of recording by security cameras at Manning Crossing Medical Centre On September 9, 2015
12. CPSBC Certificate of Continuing Medical Education—Professionalism in Medical Practice: Avoiding the Pitfalls (October 21 and 22, 2016)
13. CMPA Certificate of Completion—Documentation 1: Charting Medical Records (November 27, 2016)
14. CMPA Certificate of Completion—Documentation 2: Principles of Medical Record Keeping (November 27, 2016)
15. Agreed Statement of Facts in the Matter of an Investigation into a complaint against Dr. Tariq Alshawabkeh, a regulated Member of the CPSA
16. CPSA Patient Records Standard 21
17. Letter of Complaint Inquiry Coordinator requesting response from Dr. Alshawabkeh dated October 29, 2015

## V. EVIDENCE – TESTIMONY

1. The Complainant, HC:

HC testified and gave the following key evidence:

- HC moved to Edmonton from New Brunswick to attend bible college in September 2015, just prior to her 16th birthday. She was living with a billet family in Edmonton at the time.
- Prior to leaving New Brunswick HC had been under the care of a physician, a neurologist, to address complaints of asthma, migraine headaches, insomnia and depression.

- HC's New Brunswick physician had recommended that she be followed in Alberta so her mother arranged for a family friend in Edmonton to book HC an appointment at the Manning Clinic in Edmonton on September 19, 2015.
- HC saw Dr. Alshawabkeh at the Manning Clinic on September 19, 2015. At that time she understood her visit with Dr. Alshawabkeh was to meet Dr. Alshawabkeh and for him to monitor her health and refill her sleeping pill prescription.
- Upon her arrival at the clinic HC was checked in by the clinic staff and her height, weight and blood pressure were recorded. She was then shown into an exam room where Dr. Alshawabkeh was already waiting.
- Dr. Alshawabkeh confirmed HC`s age was under sixteen years old and he made some introductory comments to her including a comment on her "nice name". He also asked what her perfume was and he "stroked" her boots.
- HC said that Dr. Alshawabkeh told her a physical examination was part of becoming a new patient.
- HC described that she was uncomfortable at Dr. Alshawabkeh's description of what she could expect from routine care from him. HC testified that Dr. Alshawabkeh told her he expected to perform an internal exam on a monthly basis. HC declined an internal exam on September 19 explaining that she was menstruating. HC said that Dr. Alshawabkeh asked to see her in follow up in one month, at which time he would do an internal exam.
- HC also described that Dr. Alshawabkeh touched her. She testified:

  "He was touchy" and "…when I entered the office, he -- he hugged me from the side, and when he led me out of the room, he had his hand on my lower back or he would touch me on the shoulder. Like, he touched. So I felt like that was affectionate. And I find that being complimentary is a sign of affection."

- Dr. Alshawabkeh proceeded with a physical examination of HC on September 19, including her neck, chest and abdomen.
- Dr. Alshawabkeh asked HC to remove her shirt for the examination. She complied but she kept her brassiere on.
- Dr. Alshawabkeh did not leave the room while HC removed her shirt. He did not offer her a gown, a drape or a chaperone.
- HC initially denied that Dr. Alshawabkeh had used a stethoscope during his examination but she acknowledged on cross-examination that he had used a stethoscope.
- HC was firm in her evidence that Dr. Alshawabkeh did not wear gloves for the physical examination.
- HC also denied that Dr. Alshawabkeh's examination had included examining her eyes, ears, nose, mouth or throat with a penlight, using an instrument on her foot or asking her to stand and close her eyes.

- HC acknowledged that Dr. Alshawabkeh had her walk from the chair to the examination table and back, he discussed her bloodwork from New Brunswick and he asked her to follow-up with the clinic in one month or with any additional concerns.
- HC explained that Dr. Alshawabkeh was aware that HC had been taking Celexa for 2-3 weeks prior to her attendance with him but there was no discussion about the nature of her medications, what to expect from them or her response to them so far.
- HC denied that Dr. Alshawabkeh had any discussion with her about "red flag symptoms", when to go to the emergency room or when to call 911.
- On her request, Dr. Alshawabkeh gave HC a prescription for 90 tablets of Zopiclone. He did not discuss the risks of this medication with her before giving her the prescription.
- At the conclusion of the visit Dr. Alshawabkeh offered HC a card with his personal contact number. HC declined to accept the card.
- Following the visit HC "felt uncomfortable".
- HC did not return to see Dr. Alshawabkeh again but together with her friend she did make a formal complaint about Dr. Alshawabkeh's conduct to the Manning Clinic and subsequently to the College.
- HC and her family friend met with Tracy Chouinard of the Manning Clinic to recount her experience with Dr. Alshawabkeh. Ms. Chouinard made notes of this meeting but HC explained that the notes were not entirely accurate.
- On cross-examination HC acknowledged that Dr. Alshawabkeh's examination included asking her about her skin

**2. Dr. Michael Caffaro**

Dr. Michael Caffaro testified and gave the following key evidence:

- He is the Complaints Director of the College.
- He met with Dr. Alshawabkeh and his legal counsel and created a memorandum regarding this meeting.
- The meeting was to discuss a possible consensual resolution to the complaint but this never came to fruition.

**3. Dr. Susan Michelle Fairgrieve-Park**

Dr. Susan Michelle Fairgrieve-Park was accepted by the Tribunal as qualified to give expert opinion evidence on the standards of practice applicable to a family physician and gave the following key evidence:

- Dr. Fairgrieve-Park completed her residency in family medicine in 1992 and has practiced family medicine and low risk obstetrics since then.

- In her practice Dr. Fairgrieve-Park sees a significant number of pediatric patients, women and obstetrical patients. She holds an appointment as an Assistant Clinical Professor at the University of Alberta Family Medicine Department and she teaches third and fourth year medical students and residents in all areas of family medicine including physician-patient relationships and boundaries.
- Dr. Fairgrieve-Park provided a written opinion of the care provided by Dr. Alshawabkeh in this case and this written opinion was marked by agreement as an exhibit.
- In her written opinion Dr. Fairgrieve-Park opined that assuming HC's account of her interactions with Dr. Alshawabkeh were true, his conduct would be highly inappropriate.
- Dr. Fairgrieve-Park opined that Dr. Alshawabkeh would have failed to provide adequate privacy while HC was undressing and draping.
- She also opined that HC's account of Dr. Alshawabkeh's gestures and tones suggested sexualized behavior. Dr. Fairgrieve-Park explained that she would not have complimented the patient given the context of a new patient interaction.
- Dr. Fairgrieve-Park also confirmed that there is no reason to do an internal exam on a fifteen year-old female unless the patient were to present with specific concerns pertaining to this area of her body.
- Dr. Fairgrieve-Park commented that given HC's presenting complaint, which she noted was headaches and a request for a medication review, Dr. Alshawabkeh's chart contained little to no documentation regarding HC's condition. There is no note of previous medications used, how long HC had been on her current medications and no noted history about the headaches. Yet despite the limited history in the chart and the lack of any documentation about why she needs it, Dr. Alshawabkeh prescribed 90 tablets of Zopiclone.
- Dr. Fairgrieve-Park opined that prescribing sedatives and antidepressants should be done with caution. She explained that the use of Zopiclone in those under 18 is not recommended and its use is therefore not standard of care for a 15 year old patient. Dr. Fairgrieve-Park also explained that it is not standard of care to provide such a large quantity of Zopiclone to a patient of any age in the setting of a first appointment so the prescription for 90 tablets of Zopiclone at the first meeting was inappropriate.
- In her oral testimony Dr. Fairgrieve-Park further opined that there would have been no reason for HC to have removed her shirt unless the asthma had been her presenting complaint, and even then it may not have been necessary. She said:

  "You always have to offer patients the ability to change privately and offer them something to put on. They can't sit there without their shirt on."

- Regarding the suggestion that an internal exam would be a routine examination for him to perform on HC, Dr. Fairgrieve-Park said:

  "no 15-year-old needs an internal examination unless they came in specifically with a complaint that maybe warranted that", "And so that was not even appropriate, I thought, to bring up with her."

- Regarding Dr. Alshawabkeh's notes of his examination of HC, Dr. Fairgrieve-Park explained that the neurological examination would only require Dr. Alshawabkeh to have looked at the patient and conversed with her, although the Babinski test would have required him to remove the patient's shoe.
- For the examination of HC's cranial facial nerves Dr. Fairgrieve-Park commented that these can be assessed just by observing the patient.
- The musculoskeletal exam would only require Dr. Alshawabkeh to have observed MC walk about the examination room. Dr. Fairgrieve-Park confirmed that for a patient without a specific complaint, a physician can assess a patient's musculoskeletal system and get a general idea of the patient's status without examining every part of the musculoskeletal system.
- Dr. Fairgrieve-Park opined that if a physician charts "MSK" and then some details it does not imply that the physician has checked each and every part of the musculoskeletal system. On the other hand if something is specifically mentioned then it should have been done.
- The Rhomberg test would have required Dr. Alshawabkeh to have asked HC to close her eyes and for him to watch for swaying.
- Regarding the patient's skin Dr. Fairgrieve-Park opined that a physician need not look at a patient's entire skin if the patient has no complaints about it. She did say that if a physician charts that the skin is "pink-tan color, good turgor without lesions, redness, cyanosis, rashes or edema" then it implies the physician has examined the patient's entire skin.
- Dr. Fairgrieve-Park also opined that Dr. Alshawabkeh's charting was inadequate. She said that given HC's presenting complaints which included migraines, she would have expected to see a lot more information about headaches. Given the prescription for Zopiclone she would have expected a lot more about why it was needed.
- Given the history of depression and Celexa she would have expected more documentation of HC's mood.
- She explained that she was unable to tell what "red flags" or side-effects of medications Dr. Alshawabkeh discussed with HC. She also said she did not know what Dr. Alshawabkeh's reference to "counselled and advised" meant.
- In response to questions from the Tribunal, Dr. Fairgrieve-Park opined that there are no specific guidelines for appropriate touch for patients; rather this is something that

is learned by experience. She further confirmed that touching a patient is not always contrary to a standard of practice as touch can be appropriate in certain circumstances.

- In particular, touching the lower back and shoulder of a patient is not necessarily contrary to any standard of practice.

## 4. Dr. Tariq Alshawabkeh

Dr. Alshawabkeh testified in his own defense and gave the following key evidence:

- Dr. Alshawabkeh was an international medical graduate enrolled in a supervised practice assessment (SPA) for the College, from August 4, 2015 through October 26, 2015.
- Dr. Alshawabkeh said that his SPA assessor, Dr. Robinson, gave him his final feedback and congratulated him on a passing grade on the SPA and the next day he learned about HC`s complaint.
- On November 2, 2015 he was notified by the College that his SPA was suspended retroactively to September 30, 2015 and he was not able to practice independently or bill for physician services.
- Dr. Alshawabkeh requested a review of this decision and in January 2016 the decision was overturned, and he subsequently started working again on March 11, 2016, successfully completing the SPA.
- Dr. Alshawabkeh currently has a provisional license with the College without restrictions on his medical practice and he is working as a family physician at Manning Medical Clinic.
- In total he was suspended and unable to work as a physician as a result of HC's complaint from November 2, 2015 to March 11, 2016.
- Dr. Alshawabkeh testified that he could recall the visit with HC on September 19, 2015.
- He said that the visit had been booked as a "meet and greet", but as he started taking her history he changed it to a more detailed visit. Dr. Alshawabkeh said that HC highlighted symptoms and complaints that alerted him to the need to exclude some issues.
- HC reported having symptoms including chronic migraines, dizziness, insomnia, depression and also mentioned her asthma and that she needed a prescription refill.
- In regards to the completeness of his chart note, Dr. Alshawabkeh testified that HC had been seen on a Saturday and he had not yet completed his chart note by the following Monday when he heard from the clinic supervisor, Tracy, that the clinic had received a complaint. Rather than attempting to edit his chart note he called the CMPA for advice and was advised not to edit the chart.

- Dr. Alshawabkeh said that if he had taken the opportunity to finish the chart note he would have included more information including detailed information about HC`s history and symptoms. He said he needed to add more information regarding HC`s headaches, insomnia and depression but he added that HC didn`t have any severe depression or suicidal thoughts.
- In response to a question from the Tribunal Dr. Alshawabkeh said that he did not write down the full details from HC`s appointment until he prepared his written response to the complaint. Dr. Alshawabkeh explained that he did that himself, describing everything that he could remember at that time and this was provided to his legal counsel who assisted him in preparing his written response to the College which was dated November 6, 2015.
- Dr. Alshawabkeh said he has since changed his charting habits so that he finishes his charts the same day as the patient's visit.
- Dr. Alshawabkeh said he completed two modules of medical record keeping for physicians in November 2016 and he plans to take another one in British Columbia in April 2017.
- Regarding HC's medications, Dr. Alshawabkeh's chart recorded that she was taking Rizatriptan, Celexa and Zopiclone.
- In his testimony Dr. Alshawabkeh explained that Rizatriptan is a medication for migraine headaches but he said it is not recommended for use in patients under the age of 18. Dr. Alshawabkeh also explained that Celexa is a depression medication and he said that he would defer to a psychiatrist before prescribing it. Dr. Alshawabkeh also said that he didn't know of any evidence that Zopiclone is contraindicated for patients in the pediatric age group but he noted that pharmaceutical companies recommend that family physicians leave it up to specialists to prescribe Zopiclone to these patients. Dr. Alshawabkeh acknowledged that close reassessment is appropriate for patients taking these medications.
- Dr. Alshawabkeh explained that he did prescribe 90 Zopiclone 5mg tablets for HC. He testified that he would have liked to bring her back to recheck in two weeks, but she wanted as large a supply as possible to minimize prescription filling fees, because she has limited funds as a student. He acknowledged that prescribing this quantity of this medication represented poor judgment on his part.
- In relation to HC's allegation that he commented on her name and perfume and touched her shoulder and lower back, Dr. Alshawabkeh acknowledged that he commented on her first name as it is similar to his daughter's name. He asserted that he had no recollection one way or another of touching HC on her shoulder or lower back, or commenting on her perfume. He explained that he has a sensitivity to perfume so he would have noticed if she had perfume on.
- In relation to the allegation that he had HC remove her shirt and failed to provide adequate privacy and draping Dr. Alshawabkeh denied that HC removed her shirt or her shoes.

- Dr. Alshawabkeh said that he remembers this part of the visit very well:

  "…because if I will ask the patient to take off-especially if this is a female patient, I would offer her the gown and get the chaperone in. I did not do that and I did not ask the patient to take off her shirt."

- During his evidence Dr. Alshawabkeh described HC as confident and not shy. He said she approached him and shook his hand and her demeanour was why he did not consider a chaperone to be necessary. But in his written response to the complaint, Dr. Alshawabkeh had noted HC to be:

  "very soft-spoken, calm and generally showed little emotion. Several times during the appointment I had to ask her to repeat herself, as I could not hear her from my position at the computer."

- Dr. Alshawabkeh also said:

  "So I was in gloves and I asked – I asked the patient that I'm going now to examine your abdomen, is that ok. She said yes. I noticed that she's still trying to pull up her shirt – her shirt. I said no, you don't have to, I just would like to see if your abdomen is soft and lax. So I did just the physical exam or the abdominal exam over her shirt."

- Dr. Alshawabkeh said that he has now completed a "Professionalism in Medical Practice" course, and he admits that he would conduct this visit differently with a chaperone present and a gown for the patient.
- Regarding his physical examination notes Dr. Alshawabkeh explained that he used his observations of HC during the visit to complete most of the examinations that he recorded. He said that he observed HC walking in the room and used this to record the "MSK" exam. He said that he did do the Rhomberg test, which he acknowledged was properly considered a neurologic examination, and stood behind HC to catch her if she should begin to fall.
- He observed HC for abnormalities, assessed her muscle strength, noted that HC had a full range of motion, but acknowledged that he relied on HC's advice that she had no concerns with her lower extremities such as swelling or lesions.
- Dr. Alshawabkeh acknowledged that he did not actually do the Babinski test even though he typed that he did. Dr. Alshawabkeh said this was an error in his chart.
- Dr. Alshawabkeh said that he examined HC's hands, face and neck and he asked if she was having any problems with other areas of her skin. His chart note recorded that HC had no lesions, redness, cyanosis, rashes or edema.
- Dr. Alshawabkeh also said that he discussed "red flags" with HC, namely whether she was having any suicidal thoughts, severe headaches, acute changes in her mood, any shortness of breath or chest pains. He said he told her she should go to the emergency department right away if she experienced any of those red flags. He acknowledged that his chart note should have specified what the "red flags" were.

- Following the examination Dr. Alshawabkeh said that he told HC that she was free to come see him at the clinic if she had any health issues or anything to discuss regarding her health.
- Dr. Alshawabkeh denied that he offered HC a business card, and said that he doesn`t carry them. He also said that he did not have a home phone in September 2015 so he would not have written his home number on the card as HC suggested. Dr. Alshawabkeh said that the clinic front desk has cards with the clinic's contact information and he did suggest that HC take one of those.
- During his cross-examination, Dr. Alshawabkeh was asked, in part, about apparent inconsistencies between his written response to the complaint that he provided to the College and his testimony at the hearing. For example, Dr. Alshawabkeh was asked about his written response to the complaint where he indicated that HC was already in the examination room when he entered. At the hearing, Dr. Alshawabkeh admitted that he couldn't recall whether he or HC was in the examination room first.
- Dr. Alshawabkeh was also asked about his response to the complaint in which he stated that he did not say anything to HC about her name. At the hearing Dr. Alshawabkeh admitted that he mentioned to HC that her name was similar to his daughter's. Dr. Alshawabkeh said his written response to the College didn't explain what he actually said because he wasn't asked this exact question.
- Dr. Alshawabkeh was also asked about his response to the complaint where he indicated that he did not touch HC's lower back upon leading her out of the examination room. At the hearing Dr. Alshawabkeh acknowledged that he couldn`t be sure. He said he had tried his best to remember but he had no intention to touch HC inappropriately.

### 5. Ms. Tracy Elizabeth Chouinard

Ms. Tracy Chouinard was also called to testify by Dr. Alshawabkeh and she gave the following key evidence:

- Ms. Chouinard worked at the Manning clinic between February 2014 and January 2016 as the clinic supervisor.
- She worked with Dr. Alshawabkeh and found him to be "a very kind, caring, soft spoken doctor. Very dedicated to his patients."
- Previously, the clinic received positive comments from patients regarding Dr. Alshawabkeh.
- She received a phone call from HC's mother on Monday, September 21, 2015. HC's mother reported that the doctor had commented on HC's perfume, her skin and was rubbing her leg and foot. She also said that the doctor did a complete exam and asked the patient to remove her sweater while he listened to her chest and that she needed to

have a monthly vaginal exam. In a second call HC's mother reported that the doctor had also offered HC a business card with a personal phone number on it but HC did not take it.

- Upon learning of the complaint she requested that the video recordings from the cameras inside the clinic be pulled and reviewed.
- She only asked for the recording of HC leaving the clinic but the video of HC arriving and leaving was provided and entered into evidence.
- Ms. Chouinard advised that there were additional cameras including one camera that would have recorded the outside of the exam room door but this video was not preserved and she is not aware of Dr. Alshawabkeh asking for it to be preserved.
- Ms. Chouinard also met with HC and her friend on September 23, 2015 at which time she made notes of HC`s account of the appointment with Dr. Alshawabkeh. Ms. Chouinard identified her notes which were entered into evidence.

## VI. SUBMISSIONS

### 1. Mr. Boyer

- On behalf of the Complaints Director Mr. Boyer explained that the Tribunal had three functions to fulfill. It must:

  (1) make findings of fact,
  (2) determine the standard against which Dr. Alshawabkeh`s conduct should be judged, and
  (3) apply the standard to its findings of fact.

- Mr. Boyer also explained that the Tribunal`s findings of fact will require it to assess the witnesses' credibility. Mr. Boyer referred the Tribunal to the case of *Faryna v. Chorny*, 1951 CarswellBC 133 at para. 11, for the proposition that:

  The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court (or administrative tribunal) satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with the partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he made be quite honestly mistaken. For a trial Judge to say

"I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

- Mr. Boyer argued that in this case there was no chaperone and so there were only two people in the examination room who can say what actually happened.
- Mr. Boyer pointed out that HC's evidence and Dr. Alshawabkeh's evidence differ on many key points and that the Tribunal can use its own experiences to assess the witnesses' credibility.
- Mr. Boyer argued that HC's evidence was relatively consistent throughout. HC advised Dr. Alshawabkeh that she had been sexually active and then denied any sexual history when interviewed by Ms. Chouinard in the presence of her friend, but Mr. Boyer argued that this should have no significant bearing on HC's credibility. Mr. Boyer explained that HC was entitled to trust Dr. Alshawabkeh with sensitive personal information. Patients may choose to disclose information to their physicians that they do not to share with others and this should not impair their credibility.
- Conversely, Mr. Boyer pointed out issues with Dr. Alshawabkeh's evidence that impaired his credibility.
- For example, Mr. Boyer highlighted Dr. Alshawabkeh's evidence that he did not ask HC to remove her shirt and so she was not offered privacy or a gown. Mr. Boyer pointed out that Dr. Alshawabkeh also gave evidence that he wore gloves for his examination of HC. He testified that while examining HC's abdomen through her shirt, HC started to pull her shirt up and he instructed her that this was not necessary. Mr. Boyer argued that the Tribunal should consider that it would be unusual to examine a fully dressed patient with gloves on.
- Mr. Boyer also pointed out that Dr. Alshawabkeh acknowledged at least one error in his charting for HC, namely that he erroneously recorded having performed the Babinski test.
- Mr. Boyer highlighted that Dr. Alshawabkeh did not record anything in HC's chart about headaches, insomnia or depression even though he testified to having taken all of this history. Dr. Alshawabkeh also apparently omitted to record his recollections of this history anywhere after he learned of the complaint, until he prepared his response to the complaint for his legal counsel. There were passing references to HC reporting migraines, insomnia and depression in the November 6, 2015 response to the complaint.
- Mr. Boyer also highlighted what he described as Dr. Alshawabkeh's "half-truths" such as his evidence that he did not have a home phone so could not have written a home telephone number on a business card to give to HC.
- Mr. Boyer also commented on the video evidence of HC arriving and later leaving the clinic. Mr. Boyer argued that the videos should not be relied upon as evidence of what happened in the examination room. He explained that a witnesses' apparent

reaction after the fact could not be relied upon as evidence of their credibility. Mr. Boyer also pointed out that the Tribunal heard that there was other video that was not obtained for the hearing.

- Mr. Boyer summarized the evidence of Dr. Fairgrieve-Park that Dr. Alshawabkeh's conduct as described by HC fell below the expected standard of care.
- Mr. Boyer also highlighted the importance of accurate medical records to ensure continuity of care.
- Mr. Boyer noted that Dr. Alshawabkeh had admitted allegations 4 and 5 and he argued that the evidence established allegations 1, 2 and 3 and 6(a), (b) and (c).

**2. Ms. Stratton**

- On behalf of Dr. Alshawabkeh, Ms. Stratton argued that she believes HC unfortunately misinterpreted his actions and intentions.
- She argued that the Tribunal must apply the appropriate standard of proof and not find Dr. Alshawabkeh to have committed unprofessional conduct unless it is satisfied that the allegations are proven on a balance of probabilities based on clear, convincing and cogent evidence: *F.H. v. McDougall*, 2008 SCC 53.
- Ms. Stratton noted that Dr. Alshawabkeh's chart note for HC contains typographical errors, which confirms that Dr. Alshawabkeh heeded the advice he received not to edit his chart after the complaint was made.
- Ms. Stratton cautioned the Tribunal about placing too much emphasis on Dr. Alshawabkeh's November 2015 response to the complaint to the College because it was prepared before Dr. Alshawabkeh was aware of the specific allegations in the Amended Amended Notice of Hearing. Dr. Alshawabkeh`s response should not be considered incomplete as compared to the formal allegations.
- On the issue of witnesses' credibility Ms. Stratton referred the Tribunal to *R v. Filion*, 2003 CanLII 517 at para. 27 where the Ontario Superior Court cited several factors to weigh in a credibility analysis:
    - Whether the witness seems honest or has a motivation to be considered;
    - Whether the witness has an interest in the outcome of the case;
    - Whether the witness has a seemingly good memory;
    - Whether the witnesses' evidence is reasonable and consistent with the rest of the witnesses' evidence and with other evidence;
    - Whether the witnesses' evidence contains inconsistencies; and
    - The manner in which the witness testified.
- In relation to Dr. Alshawabkeh's evidence that he wore gloves to examine a fully clothed patient, Ms. Stratton pointed out that there was no evidence about whether this would be unusual or not.

- Ms. Stratton also argued that no adverse inference should be drawn from failing to produce any other videos as Dr. Alshawabkeh has produced all of the video evidence that he has.
- In relation to allegation 1 Ms. Stratton said that Dr. Alshawabkeh admitted to complimenting HC on her name but he can't recall exactly what he said. In relation to her perfume Dr. Alshawabkeh cannot recall what he said, if anything, either way. Ms. Stratton argued that even if the allegation was factually true, it would not be unprofessional conduct. Dr. Alshawabkeh had good intentions even though his actions had the opposite effect on HC. Ms. Stratton argued that there is no clear standard of practice that Dr. Alshawabkeh breached.
- In relation to allegation 2 Ms. Stratton argued that the expert evidence was that there are no written guidelines and some touching can be appropriate. It is context specific. There was no expert evidence that the touching alleged in allegation 2 was necessarily contrary to a standard of practice.
- In relation to allegation 3 the Tribunal will have to assess the witnesses' credibility. Ms. Stratton acknowledged that if the Tribunal accepts HC`s evidence that she was asked to remove her shirt and not offered a gown or drape then this conduct would not meet the standard of practice.
- In relation to allegations 4 and 5 Ms. Stratton suggested that it would be up to the Tribunal to assess these admissions.
- Regarding allegation 6(a), (b) and (c), Dr. Alshawabkeh admitted he did not examine all of the systems as alleged. Ms. Stratton argued that this was not unprofessional conduct. Ms. Stratton also argued that allegation 6 arose from the very same conduct as that alleged in allegation 4 so allegation 6 was redundant.
- In relation to 6(a) she explained that Dr. Fairgrieve-Park testified that Dr. Alshawabkeh could conclude that cranial nerves 2 through 12 were intact just by talking to the patient with no formal examination of them.
- Regarding 6(b), Ms. Stratton argued that omitting to examine the patient's entire skin was not below the standard of care. While it would be helpful to document areas of skin that were actually examined, the evidence was that there was no need to examine all of the patient's skin.
- Regarding 6(c), Ms. Stratton noted that Dr. Fairgrieve-Park opined that a physician can examine a patient's musculoskeletal system without examining the entire system, and that charting "MSK" does not suggest that the physician has examined the entire system.
- Ms. Stratton emphasized that Dr. Alshawabkeh had gone without income for a significant period of time due to this complaint and the resulting suspension of his SPA. She also pointed out that Dr. Alshawabkeh has been cooperative with the College and that the hearing was only necessary due to a technicality that made a consensual resolution unsuccessful.

- Lastly, Ms. Stratton pointed out that Dr. Alshawabkeh has taken steps to ensure that he has learned from this experience and that his future patients will not misinterpret his actions or intentions and feel uncomfortable.

### 3. Reply Argument by Mr. Boyer

- In reply, Mr. Boyer argued that there is no requirement for a standard of practice to be in writing to be enforceable against a regulated member of a profession. Standards can be established through evidence, including expert evidence.
- Mr. Boyer also argued that allegation 6 is not redundant as allegation 6 arises from the alleged recording of inaccurate information in HC's chart. Allegation 4 arises from Dr. Alshawabkeh's recording of inadequate information.

## VII. FINDINGS

### Witness Credibility

The Tribunal considered the credibility of HC and Dr. Alshawabkeh, who were the only two witnesses with direct evidence about what occurred during the appointment.

### HC's Credibility

HC testified clearly and she appeared confident in her recollection of her evidence, although she spoke quietly. HC's recall of the events in question was good and largely consistent with her handwritten summary of the complaint. HC's recollection wasn't perfect however. For example in her direct examination she denied that Dr. Alshawabkeh had used a stethoscope to examine her. On cross-examination she admitted that he had.

The Tribunal also considered that while HC expressed some frustration with Dr. Alshawabkeh in that she did not feel that he had heard and understood her during the appointment, there was no evidence of any motivation for HC to tailor her evidence. There was no evidence that HC stood to lose or gain depending on the outcome of the hearing.

There was some evidence that HC had advised her mother and others that she had no previous sexual history but she admitted to Dr. Alshawabkeh that she had recently been sexually active. Dr. Alshawabkeh argued that this should reflect on HC's credibility. The Tribunal does not agree that this was a significant factor. The Tribunal noted that HC advised Dr. Alshawabkeh that she had been sexually active when she was asked and there is no evidence that she was not open and honest with him in any other aspect of their interactions. The fact that an individual may admit certain highly personal, health related details to their physician that they do not share with others is unsurprising and the Tribunal is not prepared to find that it impaired HC's credibility.

The Tribunal took note that there were some minor inconsistencies between HC's handwritten complaint and the typed memorandum prepared by Ms. Chouinard following their meeting. The Tribunal did not consider these inconsistencies to impair HC's credibility either. HC did not prepare the meeting memorandum herself, Ms. Chouinard did. Further, Ms. Chouinard's memorandum contained other inaccuracies. For example, the memorandum described Ms. Chouinard reviewing the clinic chart with HC and it stated, in part "I pointed out to [HC] that the doctor's first thing written was how she was in because she hadn't had her period in two months & was experiencing abdominal pain. She said no that she was in because of the Rx & that her periods are irregular due to high iron because of hormone levels…" The Tribunal has reviewed the clinic chart and notes there is no reference to abdominal pain.

Lastly, the Tribunal reviewed the video footage of HC arriving at the clinic and leaving the examination room. The Tribunal found the footage unremarkable. It did not assist the Tribunal in making its findings of fact in relation to Dr. Alshawabkeh's conduct towards HC. The Tribunal placed no weight on the video evidence from the Manning Clinic.

**Dr. Alshawabkeh's Credibility**

The Tribunal considered that Dr. Alshawabkeh was sincere in his testimony that he did not intend to make HC uncomfortable. While Dr. Alshawabkeh's testimony about what happened in the exam room also appeared sincere, the Tribunal noted that Dr. Alshawabkeh's testimony conflicted with HC's about what happened in the room. The Tribunal found HC's evidence to be credible and preferred it to Dr. Alshawabkeh's evidence where their evidence conflicted.

The Tribunal noted that Dr. Alshawabkeh's testimony at the hearing was not consistent with his chart note or with his formal November 6, 2015 response to the College about the complaint. The Tribunal notes that Dr. Alshawabkeh's testimony at the hearing was much more detailed and contained different information than his chart note and his November 6, 2015 letter.

Dr. Alshawabkeh argued that it would be unfair to suggest that his November 6, 2015 response to the College was incomplete because it predated notice of the formal allegations. The Tribunal did not consider that Dr. Alshawabkeh's November 6, 2015 response to the College was proof of any of the allegations. However, the Tribunal did consider that the differences between Dr. Alshawabkeh's chart note, his November 6, 2015 letter and his testimony at the hearing impacted on his credibility.

While Dr. Alshawabkeh testified at the hearing that he did a detailed subjective history during the visit including information about all of the patient's symptoms, he did not document this in his chart note or any details about it in his November 6, 2015 letter to the College. Dr. Alshawabkeh also apparently omitted to clarify the history he had gathered from HC in this regard during his January 19, 2016 meeting with Dr. Caffaro, Complaints Director for the College. Dr. Caffaro's memorandum detailing the discussion at the meeting was entered into evidence. Dr. Caffaro wrote, in part, "With regards to history of present illness, the shortcomings of his questioning around migraine, depression and insomnia are self-evident."

As noted above, in his November 6, 2015 response letter to the College Dr. Alshawabkeh stated that HC was already in the examination room when he entered. Dr. Alshawabkeh's response to the College was unequivocal about this. Yet at the hearing, Dr. Alshawabkeh admitted during cross-examination that he couldn't recall whether he or HC was in the examination room first. Dr. Alshawabkeh's testimony that he could not recall this is important since allegation 2 includes the allegation that Dr. Alshawabkeh touched HC's shoulder and HC's evidence was that this occurred as she walked into the examination room where Dr. Alshawabkeh was waiting for her.

Dr. Alshawabkeh's November 6, 2015 written response to the complaint was also unequivocal that he did not compliment HC about her name during the visit. However at the hearing, Dr. Alshawabkeh admitted that he did, and that he mentioned to HC that her name was similar to his daughter's. When he was asked why his November 6, 2015 written response to the College did not mention what he had actually said, Dr. Alshawabkeh said that he had not been asked this. The Tribunal did not accept this and found that Dr. Alshawabkeh had changed his position on this point.

Dr. Alshawabkeh's written response to the College was also unequivocal that he did not touch HC's lower back upon leading her out of the examination room or comment on her perfume. At the hearing, Dr. Alshawabkeh admitted that he couldn't be sure about this. He said he had tried his best to remember. He also said that he had no intention to touch HC inappropriately.

Dr. Alshawabkeh acknowledged that there was an error in his chart note. He said he did not actually do the Babinski test even though he typed that he did.

Dr. Alshawabkeh also demonstrated selective recall in his testimony at the hearing. The Tribunal noted that Dr. Alshawabkeh claimed to have a very detailed recollection of HC's patient history, his examination and his advice to her, even though those details do not appear to have ever been documented. For example, Dr. Alshawabkeh testified that he was sure he had not asked HC to remove her shirt. Yet on cross examination there were a number of important details about the appointment that Dr. Alshawabkeh said he did not remember. He said he couldn't remember who entered the room first, he couldn't remember if he had commented on her perfume and he couldn't remember if he had placed his hand on her lower back to lead her out of the examination room. The Tribunal finds it difficult to accept Dr. Alshawabkeh's very detailed evidence about some aspects of what occurred during the visit when he has acknowledged that there are other aspects of the visit that he cannot recall.

**Allegations**

1. **You did make inappropriate personal comments to your patient, HC, on September 19, 2015, in particular being overly complimentary about her name, appearance and her perfume;**

The Tribunal accepts HC's evidence over Dr. Alshawabkeh's evidence on this point and finds that Dr. Alshawabkeh complimented HC as alleged. The Tribunal did note that in her testimony at the hearing, HC did not say that Dr. Alshawabkeh had commented on her height, although that was something HC mentioned in her handwritten summary attached to the complaint.

The Tribunal also notes that there is no evidence of any written or unwritten standard of practice that physicians should not compliment patients. While the expert, Dr. Fairgrieve-Park testified that she would not compliment a new patient in the particular context of this physician–patient interaction that is not sufficient evidence of a standard of practice for the profession or of a breach of a standard of practice in this case.

The Tribunal recognized that the context of the interaction can be important and considered that the patient in this case was 15 years old, female, and alone and that the investigated member was an adult, male, and in a position of trust and authority. The Tribunal also considered Dr. Fairgrieve-Park's opinion that Dr. Alshawabkeh was engaging in conduct suggestive of sexualized behavior with HC and the Tribunal weighed this against its impression of the investigated member's evidence that he was well–intentioned to make the patient feel comfortable.

The Tribunal has carefully considered the evidence of what Dr. Alshawabkeh said and did in his interactions with HC and it is not prepared to find on the evidence before it that Dr. Alshawabkeh was acting contrary to any standard of practice or otherwise engaging in sexualized behavior amounting to unprofessional conduct. Dr. Alshawabkeh's comments to HC may have represented very poor judgment given the context and his compliments obviously did not have the effect that he intended. The Tribunal notes that unprofessional conduct as defined by the *Health Professions Act* may include a lack of judgment in the provision of professional services, but the Tribunal does not find that Dr. Alshawabkeh's compliments in this case were sufficiently serious to amount to unprofessional conduct. This allegation is therefore dismissed.

The Tribunal expects that Dr. Alshawabkeh will have learned from this experience and the remedial boundary training he has since taken. The Tribunal further expects Dr. Alshawabkeh's communication with his patients in the future will be improved and that he will be much more conscious of the context in which he is interacting with patients.

While the Tribunal heard evidence of some other statements by Dr. Alshawabkeh, towards HC that may not have resulted in the same analysis, the Hearing Tribunal confirmed with the parties that allegation #1 only alleged the compliments about HC's name, appearance and perfume.

**2. You did inappropriately touch the shoulder and lower back of your patient, HC, an unaccompanied minor, on September 19, 2015;**

The Tribunal accepts HC's evidence over Dr. Alshawabkeh`s on this point and finds that Dr. Alshawabkeh touched HC's shoulder and lower back as alleged. The Tribunal also finds that there is no written or unwritten standard of practice that physicians should not touch patients. Dr. Fairgrieve-Park's expert evidence was that touch can be appropriate sometimes and that whether touch is appropriate or not is a highly subjective matter.

The Tribunal accepts that context is important and that this circumstance involved a 15-year-old unaccompanied girl, with an adult male physician in a position of trust and authority. The Tribunal considered Dr. Fairgrieve-Park`s expert evidence that Dr. Alshawabkeh's conduct towards HC was suggestive of sexualized behavior, but the Tribunal carefully considered the evidence and was not prepared to find that Dr. Alshawabkeh's use of touch was sexual in nature

or otherwise amounted to unprofessional conduct. The evidence was that Dr. Alshawabkeh touched HC's shoulder as part of guiding her into the room and touched her back as part of guiding her out after the examination.

The Tribunal found that Dr. Alshawabkeh's intentions were to make HC feel comfortable, but that she interpreted his actions differently, and they had the opposite effect. Given the context, Dr. Alshawabkeh's use of touch may have represented very poor judgment, but the Tribunal did not find that this lapse in judgment amounted to unprofessional conduct in this case. This allegation is therefore dismissed.

The Tribunal expects that Dr. Alshawabkeh will have learned from this experience and the remedial boundary training he has since completed. The Tribunal expects that Dr. Alshawabkeh's use of touch with his patients in the future will be minimized in an effort to respect the patient's personal boundaries and that he will be much more cognizant of the context in which he is interacting with the patient before choosing to use touch.

Although the Tribunal heard evidence of some other use of touch by Dr. Alshawabkeh, towards HC that may not have resulted in this same analysis, the Tribunal confirmed with the parties that allegation #2 only alleged the touching of HC's shoulder and lower back.

**3. You did fail to provide adequate draping and privacy for your patient, HC, on September 19, 2015;**

This allegation turns on the Tribunal`s findings of credibility and whether Dr. Alshawabkeh in fact asked HC to remove her shirt or sweater. If he did, she should have been offered privacy to change and a gown or drape. During argument Ms. Stratton acknowledged that the failure to do so would be unprofessional conduct. On the other hand, if he did not ask HC to remove her shirt or sweater, then there was no need for a gown or drape.

Dr. Fairgrieve-Park's expert testimony regarding the use of drapes or gowns was that they must be provided to any patient who is asked to remove clothing, to maintain patient dignity and modesty. She opined that it would have been particularly important in this physician-patient interaction which involved an unaccompanied female minor and an adult male physician in a position of trust and authority.

The Tribunal accepts HC's evidence over Dr. Alshawabkeh's on this point and finds that Dr. Alshawabkeh did ask HC to remove her shirt or sweater and that she did so, but that her brassiere remained on. The Tribunal also accepts HC's evidence that she was not offered a gown or drape. This is not in accordance with the standards of practice as explained by Dr. Fairgrieve-Park and defense counsel, Ms. Stratton acknowledged that the failure to offer privacy to change and a gown or drape to HC would amount to unprofessional conduct. The Tribunal finds that this allegation is factually proven and that Dr. Alshawabkeh's failure to provide adequate draping and privacy for HC does rise to the level of unprofessional conduct. Failing to provide necessary patient privacy and draping constitutes a lack of judgment in the practice of the medical profession as well as conduct that harms the integrity of the medical profession.

4. **You did fail to create an adequate chart record regarding your interaction with your patient, HC, on September 19, 2015, given the alleged history provided by your patient of depression, insomnia, asthma and migraines;**

The Tribunal accepts Dr. Alshawabkeh's admission that he did not create an adequate chart record regarding his interaction with his patient, HC given the history provided by HC of depression, insomnia, asthma and migraines.

The Tribunal heard evidence that Dr. Alshawabkeh did not document appropriate history regarding HC's symptoms of depression, insomnia, asthma, and migraines. The College of Physicians and Surgeons of Alberta's Patient Records Standard 21 (exhibit #16), states that the patient record in a medical practice must contain or provide reference to the presenting complaints and functional inquiry; significant prior history; and current medications, allergies and drug sensitivity. It further states that an accurate patient record must be accessible to ensure continuity of care for a patient.

Dr. Alshawabkeh testified that it was his intention to amend or edit and finish the chart note for HC's visit, but that this did not happen because he received the complaint followed by legal advice to not edit the chart. However, at the hearing, Dr. Alshawabkeh acknowledged that he made no attempt to document a proper history for HC anywhere other than HC's chart and he didn't write anything about the visit with HC until he prepared his draft response to the complaint to the College for his lawyers.

The Tribunal accepts that Dr. Alshawabkeh failed to create an adequate chart record for his patient, HC, on September 19, 2015 and finds that this constitutes unprofessional conduct. Unprofessional conduct includes failing to comply with the standards of practice of the medical profession as set by the College. An adequate chart record for a patient reporting serious issues such as depression, insomnia, asthma and migraines is essential to provide proper medical care and for continuity of care if another practitioner has to provide care.

5. **You did inappropriately prescribe 90 tablets of Zopiclone for your patient, HC, a minor, on September 19, 2015;**

The Tribunal accepts Dr. Alshawabkeh`s admission that he inappropriately prescribed 90 tablets of Zopiclone for a minor patient.

HC was an unaccompanied minor with a history of depression. Dr. Fairgrieve-Park`s expert testimony was that, under the age of 18, the use of any type of sleep medication should be undertaken with "extreme caution". She explained that the use of Zopiclone in patients under 18 years of age is not recommended and its use for a 15 or 16 year old patient is therefore not consistent with the standard of care. Dr. Fairgrieve-Park also explained that it was not the standard of care to provide such a large quantity of Zopiclone to a patient of any age in the setting of a first appointment. In his own evidence, Dr. Alshawabkeh acknowledged that pharmaceutical companies recommended that family physicians defer to specialists to prescribe Zopiclone.

The Tribunal accepts that Dr. Alshawabkeh inappropriately prescribed 90 tablets of Zopiclone, and finds that this constitutes unprofessional conduct. Dr. Alshawabkkeh`s conduct represented a lack of skill or judgment in the practice of the medical profession and conduct that harms the integrity of the profession.

**6. You did make inaccurate chart entries for the record of your patient, HC, regarding the visit on September 19, 2015, in particular, one or more of the following:**

**a. you had not examined all cranial nerves 2 through 12 of your patient;**

The Tribunal did not find allegation 6(a) to be proven. While Dr. Alshawabkeh admitted at the outset of the hearing that he did not specifically examine all the cranial nerves II through XII, the expert Dr. Fairgrieve-Park testified that it is not necessary to do so in order to chart "CN II-XII are grossly intact" as this can be assessed simply by observing the patient in motion and conversation. Therefore, there was insufficient evidence of an inaccuracy in Dr. Alshawabkeh's charting to find the allegation proven.

**b. you had not examined all of the skin of your patient;**

The Tribunal does not find (b) to be proven. Dr. Alshawabkeh admitted at the outset that he did not examine all of HC's skin and charted "Skin: pink-tan color, good turgor w/o lessions, (sic) redness, cyanosis, rashes or edema".

The Tribunal considered Dr. Fairgrieve-Park's expert evidence that the chart note implies Dr. Alshawabkeh had examined HC's entire skin. The Tribunal also noted Dr. Fairgrieve-Park's evidence that charting "MSK" and then some details about specific tests would not imply that the entire musculoskeletal system had been examined. The Tribunal accepts that Dr. Alshawabkeh's chart note about HC's skin could imply he had checked her whole skin but the Tribunal was not prepared to find that it necessarily implied that he did.

The Tribunal therefore did not agree that Dr. Alshawabkeh's chart note was inaccurate as alleged, but noted that it was incomplete because the area of skin examined was not identified. The Tribunal expects that in the future, Dr. Alshawabkeh will be more careful to specify parts of his patient's bodies he has actually examined.

**c. you had not fully examined the musculoskeletal system of your patient; and**

The Tribunal does not find (c) to be proven. Dr. Alshawabkeh admitted that he had not examined the entire musculoskeletal system and charted "MSK: Normal gait, able to walk, negative Rhomberg's sign; symmetric joints and muscles; no swelling, masses, deformity or tenderness to palpation; no heat or swelling of joints; full ROM; muscle strength 5/5". The Tribunal considered Dr. Fairgrieve-Park's expert evidence that charting "MSK" and then some details of tests that had been performed does not imply that the entire musculoskeletal system has been checked. Once again, the Tribunal did not feel that the chart note was inaccurate. Again, the Tribunal expects that in the future, Dr. Alshawabkeh will be careful to specify the parts examined.

**d.** ~~you had not placed your stethoscope on the skin of your patient while performing auscultation of the chest~~.

The Tribunal was advised that the allegation 6(d) was withdrawn and this was reflected on the Amended Amended Notice of Hearing.

Dr. Alshawabkeh had argued that allegations 6 and 4 were redundant. It was unnecessary for the Tribunal to consider this argument given its conclusion that allegation 6 was not proven.

## VIII. ORDERS / SANCTIONS

The Tribunal will receive submissions on sanction from counsel for the Complaints Director and from counsel for Dr. Alshawabkeh.

If the parties wish to proceed with written submissions on sanction the Tribunal suggests that the submissions on behalf of the Complaints Director be provided to Ms. Stratton within one month of receipt of this decision and that Ms. Stratton have a further two weeks to prepare Dr. Alshawabkeh's submissions on sanction before all of the submissions are provided to the Tribunal for consideration. These timelines are suggestions only and the parties may agree on different timelines and advise the Tribunal accordingly.

If either party wishes to speak to sanctions in an oral hearing or to call evidence on the issue of sanctions they may write to the Tribunal (by advising the Hearings Director) and the Tribunal will determine the process to be followed.

Signed on behalf of the Hearing Tribunal
by the Chair

Dated: April 12, 2017

Dr. Stacy J. Davies

COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF
A HEARING UNDER THE *HEALTH PROFESSIONS ACT*,
R.S.A. 2000, c. C-7

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. TARIQ ALSHAWABKEH

# DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA on SANCTIONS

## INTRODUCTION

The Hearing Tribunal consisting of Dr. Stacy J. Davies as Chair, Dr. Douglas Perry and Mr. Brian Popp, Public Member, held a hearing into the conduct of Dr. Tariq Alshawabkeh on December 6 and 7, 2016. The Hearing Tribunal issued a written decision dated April 12, 2017 finding Dr. Alshawabkeh to have committed unprofessional conduct. On July 11, 2017 the Hearing Tribunal reconvened to receive evidence and submissions on sanctions. This is the Hearing Tribunal's decision on sanctions.

At the continuation of the hearing before the Hearing Tribunal on July 11, 2017 the College of Physicians & Surgeons was represented by Mr. Craig Boyer, legal counsel and Ms. Annabritt Chisholm, Student-at-Law. Dr. T. Alshawabkeh was also present and represented by Ms. Barbara Stratton and Mr. Matthew Riskin, legal counsel and Mr. Luke Wolfe, law student. Dr. Alshawabkeh's spouse, Dr. D. Alshawabkeh was also present. In addition, Mr. Gregory Sim was present as legal counsel to the Hearing Tribunal.

## FINDINGS

In its decision dated April 12, 2017, the Hearing Tribunal found Dr. Alshawabkeh to have committed unprofessional conduct as alleged in allegations 3, 4 and 5 in the Amended Notice of Hearing:

3. You did fail to provide adequate draping and privacy for your patient, HC, on September 19, 2015;

4. You did fail to create an adequate chart record regarding your interaction with your patient, HC, on September 19, 2015, given the alleged history provided by your patient of depression, insomnia, asthma and migraines;

5. You did inappropriately prescribe 90 tablets of Zopiclone for your patient, HC, a minor, on September 19, 2015;

## EVIDENCE – EXHIBITS

At the outset of the sanctions hearing on July 11, 2017, the parties entered 7 additional documentary exhibits by agreement. These were numbered exhibits 18-24 and consisted of:

18. Chronology of Complaint Process Against Dr. Alshawabkeh
19. Decision of the Review Panel of the Appeals Committee of the Council of the College of Physicians & Surgeons of Alberta, dated February 26, 2016
20. Letter to Tribunal from Dr. Abdel Elfourtia, dated July 4, 2017
21. Supervised Practice Assessment Final Report (Dr. Jeff Robinson) dated April 26, 2016

22. Curriculum Vitae of Dr. Jeff Robinson
23. CPSBC Certificate of Continuing Medical Education – Medical Record Keeping for Physicians (February 22, 2017)
24. CPSBC Certificate of Continuing Medical Education – Prescriber's Course (April 28, 2017)

**EVIDENCE – TESTIMONY**

Mr. Boyer did not call any witnesses to testify on the issue of sanctions. Ms. Stratton called Dr. Alshawabkeh and Dr. Jeff Robinson.

**Dr. Tariq Alshawabkeh**

Dr. Alshawabkeh testified and gave the following key evidence on the issue of sanctions:

- Dr. Alshawabkeh reviewed the chronology of the complaint process against him that was entered as an exhibit. Between April and July of 2015, Dr. Alshawabkeh completed a Preliminary Clinical Assessment with Dr. Abdel Elfourtia. This involved attending patients together with Dr. Elfourtia who provided feedback to Dr. Alshawabkeh on his patient care and charting.
- In August 2015 Dr. Alshawabkeh commenced a Supervised Practice Assessment ("SPA") with Dr. Nabil Elforti. Dr. Alshawabkeh explained that during the SPA he practiced independently and Dr. Elforti would meet with him 2-3 times each week at his practice to review his charts and provide feedback on Dr. Alshawabkeh's patient care and charting.
- HC's appointment with Dr. Alshawabkeh was on Saturday September 19, 2015.
- By October 27, 2015 Dr. Alshawabkeh had been informed by Dr. Elforti that he had successfully completed the SPA and that Dr. Elforti was submitting his final report to the College.
- Three days later, on October 30, 2015, Dr. Alshawabkeh learned that HC had submitted a complaint about his conduct to the College, although the College had received that complaint on September 30, 2015.
- On November 2, 2015 Dr. Alshawabkeh was informed by the College's Deputy and Assistant Registrars that his SPA was suspended retroactively to September 30, 2015 and his application for registration as a regulated member of the College was suspended pending the determination of HC's complaint.
- Dr. Alshawabkeh was thereafter unable to practice independently and this situation persisted for just over 4 months. He did not earn any income during this time and he used the time to read resources to identify where he went wrong.
- Dr. Alshawabkeh requested a review of the suspensions and on January 25, 2016, the Review Panel of the Appeals Committee of the Council of the College conducted a hearing and a decision was issued on February 26, 2016. The Review Panel overturned the suspensions as unfair and directed that Dr. Alshawabkeh should be permitted to complete the SPA.
- Between March and April 2016, Dr. Alshawabkeh completed his SPA with Dr. Jeff Robinson. Dr. Alshawabkeh explained that Dr. Robinson met with him 2-3 times each

week for 1-3 hours each time. Dr. Robinson did not attend patients with Dr. Alshawabkeh but he did review Dr. Alshawabkeh's charts and provided feedback on patient care and charting. Dr. Alshawabkeh said that he specifically discussed HC's case with Dr. Robinson and Dr. Robinson provided guidance on the use of chaperones and protecting professional and patient boundaries in similar situations in the future. Dr. Alshawabkeh said Dr. Robinson also provided guidance on prescribing practices with minor patients.

- Dr. Alshawabkeh said he has taken several courses. On the advice of his legal counsel he took a "Professionalism in Medical Practice" boundaries course at the University of British Columbia in October of 2016. On November 27, 2016 he completed two online medical record keeping courses offered by the Canadian Medical Protective Association. On February 22, 2017 he took a medical record-keeping course offered by the College of Physicians and Surgeons of British Columbia. Dr. Alshawabkeh said that he now completes as much charting as possible the same day or by the following morning at the latest. Finally on April 28, 2017 Dr. Alshawabkeh attended a "Prescriber's Course" offered by the College of Physicians and Surgeons of British Columbia. Dr. Alshawabkeh explained that this course covered all manner of medications and how to properly use them. In cross-examination Dr. Alshawabkeh acknowledged that the Prescriber's Course did not involve a formal examination or assessment. The participants had to present their approaches to various scenarios and the course organizers confirmed that he had completed the course.
- Dr. Alshawabkeh made reference to a letter of reference he obtained from Dr. Elfourtia, who supervised his Preliminary Clinical Assessment and which was entered into evidence. The letter of reference was dated July 4, 2017 but did not make reference to the Hearing Tribunal's previous decision or the conduct in issue.
- Dr. Alshawabkeh also explained that as a result of this case he has hired a Licensed Practical Nurse to support him in his practice. This LPN takes vital signs, patient histories, organizes the patient schedule and assists with charting and increasing the efficiency of his practice. Dr. Alshawabkeh noted that where the LPN identifies any concerns he independently verifies the concern, for example rechecking the patient's vital signs himself and making his own independent chart notes.
- Dr. Alshawabkeh explained that his LPN also determines which patients should be offered gowns or drapes and does this, as well as acting as a chaperone whenever required. Dr. Alshawabkeh expressed that having the LPN adds value to his clinical practice and makes his patients feel more comfortable. He said that if he had to do HC's appointment with him over again it would be different because the LPN would first evaluate HC, note her age, offer her a gown and serve as a chaperone during the appointment.
- Dr. Alshawabkeh concluded his testimony by noting that HC's complaint resulted in him being unable to do the work that he loves for a lengthy period and this affected him and his family, for whom he is the sole source of income. He expressed that he has learned from this experience and he will continue to enhance his knowledge. He said that if he was doing the appointment with HC again he would have charted her illnesses and when they began, her complaints of migraines and sleeping issues the same day and he would not wait to fill in those details later. He would also have suggested a psychiatric evaluation as soon as possible. He said he would also contact HC's previous physicians

to obtain her chart to better supervise her care. He said he would have been careful to respect professional boundaries in the topics he discussed with HC and he would have limited the quantity of Zopiclone he prescribed so that he could have followed up with her sooner.

**Dr. Jeff Robinson**

Ms. Stratton also called Dr. Robinson who gave the following key evidence:

- Dr. Robinson has been practicing medicine since 1981, including at the University of Alberta Hospital, the Misericordia Hospital and the Glen Sather Sports Medicine Clinic in the areas of family, sports and emergency medicine. He has also served as the Executive Director of the Alberta Chapter of the College of Family Physicians of Canada and as the Chief of Staff of the Caritas Health Group and as the Vice President, Medicine and Chief Medical Officer of Covenant Health. He explained he began doing formal physician assessments for the College in 2015 after receiving training in the area of physician assessment and reviewing materials in relation to physician assessment.
- Dr. Robinson confirmed that he was appointed to act as Dr. Alshawabkeh's SPA assessor for the completion of the SPA. Dr. Robinson said that he met with Dr. Alshawabkeh for 1-3 hours each time. He would review between 5 and 15 patient charts and provide feedback to Dr. Alshawabkeh.
- Dr. Robinson said that Dr. Alshawabkeh was very forthcoming with him about the issues in HC's complaint and they discussed those issues such as appropriate draping and the use of chaperones.
- Dr. Robinson gave Dr. Alshawabkeh a satisfactory rating in the completion of his SPA. There was no higher level of approval contemplated by the SPA process. Dr. Robinson noted that there were no areas in which he gave Dr. Alshawabkeh an unsatisfactory rating.
- Dr. Robinson was complimentary of Dr. Alshawabkeh's charting, diagnoses, prescribing practices and follow-up care. Dr. Robinson also remarked that HC's complaint had tremendous impact on Dr. Alshawabkeh and this was reflected in Dr. Alshawabkeh taking advantage of resources that were available to him to improve his interactions with people, his charting, his care and his use of chaperones.
- Dr. Robinson confirmed that at the time Dr. Alshawabkeh completed the SPA he met College standards.
- Dr. Robinson also acknowledged that he had read the Hearing Tribunal's previous decision in this matter.

**SUBMISSIONS**

**Mr. Boyer**

Mr. Boyer submitted that the appropriate sanctions in this case were:

a) Dr. Alshawabkeh should receive a one month suspension;

b) Dr. Alshawabkeh should complete a Boundaries course, the content of and completion date for such course being acceptable to the Complaints Director;
c) That Dr. Alshawabkeh undergo a review by the College's Continuing Competence Department to confirm he has implemented the content of his medical documentation courses, with the formal of this review to be at the direction of the Deputy Registrar (Continuing Competence) or her designate;
d) That Dr. Alshawabkeh complete a Prescribing course, the content of and completion date for such course being acceptable to the Complaints Director; and
e) That Dr. Alshawabkeh be responsible for 75% of the costs of the investigation and hearing.

Mr. Boyer made the following main arguments on the issue of sanctions and costs:

- Mr. Boyer made reference to the case of *Jaswal v. Newfoundland Medical Board*, [1996] N.J. No. 50. He argued that the case sets out several factors that the Hearing Tribunal may take into consideration when determining sanctions.
- Mr. Boyer argued that Dr. Alshawabkeh was not a young, inexperienced physician at the time of HC's appointment with him. He had been practicing medicine for some 15 years, albeit most of it overseas.
- Mr. Boyer highlighted that Dr. Alshawabkeh's background was that he came from a part of the world in which boundaries between men and women were more, not less rigid than in Canada. As such Dr. Alshawabkeh's background practicing medicine in Jordan should not be considered a mitigating factor.
- Mr. Boyer argued that Dr. Alshawabkeh was a fiduciary and HC was depending on him to act in her best interests and to chart accurately. His proven conduct engages the public interest and requires serious sanctions. Remedial education is not sufficient, as the sanctions need to ensure Dr. Alshawabkeh as well as other physicians will be deterred from similar conduct in the future and the public will remain confident in the proper regulation of the medical profession.
- Mr. Boyer pointed to Dr. Alshawabkeh's charting and argued that the chart suggests a more fulsome patient examination than actually occurred.
- Mr. Boyer argued that Dr. Alshawabkeh behaved differently with HC than Dr. Elfourti and Dr. Robinson's impressions of him would suggest. HC was a young woman who had recently relocated to the Edmonton area. She was by herself and Dr. Alshawabkeh knew that she was sexually active, she had a history of depression and he prescribed a large quantity of a medication. Mr. Boyer characterized HC as vulnerable and Dr. Alshawabkeh's conduct as "early grooming".
- Mr. Boyer acknowledged that HC's appointment with Dr. Alshawabkeh was an isolated incident and Dr. Alshawabkeh's lack of any previous discipline history.
- Mr. Boyer also acknowledged that Dr. Alshawabkeh had already been suspended from independent practice for about 4 months as a result of the complaint having been made.
- Mr. Boyer further acknowledged that Dr. Alshawabkeh had admitted allegations 4 and 5 and that this could be considered a mitigating factor.
- In relation to the issue of costs Mr. Boyer argued that the two day hearing was required notwithstanding the Hearing Tribunal's dismissal of allegations 1, 2 and 6. Mr. Boyer

explained that the facts about what occurred in the examination room were disputed and the two day hearing with witnesses was required to resolve the factual issues.
- Mr. Boyer also referred to a number of case precedents on sanctions that are addressed below.

**Ms. Stratton**

Ms. Stratton argued that the Complaints Director's position on sanctions was too severe and that it did not align with the Hearing Tribunal's findings. Ms. Stratton argued that the following sanctions would be appropriate:

a) That Dr. Alshawabkeh complete a Boundaries course (with the course already taken to be considered sufficient);
b) That Dr. Alshawabkeh complete a Charting (documentation) course (with the courses already taken to be considered sufficient);
c) That Dr. Alshawabkeh complete a Prescribing course (with the course already taken to be considered sufficient); and
d) That Dr. Alshawabkeh be responsible for 25% of the costs of the investigation and hearing.

Ms. Stratton made the following main arguments on the issues of sanctions and costs:

- Ms. Stratton also addressed the factors in the *Jaswal* case. In relation to the nature and gravity of the conduct in issue, Ms. Stratton argued that Dr. Alshawabkeh's proven conduct was less serious than ethical and professional violations such as sexual boundary violations.
- Ms. Stratton also argued that the Complaints Director had not viewed the matter as requiring a hearing. She argued that this matter had come before the Hearing Tribunal because of a technicality, in that physicians in the SPA process are unable to access the College's Physician Competence program. Ms. Stratton pointed to exhibit 8, being a memorandum prepared by the Complaints Director on January 19, 2016 in which he concluded that a referral to the Hearing Tribunal was not necessary and that it would be appropriate to resolve this matter with Dr. Alshawabkeh's undertaking to complete a formal boundaries course and his referral to the Physician Competence program. She argued that it would not be appropriate to impose more severe sanctions because of that technicality, particularly since the Hearing Tribunal had dismissed some of the allegations that were still at issue in January of 2016.
- On the issue of Dr. Alshawabkeh's age and experience Ms. Stratton noted that Dr. Alshawabkeh was 40 years old at the time of HC's appointment. While he was not a new physician, he was relatively new to Canada and was in the middle of his SPA.
- Ms. Stratton noted that Dr. Alshawabkeh has no history of prior complaints to the College. She also referred to a character reference letter from Dr. Elfourtia and to Ms. Chouinard's evidence as to his demeanor.
- Ms. Stratton recalled the evidence of Dr. Alshawabkeh's impressions of HC, noting that he assessed her as a mature minor with capacity to give consent.

- Ms. Stratton argued that this matter arises from a single patient visit on September 19, 2015. There was no evidence of any pattern of unprofessional conduct.
- In relation to Dr. Alshawabkeh's role in acknowledging what has occurred, Ms. Stratton pointed out that Dr. Alshawabkeh admitted to two of the allegations that were found proven and these admissions should be considered mitigating factors. Further, she argued that Dr. Alshawabkeh has voluntarily completed four courses at his own expense and he has demonstrated insight into his actions and modified his behavior. Ms. Stratton also pointed out that Dr. Alshawabkeh's denial that he had omitted to offer HC a gown or drape should not be considered an aggravating factor, as he was entitled to require the Complaints Director to prove the allegation with evidence.
- Ms. Stratton highlighted that Dr. Alshawabkeh has already suffered a serious penalty as a result of the decision to suspend his SPA following HC's complaint. This resulted in Dr. Alshawabkeh being prevented from practicing or earning income for approximately four months. Ms. Stratton also highlighted that the Review Panel of the Appeals Committee of the College's Council has since determined this suspension to have been procedurally unfair.
- Regarding the impacts of Dr. Alshawabkeh's proven conduct on HC, Ms. Stratton argued that there is no direct evidence of harm, except that HC felt uncomfortable.
- Ms. Stratton argued that while deterrence is important, it does not itself justify a harsh sentence and it is important to consider each case on its own facts. She also pointed out that the approximately four month suspension Dr. Alshawabkeh has served would serve as a significant specific and general deterrent.
- On maintaining public confidence in the integrity of the profession Ms. Stratton argued that this should be balanced with the seriousness of the allegations and the corresponding loss of public confidence if sanctions are too severe.
- On the degree to which Dr. Alshawabkeh's proven conduct was beyond the acceptable range, Ms. Stratton argued that the proven conduct represented a breach of Dr. Alshawabkeh's professional obligations, the standards of practice and a lack of skill or judgment but his conduct was not sexual in nature or otherwise egregious.
- Ms. Stratton also pointed out that Dr. Alshawabkeh has now completed his SPA with Dr. Robinson and this resulted in 34 additional days of assessment that were more rigorous than the Physician Competence program provides. Dr. Robinson said that he met with Dr. Alshawabkeh 2-3 times each week for 1-3 hours each time and his evidence was that this was more substantial than a competency review.
- Ms. Stratton also noted out that Dr. Alshawabkeh had taken courses before the July 11, 2017 sanctions hearing. He took the boundaries course from the College of Physicians and Surgeons of British Columbia, another course from the College in British Columbia on medical documentation and a third course on prescribing in British Columbia. Ms. Stratton also indicated that Dr. Alshawabkeh had taken an online CMPA medical documentation course.
- Ms. Stratton responded to Mr. Boyer's submissions that Dr. Alshawabkeh had been "grooming" HC. She characterized these arguments as inflammatory and not supported by the evidence or the Hearing Tribunal's findings of fact.
- On the range of sanctions imposed in other, similar cases, Ms. Stratton emphasized that the use of precedent cases has limited utility but referred to several cases said to be comparable. These are discussed below. Ms. Stratton also responded to the case

precedents referenced by Mr. Boyer, arguing that they were factually quite different and the proven conduct in the case precedents was much more severe than Dr. Alshawabkeh's proven conduct. She suggested that it is difficult to find cases that are factually similar since such cases are often not referred to a hearing and each case must be judged on its own facts.

- On the issue of costs, Ms. Stratton pointed out that Dr. Alshawabkeh had admitted allegations 3 and 4 and in relation to allegation 5 he admitted that his conduct would be unprofessional if the Hearing Tribunal found that he had not offered HC a gown. Ms. Stratton acknowledged that the hearing would still have been required but she said it would have been shorter, perhaps one day rather than two. Ms. Stratton suggested that Dr. Alshawabkeh should not be ordered to pay more than 25% of the investigation and hearing costs.

**Reply Argument on Sanctions by Mr. Boyer**

- In reply on the issue of costs Mr. Boyer argued that there is no evidence the complainant would have agreed to an informal resolution short of a formal hearing, and even if the parties were able to agree on all matters a hearing would still have been required by section 70 of the Act.

**ORDERS**

The Hearing Tribunal has carefully considered the record of the hearing, the further evidence received on July 11, 2017 and the submissions of the parties. The Hearing Tribunal makes the following orders:

1. The Hearing Tribunal's decision shall serve as a reprimand;
2. Dr. Alshawabkeh shall be required to complete a Boundaries course, the content of and completion date for which must be acceptable to the Complaints Director;
3. Dr. Alshawabkeh shall be required to complete a Medical Charting course, the content of and completion date for which must be acceptable to the Complaints Director;
4. Dr. Alshawabkeh shall undergo a review by the Continuing Competence Department to confirm that learnings from the Medical Charting course have been implemented into his practice, the format of this review to be at the direction of the Deputy Registrar (Continuing Competence) or her designate;
5. Dr. Alshawabkeh shall be required to complete a Prescribing course, the content of and completion date for which must be acceptable to the Complaints Director;
6. Dr. Alshawabkeh shall be responsible for 40% of the costs of the investigation and hearing.

In oral argument Mr. Boyer confirmed that the Boundaries course and the Medical Charting courses already completed by Dr. Alshawabkeh were acceptable to the Complaints Director. Mr. Boyer explained that the Prescribing course was not acceptable to the Complaints Director, as it did not require Dr. Alshawabkeh to complete any formal assessment.

**REASONS FOR ORDERS**

Dr. Alshawabkeh's proven conduct consisted of failing to provide adequate draping and privacy for his minor, female patient; failing to create an adequate chart record regarding his interactions with his patient given the history she provided; and inappropriately prescribing 90 tablets of Zopiclone to his minor patient. There is no question these are serious matters falling outside the scope of acceptable practice. Respect for the standards of practice requiring draping and privacy are important aspects of maintaining appropriate physician-patient boundaries and the integrity of the profession. Adequate medical record keeping and safe and appropriate prescribing are fundamental to the physician's role to act in the best interests of the patient and they are a basic expectation of the College and the public.

The Tribunal has considered that HC was a minor female patient, alone in an examination room with an adult male physician at the time in question. While Dr. Alshawabkeh may have judged HC to be a mature minor, capable of providing informed consent, HC's apparently mature demeanor does not change the fiduciary nature of the physician-patient relationship or diminish the imbalance of power in that relationship.

On the other hand, the Hearing Tribunal does not consider the nature of the proven conduct to rise to the level of transgressions that would justify a suspension. The Tribunal did not agree that that the evidence showed that Dr. Alshawabkeh was "grooming" HC. The Hearing Tribunal has also noted that Dr. Alshawabkeh has already been suspended for over four months as a result of HC's complaint being made. This occurred during Dr. Alshawabkeh's SPA when he was not yet registered on the College's provisional register. It was argued before the Hearing Tribunal that Dr. Alshawabkeh was ineligible to be referred to the Physician Competence Program, which would have been an acceptable outcome from the College's perspective at the time of HC's complaint. The Hearing Tribunal does not believe that imposing a period of suspension is necessary or warranted in this case.

The Tribunal has taken note that Dr. Alshawabkeh has no prior discipline history and that he was described by Ms. Chouinard as a kind, soft-spoken doctor and by Dr. Elfourtia as having good judgment, a professional demeanor and care for his patients. The Tribunal has also noted that Dr. Alshawabkeh was relatively new to Canada at the time of his proven conduct, having been educated overseas, and that neither Ms. Chouinard, nor Dr. Elfourtia were present at the time of HC's appointment or commented on Dr. Alshawabkeh's care of HC specifically.

The Tribunal has taken careful note of Dr. Alshawabkeh's acknowledgment that his conduct was unprofessional through his admission of allegations 4 and 5 at the hearing. The Tribunal has also taken note of Dr. Alshawabkeh's efforts to enhance his knowledge and modify his behaviour, taking courses at his expense on boundaries, medical record keeping and prescribing and hiring an LPN to assist him since learning of HC's complaint. The Hearing Tribunal has not considered Dr. Alshawabkeh's denial that he omitted to offer HC adequate draping and privacy as an aggravating factor in determining sanctions. Dr. Alshawabkeh was entitled to require the Complaints Director to prove the facts underlying this allegation.

The Tribunal has considered the need for both specific and general deterrence. The Tribunal is satisfied that Dr. Alshawabkeh has acknowledged that his proven conduct was unprofessional and remediated it by undertaking a significant amount of coursework. The Tribunal noted that the Complaints Director confirmed his satisfaction with the coursework Dr. Alshawabkeh has completed in boundaries and medical record keeping. The Tribunal also noted that the prescribing course Dr. Alshawabkeh undertook did not involve any formal examination or assessment process and it is not acceptable to the Complaints Director. The Tribunal therefore expects that Dr. Alshawabkeh will undertake another, more formalized Prescribing course acceptable to the Complaints Director.

The Tribunal took note of Dr. Alshawabkeh's testimony at the sanctions hearing and believes that Dr. Alshawabkeh has learned tremendously from this experience. The Tribunal is also satisfied that the rest of the profession will be adequately deterred by the sanctions set out above. A reprimand is a significant penalty for a professional person whose livelihood is based on their reputation. The remedial courses and assessment are directly related to the proven conduct and, together with the reprimand, they are a proportionate response. While the Continuing Competence Department review may duplicate parts of the balance of the SPA recently completed with Dr. Robinson, the Tribunal notes the review is remedial, not punitive in nature and it is consistent with the objective of protecting the public and proportionate to the proven conduct.

The Tribunal has also considered the need to maintain public confidence in the profession. The Tribunal is satisfied that the public would view the sanctions set out above as a proportionate response to Dr. Alshawabkeh's proven conduct.

The Tribunal has considered the cases referenced by the parties. Mr. Boyer referred to *CPSO v. Peirovy*, 2017 ONSC 136, in which a physician had been found by a Discipline Committee to have committed improper sexual touching towards five of his female patients. A six month suspension was imposed with restrictions imposed on his practice for a further 12 months thereafter. In addition the physician was ordered to take training, to pay for therapy for his victims and to pay about $35,000 in costs. The College appealed arguing the sanctions were too lenient. The Ontario Superior Court considered all of the evidence and held that a short suspension was clearly inadequate to deter others and to contribute meaningfully to the eradication of sexual abuse in the profession. The conduct in the *Peirovy* case is clearly egregious in comparison with Dr. Alshawabkeh's proven conduct. There was no evidence that Dr. Alshawabkeh engaged in improper sexual conduct.

Similarly, in *CPSA v. Smeida*, 2011 CanLII 82777 (AB CPSDC), the physician was found to have inappropriately hugged and touched two patients, to have inappropriately complimented two patients during medical appointments, to have invited one patient to go out with him and to have purported to terminate the physician patient relationship with another patient to pursue an intimate relationship including sexual intercourse with that patient. The physician was suspended for one year and was required to complete a boundaries course and a multidisciplinary assessment and any recommended treatment before returning to practice. The physician was also ordered to have a chaperone present with any female patients under the age of 15, to pay $21,000

in costs and to enter into a continuing care agreement for a minimum of five years. While some of Dr. Smeida's conduct was similar to conduct Dr. Alshawabkeh was alleged to have engaged in, Dr. Alshawabkeh's proven conduct was quite different.

In *CPSO v. Lambert*, [1992] O.R. (3d) 545, a Discipline Committee found a physician to have made derogatory, sexual and unprofessional comments to female patients, albeit in an ill-advised attempt to be humorous. The comments were found to have greatly upset the patients and brought disrepute to the medical profession. The Discipline Committee imposed a reprimand and a six-month suspension. The sanctions were upheld on appeal to the Court. The majority held the sanctions decision contained no error in principle. One Justice dissented and held the sanctions in the case were grossly excessive and would have imposed only a reprimand and a $20,000 fine. Again, Dr. Alshawabkeh's proven conduct is quite different from the conduct at issue in the Lambert case.

In *CPSO v. Wilson*, 2016 ONCPSD 46, a physician admitted and was consequently found to have omitted to provide a female patient with an appropriate gown, to have omitted to obtain informed consent or explain why he performed clinically indicated pelvic and breast examinations, to have omitted to explain the medical basis for highly invasive questions about the patients' sexual activities and to have omitted to obtain informed consent or explain the clinical basis for having the patient bend at the waist while her back and buttocks were exposed to the physician. The physician had a prior complaint history and had previously been recommended to take a boundaries course. The Discipline Committee accepted a joint submission on penalty for a reprimand, four month suspension, the continuation of a prior undertaking to use a practice monitor/chaperone and costs of $5000. While in both the *Wilson* case and Dr. Alshawabkeh's case there was an omission to provide an appropriate gown, the similarities appear to end there. Dr. Wilson's proven conduct was egregious in comparison to Dr. Alshawabkeh's proven conduct and Dr. Alshawabkeh has no prior history of similar conduct that would justify a suspension.

Ms. Stratton referred the Hearing Tribunal to *CPSO v. Nicol*, 2007 ONCPSD 26, in which the physician was found to have made inaccurate and incomplete chart entries for three patients, one of whom had died on the same date that the physician had charted an attendance with the patient and resulting in the physician's chart note being shown to be inaccurate. There was a prolonged pattern of repeated inaccuracies and omissions in the physician's record keeping and his faulty records had misled the deceased patient's relatives, resulting in pain, confusion and harm to the reputation of the medical profession. The Discipline Committee noted that the physician had cooperated and acknowledged his unprofessional conduct. The Discipline Committee imposed a reprimand, placed conditions on the physician's practice and ordered that he complete remedial courses on medical record keeping and ethics. While the proven conduct is different, this case provides a somewhat similar comparator to Dr. Alshawabkeh's case.

In *CPSM v. Rusen*, 2006 CanLII 61079, the physician pled guilty and was found to have committed professional misconduct by examining his patient's breasts in a manner not medically indicated and by failing to respect her privacy or dignity by instructing her to palpate her own breasts while he watched, by failing to ensure she was appropriately draped and be referring to her as "busty". The Inquiry Panel accepted a joint submission on sanctions and imposed a

reprimand and ordered the physician to pay the costs of the proceedings. The Inquiry Panel also took into consideration that the physician had undertaken to complete a boundaries course and to only conduct intimate examinations in the presence of a chaperone. Aspects of this case are similar to Dr. Alshawabkeh's proven conduct in that in both cases there was a failure to offer appropriate gowning and privacy. Dr. Alshawabkeh's proven conduct was more extensive as it extended to record keeping and prescribing, but Dr. Rusen's conduct was much more severe.

In *CPSA v. Jeh*, a decision of the College's Hearing Tribunal reported in the Messenger publication in September 2013, the physician was found to have inappropriately prescribed narcotic and barbiturate medications to a patient over a six year period, failing to provide appropriate care and failing to document some of the prescriptions in the patient's medical records. The conduct caused or contributed to the patient becoming dependent on the medications. Five other allegations of unprofessional conduct were dismissed. The physician was reprimanded, restricted from prescribing any triplicate prescription drugs until he had completed a prescribing course, subjected to monitoring and required to pay 25% of the costs of the investigation and hearing. The case serves as an example that a reprimand and remedial measures may be a proportionate response to prescribing issues.

In *Friedman (Re)*, 2003 CanLII 57469 (AB CPSDC), the physician was found guilty of demonstrating a lack of skill or judgment by making inadequate patient records for eight patients and of a pattern of unjustified diagnostic investigations. The College's Council ordered the physician to undergo a competency evaluation and undertake any recommended remedial training; that if he did not submit to the evaluation and retraining that he would be suspended until he had; and that he pay the costs of the investigation and hearing. This was argued to justify a lesser sanction for Dr. Alshawabkeh.

Ms. Stratton also referred to cases in which she argued the proven conduct was more severe than Dr. Alshawabkeh's but the sanctions were similar to, or less severe than the Complaints Director was seeking in this case. In *CPSA v. Hudson*, a decision of the College's Hearing Tribunal dated February 13, 2017, the physician admitted and was found to have failed to adequately assess a patient who subsequently died from his undiagnosed condition, and to have failed to document certain relevant information in the patient's chart. The Tribunal accepted a joint submission on sanctions for a reprimand, participation in the College's Practice Visit program and for the physician to pay the costs of the investigation, hearing and the Practice Visit program.

In *CPSA v. Visconti*, 2012 CanLII 5913 (AB CPSDC), the physician was found guilty of 31 charges respecting 9 patients arising from submitting inappropriate billing claims and failing to appropriately treat patients suffering respiratory distress. The physician was suspended for one month, ordered to complete a peer review and 25 hours of continuing medical education. He was also ordered to pay a portion of the investigation and hearing costs.

Finally, in *CPSO v. Pontarini*, 2012 ONCPSD 27, the physician was found to have failed to meet the standards of practice for record keeping and the prescribing of stimulants and to have engaged in prescribing for a canine, which he was not licensed to do. The physician was also noted to have had prior disciplinary matters in which he was sanctioned, including for inadequate record-keeping, failing to maintain the standard of practice in respect of his care of patients,

having been found guilty of an offence relevant to his suitability to practice and having prescribed, dispensed or sold drugs for an improper purpose and having been found guilty of evading income taxes related to his medical practice. The Discipline Committee imposed a reprimand, a one month suspension and conditions on the physician's practice as well as costs of the proceeding.

On balance, having considered the cases referenced by both parties, the Hearing Tribunal feels the sanctions set out above are a rational and proportionate response to Dr. Alshawabkeh's proven conduct.

On the issue of costs, the Complaints Director sought 75% of the costs of the investigation and hearing. The Tribunal was not provided with an estimate of costs to date. Mr. Boyer referred to the *Jaswal* case and its reference to factors the Tribunal may take into account in assessing costs. These are:

1. The degree of success, if any, of the physician in resisting any or all of the allegations;
2. The necessity for calling all of the witnesses who have evidence or for incurring other expenses;
3. Whether the person presenting the case against the physician could reasonably have anticipated the result based on what they knew prior to the hearing;
4. Whether those presenting the case against the physician could reasonably have anticipated the lack of need for certain witnesses or incurring certain expenses in light of what they knew prior to the hearing;
5. Whether the physician cooperated with respect to the investigation and offered to facilitate proof by admissions, etc.
6. The financial circumstances of the physician and the degree to which his financial position has already been affected by other aspects of any penalty that has been imposed.

Mr. Boyer also referred to the case of *Alberta College of Physical Therapists v. Fitzpatrick*, 2015 ABCA 95 for the proposition that costs need not necessarily be significantly reduced where only a portion of the allegations have been proven. In *Fitzpatrick* a costs order of $20,000 (compared to $46,000 in costs incurred for the hearing) was upheld by the Court of Appeal where only 2 of 4 allegations of unprofessional conduct were sustained. Mr. Boyer also referred to *Berge v. College of Audiologists and Speech-Language Pathologists of Ontario*, 2016 ONSC 7034 where the Court referred to a "typical two-thirds approach" to the quantification of costs awards in professional discipline cases and commented that it is inappropriate to look to other members of the profession to fund the entire prosecution. Mr. Boyer similarly referenced *Hoff v. Alberta Pharmaceutical Association* (1994), 18 Alta. L.R. (3d) 387 where the Court commented that the regulatory body's costs to prosecute the case may properly be borne by the professional whose conduct is at issue and has been found wanting.

On behalf of Dr. Alshawabkeh Ms. Stratton submitted that he should be responsible for only 25% of the costs of the investigation and hearing. Three of the six allegations of unprofessional conduct were found proven and two of those were admitted at the outset of the hearing. Ms. Stratton highlighted Dr. Alshawabkeh's cooperation with the investigation and hearing processes and the fact that the hearing was only necessary due to a technicality, namely Dr. Alshawabkeh's

inability to access the Physician Competence Program given that he was not yet on the provisional register.

It cannot be said that the hearing was unnecessary. Dr. Alshawabkeh successfully resisted 3 of the 6 allegations brought against him but Dr. Alshawabkeh did not admit allegation 3, that he inappropriately failed to provide adequate draping and privacy for HC, and this was found proven. Dr. Alshawabkeh was entitled to deny this allegation and require the Complaints Director to prove it, but this contributed to the costs of the hearing. Mr. Boyer called HC, Dr. Fairgrieve-Park and the Complaints Director to testify as part of the prosecution. The evidence of HC and Dr. Fairgrieve-Park were necessary in relation to allegation 3 and the Complaints Director's evidence was very short. The hearing would likely have been shorter if the Complaints Director had not proceeded on the allegations that were ultimately dismissed, perhaps one day as acknowledged by Ms. Stratton, and this factor as well as Dr. Alshawabkeh's cooperation have been taken into account in the order that Dr. Alshawabkeh pay 40% of the costs on the investigation and hearing. The Tribunal also considered that Dr. Alshawabkeh's practice and livelihood had been suspended for approximately four months even though there was no evidence of Dr. Alshawabkeh's actual financial position.

Signed on behalf of the Hearing Tribunal
by the Chair

Dated: October 16, 2017

Dr. Stacy J. Davies

COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA

IN THE MATTER OF
A HEARING UNDER THE *HEALTH PROFESSIONS ACT*,
R.S.A. 2000, c. C-7

AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF DR. TARIQ ALSHAWABKEH

# DECISION OF THE HEARING TRIBUNAL OF THE COLLEGE OF PHYSICIANS & SURGEONS OF ALBERTA on COSTS

## INTRODUCTION

The Hearing Tribunal consisting of Stacy J. Davies as Chair, Dr. Douglas Perry and Mr. Brian Popp, Public Member, held a hearing into the conduct of Dr. Tariq Alshawabkeh on December 6 and 7, 2016. The Hearing Tribunal issued a written decision dated April 12, 2017 finding Dr. Alshawabkeh to have committed unprofessional conduct.

The Hearing Tribunal received evidence and submissions on sanctions and issued a decision on sanctions dated October 16, 2017. In the decision on sanctions the Hearing Tribunal ordered that Dr. Alshawabkeh be responsible for 40% of the costs of the investigation and hearing.

Subsequently, the College provided a statement of the costs of the investigation and hearing to Dr. Alshawabkeh's counsel, Ms. Stratton. Ms. Stratton disputed some of the costs in a November 23, 2017 letter to the College and the parties then provided written submissions on costs to the Hearing Tribunal. The Hearing Tribunal received and reviewed Ms. Stratton's November 23, 2017 letter to Mr. David Kay of the College, Mr. Boyer's December 1, 2017 written submission with attachments and Ms. Stratton's December 6, 2017 reply submission with attachments. The Hearing Tribunal convened on January 29, 2018 and this is the Hearing Tribunal's decision on the disputed costs.

## SUBMISSIONS

### Ms. Stratton's November 23, 2017 Letter to the College

In Ms. Stratton's November 23, 2017 letter she was responding to Mr. Kay's letter of November 8, 2017 outlining the costs of the investigation and hearing that the College sought to have Dr. Alshawabkeh pay in accordance with the Hearing Tribunal's orders. Ms. Stratton indicated that Dr. Alshawabkeh took the position that he should not be responsible for some of the items. In particular Dr. Alshawabkeh took issue with legal fees of $857.85 incurred by the College which appeared to relate to the suspension of Dr. Alshawabkeh's supervised practice assessment and his successful appeal of the suspension rather than to the investigation or prosecution of the complaint itself.

In addition, Dr. Alshawabkeh took issue with the amount of $5,404.01 which he argued was attributable to the October 6, 2016 appearance before the Hearing Tribunal to set hearing dates. Ms. Stratton argued that the initial October 2016 hearing dates were set arbitrarily without her input and she had maintained from the outset that those dates would not allow sufficient time for Dr. Alshawabkeh to obtain a suitable expert opinion. She argued that the Complaints Director had agreed to an adjournment but insisted that the parties appear before the Hearing Tribunal to confirm new hearing dates. Ms. Stratton also said that the parties had agreed the adjournment application could be heard by teleconference call but this did not occur. Ms. Stratton said that Dr. Alshawabkeh should not bear $5,404.01 in costs of the October 6, 2016 appearance including the per diem costs for the Tribunal members, their travel expenses, legal fees for the Tribunal's independent legal counsel and the costs of the Court Reporter.

**Mr. Boyer's Submissions to the Hearing Tribunal**

Mr. Boyer provided a written submission with attachments to the Hearing Tribunal dated December 1, 2017. Mr. Boyer argued that the Hearing Tribunal has made a final decision in this matter. Mr. Boyer explained that the Hearing Tribunal cannot go back and vary its decision except in very limited circumstances, where there has been a slip in drafting the decision or an error in expressing the Tribunal's manifest intention in its written decision, citing *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

Mr. Boyer noted that the Complaints Director agreed that the legal fees of $857.85 should not have been included in the costs for which Dr. Alshawabkeh was responsible because they did not relate to the investigation or hearing. Mr. Boyer characterized their inclusion as a manifest error and argued that the Hearing Tribunal has the ability to correct the error despite having issued its final decision on sanctions.

Mr. Boyer explained that the Complaints Director did not agree that the Hearing Tribunal could or should issue a further decision on the $5,404.01 in costs of the October 6, 2016 appearance. Mr. Boyer argued that sanctions, including costs were argued at length before the Hearing Tribunal on July 11, 2017 and the Hearing Tribunal issued a final decision on sanctions on October 16, 2017 concluding that Dr. Alshawabkeh was responsible for 40% of the costs of the investigation and hearing. Mr. Boyer argued that the $5,404.01 were costs that the Hearing Tribunal had the power to order under subsections 82(1)(j)(i),(ii) and (v) of the *Health Professions Act*, R.S.A. 2000, c. H-7 and the Hearing Tribunal had already made a decision on the matter. The appeal period had since expired and the decision was final. Mr. Boyer said that Dr. Alshawabkeh was, in effect, asking for a variation of the Hearing Tribunal's order that he pay 40% of the costs.

In response to Ms. Stratton's argument that Dr. Alshawabkeh had never agreed to the original hearing dates and should not bear the costs of the October 6, 2016 appearance to set new dates, Mr. Boyer noted that Dr. Alshawabkeh had received a draft Notice of Hearing, the Investigation Report and the expert opinion of Dr. Fairgrieve-Park in mid-June 2016, a month prior to being served with the original Notice of Hearing on July 14, 2016. Ms. Stratton did not confirm that Dr. Alshawabkeh and his witnesses would be available on the new December 5-9, 2016 hearing dates until October 5, 2016 at 4:01pm, while the October 6, 2016 appearance was to occur the following morning. The parties never made any submissions to the Hearing Tribunal about excluding the costs of the October 6, 2016 appearance from the costs of the hearing and it is too late to do so now.

**Ms. Stratton's Submissions to the Hearing Tribunal**

Ms. Stratton also provided submissions. Ms. Stratton explained that Dr. Alshawabkeh had not been provided with a breakdown of the costs of the investigation or hearing until he requested it through her office, and Mr. Kay provided the breakdown on behalf of the College on November 8, 2017. Ms. Stratton noted that as a result, Dr. Alshawabkeh did not have a breakdown of the costs of the investigation or hearing when sanctions were argued before the Hearing Tribunal on July 11, 2017 and the detailed costs had not been before the Hearing Tribunal.

Ms. Stratton argued that Dr. Alshawbkeh is not seeking to vary the Hearing Tribunal's decision that he pay 40% of the costs. Dr. Alshawabkeh is only seeking a determination that certain costs should not be included in the costs of the investigation and hearing for which he is 40% responsible.

Regarding the October 6, 2016 appearance to set hearing dates, Ms. Stratton argued that she had been indicating to Mr. Boyer since July 2016 that October hearing dates would not provide sufficient time to retain an expert and arrange her witnesses. Ms. Stratton said that despite these indications, the Complaints Director issued a Notice of Hearing on July 14, 2016 setting the hearing on October 6 and 7, 2016. She said the Complaints Director would not defer the Notice of Hearing until mutually agreeable dates could be set. The parties ultimately agreed to adjourn the October 6 and 7, 2016 hearing dates to tentative new hearing dates in December, 2016 but the Complaints Director insisted that the Hearing Tribunal hear and grant an adjournment request. While the parties were prepared for the adjournment request to be determined by teleconference the College did not pursue this. On October 5, 2016 Ms. Stratton confirmed her witness availability for the December hearing dates however the following morning the Hearings Director's assistant advised that the Hearing Tribunal would still be convening. A further email from the Hearings Director's assistant on the morning of October 6, 2016 indicated that Dr. Alshawabkeh's counsel need not appear.

Ms. Stratton argued that the October 6, 2016 appearance was unnecessary and at most a conference call would have sufficed. She argued that Dr. Alshawabkeh had done everything possible to avoid an unnecessary appearance before the Hearing Tribunal on October 6, 2016 and he should not bear the costs of it, which were substantial.

**DECISION**

In accordance with the agreement of the parties, the amount of $857.85 is excluded from the costs of the investigation and hearing in this matter for which Dr. Alshawabkeh is responsible.

The amount of $5,404.01 is also excluded from the costs of the investigation and hearing in this matter for which Dr. Alshawabkeh is responsible.

Dr. Alshawabkeh is therefore responsible for costs in the amount of $30,070.91 which is 40% of $75,177.28.

**REASONS**

The Hearing Tribunal has the power under the *Health Professions Act* to order regulated members found to have committed unprofessional conduct to pay some or all of the costs of the investigation and hearing into their conduct. Section 82(1)(j) provides that the Hearing Tribunal can direct an investigated person to pay all or part of the expenses of, costs of and fees related to the investigation or hearing or both including (ii) legal expenses and legal fees, (iii) travelling expenses and a daily allowance for members of the Hearing Tribunal and (v) the costs of creating a record of the proceedings and transcripts.

In this case the parties appeared before the Hearing Tribunal on July 11, 2017 and made argument on the issue of costs. As reflected in the transcript of the hearing (page 396-397) Mr. Boyer referred to a summary of the costs but a breakdown of costs was not before the Hearing Tribunal on July 11, 2017 or when it issued its decision on sanctions on October 16, 2017. The parties made submissions about the percentage of costs for which Dr. Alshawabkeh should be responsible. The Complaints Director argued that Dr. Alshawabkeh should be responsible for 75% while Dr. Alshawabkeh argued that 25% was appropriate. The Hearing Tribunal considered applicable factors and determined that Dr. Alshawabkeh should be responsible for 40% of the costs of the investigation and hearing but the Tribunal did not consider or decide whether any particular items should be included or excluded from the College's breakdown of those costs.

The Hearing Tribunal has considered the *Chandler* case referred to by Mr. Boyer but the Tribunal finds that it has the power to consider and determine whether particular items are properly included in the College's breakdown of costs. The *Chandler* case provides that the *functus officio* principle applies to administrative tribunals like the Hearing Tribunal. The Hearing Tribunal accepts that once it makes a final decision on a matter properly before it pursuant to the *Health Professions Act* it is not open to the Tribunal to revisit that decision. The Tribunal is not expressly authorized to re-open its decisions by the *Health Professions Act* so it could only do so if there is implied authority, if there has been a slip in drafting its decision or an error in expressing the Tribunal's manifest intention in its decision.

The Supreme Court of Canada's decision in *Chandler* also provides at paragraphs 22-23 that the *functus officio* principle should not be strictly applied where there are indications that an administrative tribunal has not disposed of an issue which is fairly raised by the proceedings and which the tribunal is empowered to dispose. The Court in *Chandler* provided that in those circumstances, the tribunal ought to be allowed to complete its statutory task.

The Hearing Tribunal finds that section 82(1)(j) of the *Health Professions Act* expressly empowers it to determine which expenses, costs and fees in the College's breakdown are properly attributable to the investigation and hearing of a matter and which a regulated member of the College should fairly be responsible to pay. To date the Hearing Tribunal has only determined that Dr. Alshawabkeh is responsible for 40% of the costs. The Hearing Tribunal has not determined which expenses, costs and fees in the College's breakdown are properly attributable to the investigation and hearing of this matter and for which Dr. Alshawabkeh should fairly be responsible. Until the parties provided their submissions on this issue, the Hearing Tribunal had not been provided with the breakdown of costs. The issue of which costs are properly attributable to the investigation and hearing of this matter and for which Dr. Alshawabkeh should be responsible has been raised by these proceedings and the Hearing Tribunal is empowered to deal with the issue. The Tribunal concludes that it has the jurisdiction to now determine which expenses, costs and fees on the College's breakdown should be included and excluded and to issue this decision.

The parties agree that the legal fees of $857.85 were not attributable to the investigation and hearing of this matter. These legal fees related to the suspension of Dr. Alshawabkeh's

supervised practice assessment and his appeal from it and should be excluded from the costs of the investigation of the complaint and hearing for which he is 40% responsible.

Ms. Stratton calculated that costs of $5,404.01 were attributable to travel and per diem expenses of Hearing Tribunal members, legal fees for the Tribunal's independent legal counsel and costs of the Court Reporter for the October 6, 2016 appearance to set the December 2016 hearing dates. Mr. Boyer did not dispute this calculation. The Tribunal has reviewed the chronology of events and correspondence leading up to the October 6, 2016 appearance provided by both parties.

In mid-June 2016, Mr. Boyer provided Ms. Stratton with a draft Notice of Hearing, the Investigation Report and Dr. Fairgrieve-Park's expert opinion. Approximately one month later, on July 14, 2016 a signed Notice of Hearing setting the hearing to commence on October 6, 2016 was served. On July 20, 2016 Ms. Stratton wrote to Mr. Boyer confirming that the October dates would be too soon to permit Dr. Alshawabkeh's defence to be ready. Ms. Stratton requested the October dates be cancelled while they assessed how much time they would require. The parties then discussed adjourning the October hearing dates to new dates in December 2016. On September 30, 2016 Mr. Boyer confirmed that the Complaints Director did not object to having a teleconference with the Hearing Tribunal on October 6, 2016 to deal with the adjournment and the parties were just waiting for Ms. Stratton to confirm her witnesses' availability for the December hearing dates. Also on September 30, 2016 Ms. Stratton's colleague Mr. Riskin advised the Hearings Director's assistant that the parties agreed the hearing would not proceed on October 6, 2016 and there would be no need for the Hearing Tribunal to convene on that day. On October 5, 2016 Ms. Stratton confirmed to the Hearings Director's assistant that Dr. Alshawabkeh's witnesses were all available on the proposed December hearing dates and she asked if it would be necessary to appear the next day, on October 6, 2016. The Hearings Director's assistant replied the next morning, October 6, 2016 and advised Ms. Stratton that they did not need to appear before the Hearing Tribunal. The Hearing Tribunal convened on October 6, 2016 at 8:54am. Mr. Matt Langer appeared for Mr. Boyer on October 6, 2016 and advised the Hearing Tribunal that the parties had agreed to adjourn the hearing to December 5-9, 2016 and those dates had been confirmed the previous day at 4:01pm by email. Mr. Langer advised that as a result the Hearing Tribunal need not make any directions. Mr. Riskin attended on behalf of Dr. Alshawabkeh. He confirmed the adjournment was by consent and that Dr. Alshawabkeh had never agreed that he could be ready to proceed on the earlier October dates. The hearing was then adjourned at 9:01am, 7 minutes after it had begun.

The Hearing Tribunal concludes that Dr. Alshawabkeh should not bear $5,404.01 in costs of the October 6, 2016 appearance to set the new December 2016 hearing dates. It is apparent that Dr. Alshawabkeh had not agreed to proceed on the October hearing dates and upon being served with the signed Notice of Hearing he promptly, through his counsel, advised that he would need additional time to prepare his defence. The Complaints Director was prepared to agree to new hearing dates in December 2016 but was not prepared to agree to an indefinite adjournment while Dr. Alshawabkeh consulted his witnesses for their availability. The Complaints Director wanted to preserve the October 6, 2016 hearing date in order to speak to scheduling and avoid an indefinite adjournment. This is understandable but it is unclear why a short teleconference with the Hearing Tribunal was not pursued as the parties had suggested on September 30, 2016 rather

than convening the Hearing Tribunal in Edmonton, or why the Hearing Tribunal had to convene on the morning of October 6, 2016 and incur additional expenses since there was no need for the Tribunal to make a decision at that point.

Signed on behalf of the Hearing Tribunal
by the Chair

Dated: February 20, 2018

Dr. Stacy J. Davies