

ALBERTA COLLEGE OF PHARMACY

IN THE MATTER OF
THE *HEALTH PROFESSIONS ACT*
being Chapter H-7 of the Revised Statues of Alberta, 2000

AND IN THE MATTER OF A HEARING REGARDING THE
CONDUCT OF

SHEREEN ELBAYOMY
Registration No. 9612

HEARING TRIBUNAL DECISION ON SANCTION

April 4, 2019

DECISION OF THE HEARING TRIBUNAL ON SANCTION

(1) Hearing

The Hearing Tribunal met on March 13, 2019 at the second-floor conference center, College Plaza, 8215 – 112 Street, Edmonton, Alberta to consider the submissions on sanction. The following individuals were present:

Hearing Tribunal:

Christopher Heitland, Pharmacist, Chairperson
Ted Szumlas, Pharmacist
Beverley Rushton, Pharmacist
June MacGregor, Public Member

Independent Legal Counsel for the Hearing Tribunal:

Julie Gagnon

(2) Preliminary Matters

The Hearing Tribunal issued a decision dated January 30, 2019 finding Ms. Elbayomy guilty of unprofessional conduct on the allegations referred to a hearing, as follows:

IT IS ALLEGED THAT, between January 30, 2015 and February 28, 2017, while you were both a licensed Alberta pharmacist and the licensee of Metro Pharmacy (ACP Licence #2869), you:

1. Submitted approximately \$299,659.67 worth of claims for five nutritional supplements (Ensure Plus, Ensure Regular, Ensure High-Protein, Boost Oral Liquid and Glucerna Oral Liquid) and three drugs (Advair 250 mcg Metered Dose Aerosol, Levemir 100 unit/ml Injection Cartridge, Symbicort 200 Turbuhaler Metered Inhalation Powder) to Alberta Blue Cross without being able to provide the required supporting invoices;
2. Created false dispensing records when you submitted claims for Ensure Plus, Ensure Regular, Ensure High-Protein, Boost Oral Liquid, Glucerna Oral Liquid, Advair 250 mcg Metered Dose Aerosol, Levemir 100 unit/ml Injection Cartridge and Symbicort 200 Turbuhaler Metered Inhalation Powder when Metro Pharmacy did not have the corresponding stock for those products to have been dispensed to patients;
3. Dispensed drugs on several occasions when you were not authorized to do so; including the dispensing of drugs for

- a. approximately 13 prescriptions (for 31 original prescription numbers) in excess of the quantity authorized by the prescriber, for a total of \$15,937.92 worth of claims;
 - b. 2 miscellaneous compound prescriptions and 1 prescription for PMS Clonazepam-R 0.5 mg tablet when you were not authorized by the prescriber to do so, for a total of \$725.66 worth of claims;
 - c. approximately 5 prescriptions (totaling 32 different drugs) before the date authorized on the original prescriptions or in the absence of the prescriber's authorizing signature, for a total of \$4,667.78 worth of claims;
 - d. approximately 4 prescriptions involving 7 different drugs where the drug provided was not the drug that was authorized, for a total of \$4,124.36 worth of claims;
4. Failed to create or retain original prescriptions for approximately 23 prescriptions that were dispensed, for a total of \$25,330.65 worth of claims; and
 5. Failed or refused to cooperate with the investigation into this matter when you did not respond to the Complaints Director as requested on May 30, 2018, June 12, 2018, July 3, 2018 and July 13, 2018.

The Hearing Tribunal directed that its written decision be sent to Ms. Elbayomy by regular mail, registered mail and email. The Hearing Tribunal also directed that the parties could provide written submissions on sanction, or request to convene the Hearing Tribunal to hear oral submissions.

The Hearing Tribunal received written submissions on behalf of the Complaints Director. The Hearing Tribunal also received a letter from Margaret Morley, Hearings Director, dated February 28, 2019, indicating that she had served the Hearing Tribunal's decision by registered mail and regular mail, which were both returned and stamped "moved" on the envelopes by Canada Post. The email sent by Ms. Morley resulted in a reply message stating, "was not found at gmail.com". The Hearings Director indicated she had exhausted all possibilities for contacting Ms. Elbayomy.

The Hearing Tribunal considered the February 28, 2019 letter and determined that all reasonable attempts at service had been made and determined that it would proceed to consider the appropriate sanction in this case.

The letter from Margaret Morley, Hearings Director, was marked as Exhibit #6, given that it was considered by the Hearing Tribunal in reaching its decision to proceed.

Given that neither party had requested to convene the Hearing Tribunal to hear oral submissions, the Hearing Tribunal proceeded to make its decision on sanction based on the written submissions received from the Complaints Director.

(3) Submissions from the Complaints Director

The Complaints Director seeks the following sanctions pursuant to section 82 of the HPA:

1. An order cancelling Ms. Elbayomy's registration;
2. An order imposing a fine of \$10,000 in respect of each of the proven allegations in the Notice of Hearing (Allegations 1, 2, 3, 4, and 5) for a total fine of \$50,000;
3. An order that the fines imposed on Ms. Elbayomy should be paid within 90 days of the date of the written decision on sanctions pursuant to a payment schedule acceptable to the Hearings Director;
4. An order preventing Ms. Elbayomy from serving as a licensee or owning some or part of a pharmacy in the next five years; and
5. An order that Ms. Elbayomy pay the costs of the investigation and hearing of this matter within one year from the date of the written submissions on sanction pursuant to a payment schedule acceptable to the Hearings Director.

The Complaints Director also requests that the Hearing Tribunal provide a written copy of its decision in this matter to the Minister of Justice and Solicitor General.

The written submissions of the Complaints Director note the purposes of sanction following one or more findings of unprofessional conduct, including protection of the public, maintaining the integrity of the profession, fairness to the member, and deterrence (both specific and general).

The Complaints Director's written submissions referenced and reviewed the relevant factors in the decision in *Jaswal v. Newfoundland Medical Board* and how they related to the proposed sanctions for Ms. Elbayomy. The Complaints Director provided previous decisions in support of the orders it seeks, but also noted that there were no similar cases with two very serious elements of unprofessional conduct such as in this case (that is the claims to an insurer for products that were never provided to patients, resulting in a substantial monetary benefit to the pharmacist and licensee and a failure to cooperate with the Complaints Director in the investigation of a matter).

In response to a question from the Hearing Tribunal that arose during deliberations regarding the authority of the Hearing Tribunal to the order sought in paragraph 4 above, the Complaints Director advised that there was a general power under section 82(1)(i) of the *Health Professions Act* ("HPA") to make "any order that the hearing tribunal considers appropriate for the protection of the public". The Complaints Director noted as well that, the *Pharmacy and Drug Act* provides at section 26(3) that "The hearing tribunal may make any ancillary order that is required or appropriate in connection with any order referred to in subsection (1) or may make any other order it considers appropriate."

The Hearing Tribunal also asked if the suggested period of a 5-year restriction was provided for in the legislation and whether the Complaints Director would object to a longer period, such as 10

years. The Complaints Director indicated that the legislation did not provide time frames, or maximum restrictions and that he would not object to a restriction that was longer than 5 years.

(4) Hearing Tribunal Decision

The Hearing Tribunal finds that, generally, the orders sought by the Complaints Director are reasonable and appropriate. They serve the objectives of protecting the public, ensuring the integrity of the profession and serving both as a general and specific deterrent. With respect to the restriction on acting as a licensee or owner (Order 4 of the orders sought by the Complaints Director), the Hearing Tribunal finds that the time frame for the restriction should be increased to 10 years. The reasons for the Hearing Tribunal's decision are set out below.

(5) Hearing Tribunal Findings and Reasons

The Hearing Tribunal considered the submissions of the Complaints Director, including the objectives of sentencing. The Hearing Tribunal finds that the orders made must ensure the protection of the public, must address fairness to the member, must maintain the integrity of the profession and should try to achieve deterrence, both of the member specifically and of the membership generally.

The Hearing Tribunal considered the factors in *Jaswal*, as follows:

- i. Nature and gravity of the proven allegations

The Hearing Tribunal finds that the conduct in all allegations are very serious. Specifically, the conduct elements that are of serious concern include the submission of false claims, the creation of false dispensing records, and the failure to cooperate with the investigation.

The submission of false claims seriously undermines the integrity of the profession, with respect to patients and stakeholders, such as Alberta Blue Cross ("ABC"). There is no justification for this conduct and Ms. Elbayomy clearly profited from such conduct, to the detriment of the profession and various stakeholders, including the public generally and ABC.

The creation of false dispensing records is also very serious. While there is no evidence of actual patient harm, there is the potential for patient harm if another health professional relies on the information in the patient's local or NetCare record.

The failure to cooperate in the investigation is another element that is of very serious concern to the Hearing Tribunal. Membership in a self-regulated profession is a privilege and not a right. The privilege comes with a corresponding responsibility and obligation to cooperate in the investigation of complaints and to respond to the College when requested or required to do so. Ms. Elbayomy completely shut off all contact with the College and has made it impossible for the College to reach her. By doing so, she cannot be held accountable for her conduct. This seriously undermines the ability of the College to regulate its members. It puts the College's role as a self-regulator in jeopardy and seriously undermines the integrity of the profession.

- ii. Age and experience of the member;

Ms. Elbayomy was registered for approximately 5 years and was a licensee for almost 3 years. She had sufficient experience to know her conduct was improper and was both a serious breach of the Code of Ethics, Standards of Practice for Pharmacists and Pharmacy Technicians, and Standards for the Operation of Licensed Pharmacies.

- iii. Presence or absence of prior complaints

There are no prior complaints or findings of unprofessional conduct.

- iv. Age and mental condition of the offended patient;

There is no information regarding specific patients.

- v. Number of times the offences were proven to have occurred

There were a number of proven allegations and the conduct was repeated over a lengthy period of time. Her conduct culminated in a failure to comply with the investigation. Ms. Elbayomy failed to cooperate in the process despite being given multiple opportunities to do so.

- vi. The role of the member in acknowledging what occurred

Although the evidence in the hearing was that Ms. Elbayomy told ABC she would pay back the amounts owing, there is no evidence she did so. In this proceeding, there is no evidence that Ms. Elbayomy acknowledges her conduct, either factually or with respect to the seriousness of the unprofessional conduct found to have occurred. There was no communication with the College besides advising the College that she was closing the pharmacy. Further to this, Ms. Elbayomy has made it impossible for the College to be able to reach her.

- vii. Other financial penalties

There is no evidence that Ms. Elbayomy has suffered any penalties, financial or otherwise.

- viii. Impact on patients

There is no evidence of impact on patients, however, the Hearing Tribunal notes that there was a potential for impact on patients if incorrect information in their patient records was relied on by other health professionals.

- ix. Presence or absence of mitigating circumstances

There is no evidence of any mitigating circumstances.

- x. Need to impose specific and general deterrence

The Hearing Tribunal views this as an extremely important factor in this case. A strong message must be sent to Ms. Elbayomy should she ever return to the profession of pharmacy in Alberta or elsewhere. As well, a strong message must be sent to the membership in general that such conduct will not be tolerated. The need for deterrence is equally important for the inappropriate billing issues, creation of false records and for the failure to respond.

The Hearing Tribunal wishes to send a very strong message to both Ms. Elbayomy and the profession generally, that there will be very serious consequences to such conduct.

xi. Need to maintain public's confidence in the profession

A self-regulated profession must regulate its members in a way that maintains the public's confidence in the integrity of the profession. In order to do so, its processes must be open, transparent and accountable to the public. This is another important factor in this case and the Hearing Tribunal is greatly concerned that Ms. Elbayomy conduct seriously undermines the integrity of the profession and must therefore have serious consequences.

xii. Degree to which the conduct is clearly outside the range of permitted conduct

There is no question that the conduct in this case on all allegations is far beyond the range of permitted conduct. There is a repeated pattern of dishonest interactions with an insurer, the creation of false dispensing records and the failure to comply with an investigation. Ms. Elbayomy's conduct demonstrates an unwillingness to comply with the fundamental duties of a pharmacist and licensee as well as a complete disregard for the ethical duties and standards that apply to pharmacists and licensees.

xiii. Range of sentences in similar cases

The Hearing Tribunal reviewed and considered the cases submitted by the Complaints Director, including the decisions involving David Hill and Colin Porozni. In the case involving Mr. Hill, the Hearing Tribunal ordered a three-month suspension, a fine of \$10,000, costs to a maximum of \$30,000 and a restriction from acting as a proprietor or licenses for three years. In the case involving Mr. Porozni, the Hearing Tribunal ordered a one-month suspension, a fine of \$10,000, 80% of costs, and a restriction from acting as a proprietor or licenses for three years. Ms. Elbayomy's case is more serious than the cases involving Mr. Hill and Mr. Porozni. In another case involving Sinan Hadi, there was a finding of failure to comply with the investigator. Mr. Hadi's registration was cancelled and he was ordered to pay full costs of the investigation and hearing.

The Hearing Tribunal agrees with the submission of the Complaints Director that this case is unique in that it deals with two very serious aspects of unprofessional conduct: 1) a dishonest breach of the code and standards involving submission of claims and creation of false records and 2) a failure to cooperate in an investigation.

The Hearing Tribunal has considered the *Jaswal* factors in determining what is the appropriate sanction in this case. The Hearing Tribunal finds that the conduct is extremely serious with respect to all five allegations. The conduct involves dishonest conduct by the member, which benefitted

her financially. Ms. Elbayomy also created false dispensing records for claims that were submitted to ABC. These represent egregious breaches of her duties and responsibilities as a pharmacist. Her conduct's seriousness undermines the integrity of the profession. In addition, Ms. Elbayomy's failure or refusal to cooperate in the investigation raises a concern with respect to the College's ability to regulate her as a member. If a College is unable to regulate its members, its ability to act as a self-regulating profession is placed in jeopardy.

It is appropriate in this case that Ms. Elbayomy's registration be cancelled. She no longer has a practice permit and the Hearing Tribunal notes that it would have been appropriate to cancel her practice permit if she still had one. Given that Ms. Elbayomy is not willing to cooperate with an investigation of her College, it is appropriate that her registration be cancelled.

With respect to a fine, it is appropriate to award a fine for each finding of unprofessional conduct. The requested fine of \$10,000 for each of the five allegations, for a total of \$50,000 represents the highest award of fines that can be made under the HPA. The Hearing Tribunal finds that given the very serious nature of the conduct, maximum fines are appropriate in this case. The payment of such fines within 90 days is also appropriate.

With respect to a restriction on Ms. Elbayomy's ability to serve as a pharmacy licensee, proprietor or owning some or part of a pharmacy, the Hearing Tribunal considered that five years was not appropriate in this case. Ms. Elbayomy received substantial monetary benefits from submitting claims to ABC that she was not entitled to. There was a repeated pattern of misconduct for a lengthy period of time. She has provided no evidence regarding remorse for her actions or how she intends to rehabilitate her behaviour. She closed the doors to her pharmacy and left the jurisdiction. The Hearing Tribunal finds that it is not appropriate for Ms. Elbayomy to be a licensee or an owner of all, part or some of a pharmacy and that there should be a restriction in place for a number of years. This is an important aspect of deterrence, general and specific and of ensuring the integrity of the profession.

Finally, the Hearing Tribunal considered the costs to be awarded in this case. The Hearing Tribunal finds that this is an appropriate case to order full costs of the investigation and hearing, to be payable within a year. The Complaints Director had no choice but to prosecute this case. It called evidence and a witness (the Complaints Director) that were necessary for the case. There is no evidence presented by Ms. Elbayomy that the costs award would be a financial hardship for her, and it is appropriate to award full costs here.

(6) Orders

For the reasons noted above, the Hearing Tribunal hereby makes the following Orders:

1. Ms. Elbayomy's registration is hereby cancelled;
2. Ms. Elbayomy shall pay a fine of \$10,000 in respect of each of the proven allegations in the Notice of Hearing (Allegations 1, 2, 3, 4, and 5) for a total fine of \$50,000;
3. The fines must be paid within 90 days of the date of this written decision on sanction pursuant to a payment schedule acceptable to the Hearings Director;

4. Ms. Elbayomy is prohibited from serving as a licensee or owning all, some or part of a pharmacy for a period of 10 years following the date of this decision; and
5. Ms. Elbayomy shall pay the costs of the investigation and hearing of this matter within one year from the date of this written decision on sanction pursuant to a payment schedule acceptable to the Hearings Director.

The Hearings Tribunal also directs the Hearings Director to provide a written copy of its decision on the merits dated January 30, 2019 and a copy of this decision on sanction to the Minister of Justice and Solicitor General.

DATED April 4th, 2019

SIGNED ON BEHALF OF THE HEARING TRIBUNAL BY

[Christopher Heitland]

Christopher Heitland, Chair