

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

-and-

**IN THE MATTER OF AN APPEAL BY SHEREEN ELBAYOMY PURSUANT TO
SECTION 87 of the *HEALTH PROFESSIONS ACT*
FROM DECISIONS OF THE HEARING TRIBUNAL OF THE ALBERTA COLLEGE
OF PHARMACY DATED JANUARY 30, 2019 and APRIL 4, 2019**

**DECISION OF THE COUNCIL OF THE ALBERTA COLLEGE OF PHARMACY ON
SANCTIONS**

1. INTRODUCTION

The Appeal Panel of the Council of the Alberta College of Pharmacy (“Appeal Panel”) consisting of Dana Lyons, Pharmacy Technician and Chairperson, Peter Eshenko, Pharmacist and Irene Pfeiffer, Public Member convened to hear an appeal pursuant to section 87 of the *Health Professions Act* on January 28, 2020, at the Alberta College of Pharmacy located at 1100-8215 112 St. NW, Edmonton, Alberta.

The Appellant, Ms. Shereen Elbayomy appealed the findings of unprofessional conduct as well as the sanctions imposed upon her by a Hearing Tribunal. At the request of both parties the sanctions appeal was deferred until after the Appeal Panel determined Ms. Elbayomy’s appeal from the findings of unprofessional conduct. On April 20, 2020, the Appeal Panel issued a decision on the merits quashing one finding of unprofessional conduct against Ms. Elbayomy, but upholding the remaining four findings. The Appeal Panel reconvened with the parties on July 6, 2020 by Zoom videoconference for the sanctions appeal. This is the Appeal Panel’s decision on the sanctions appeal.

Between January 28 and July 6, 2020 Ms. Elbayomy’s legal counsel Mr. Whitling was appointed to the Court of Queen’s Bench. Ms. Elbayomy’s new legal counsel, Mr. Billal Saleem represented her for the sanctions appeal, which Ms. Elbayomy attended. The Complaints Director continued to be represented by Mr. David Jardine and Ms. Paula Hale. Mr. Gregory Sim continued to act as independent legal counsel for the Appeal Panel.

Neither party raised any preliminary or jurisdictional objections to the Appeal Panel proceeding with the sanctions appeal. The parties consented to the use of Zoom videoconferencing and to the making of a Zoom recording of the hearing as a backup to the official recording. The parties also consented to Ms. Morley, the Hearings Director participating as the Zoom videoconference facilitator, and they confirmed that they were not making their own recordings of the hearing.

2. STANDARD OF REVIEW

The parties agreed that the Appeal Panel should review the issue of sanctions on the reasonableness standard of review.

3. SUBMISSIONS

Submissions on behalf of Ms. Elbayomy

The Hearing Tribunal imposed sanctions on Ms. Elbayomy. The Hearing Tribunal ordered cancellation of her registration with the College; fines of \$10,000 for each of allegations 1, 2, 3, 4 and 5; it prohibited her from serving as a pharmacy licensee or owner for 10 years; and required that she pay the costs of the investigation and hearing into her conduct. Mr. Saleem provided oral submissions arguing that these sanctions orders were unreasonable.

Mr. Saleem reviewed relevant factors for determining sanctions from *Jaswal v. Newfoundland (Medical Board)*, 1996 NJ No. 50 (“*Jaswal*”):

i. Nature and Gravity of the proven allegations

Mr. Saleem acknowledged that the findings of unprofessional conduct upheld against Ms. Elbayomy were serious, but he said the Appeal Panel should reassess the overall severity of Ms. Elbayomy’s proven unprofessional conduct since the finding of unprofessional conduct on allegation 5 was quashed. The Hearing Tribunal had found that Ms. Elbayomy failed to cooperate with the Complaints Director’s investigation and that this was a very serious concern. The Tribunal suggested that Ms. Elbayomy intentionally evaded accountability and this undermined the College’s ability to regulate the profession, and therefore undermined the integrity of the profession.

ii. Age and experience of the member

Mr. Saleem argued that Ms. Elbayomy was registered with the College, but working in academia for several years before she became a licensee in June of 2015. Even then she hired other pharmacists to work in the pharmacy instead of her. She only began to practice clinical pharmacy in January 2017. She was a relatively new practitioner with little experience at the time represented in the allegations. This should be considered a mitigating or neutral factor.

iii. Presence or absence of prior complaints

Ms. Elbayomy had no prior complaints.

iv. Number of time the offences were proven to have occurred

Mr. Saleem acknowledged that Ms. Elbayomy’s conduct was repeated over a period of time, but the Hearing Tribunal stated that her conduct culminated with her failure to cooperate with the investigation. This suggests the Hearing Tribunal treated this factor on the higher end as an aggravating factor. Mr. Saleem argued that this factor should be reassessed, disregarding any notion that Ms. Elbayomy failed to cooperate.

v. The Role of the member in acknowledging what occurred

Mr. Saleem argued that the Hearing Tribunal found there was no evidence that Ms. Elbayomy acknowledged her unprofessional conduct or made any efforts to repay ABC. Given the Appeal Panel’s September 9, 2019 decision permitting Ms. Elbayomy to introduce new evidence, being TD bank cheque details of payments to ABC, there was evidence that Ms. Elbayomy had taken responsibility for her conduct from an early stage, prior to the Hearing Tribunal’s decision. The repayments should be seen as restitution and an acknowledgment of her error. Mr. Saleem argued this should be treated as a mitigating factor.

vi. Other Financial Penalties

Mr. Saleem argued that Ms. Elbayomy was required to pay back to Alberta Blue Cross a considerable sum of money and she was no longer able to operate her pharmacy and was forced to close it down. She did this in order to protect the public. Since then she has not worked in a

pharmacy or otherwise. Mr. Saleem suggested the Appeal Panel take this into account as a mitigating factor.

vii. Impact on patients

Mr. Saleem submitted that there was no evidence of any impact on patients from Ms. Elbayomy's unprofessional conduct. While some false dispensing records were uploaded and this may have led to a risk of patient harm, this was only speculative.

viii. Need to impose specific and general deterrence

Mr. Saleem acknowledged that it is necessary to deter Ms. Elbayomy, as well as the College's membership from similar unprofessional conduct in the future, but sanctions should be similar in similar cases. There is no basis based on the history of cases of this type to suggest that the sanctions in recent similar cases are insufficient. Nobody has re-offended, for example. With respect to general deterrence, the cases have not been out long enough and the sanctions haven't been published fast enough in order for the general public to know that this is what happens when you make this type of error or mistake or you engage in this type of unprofessional conduct.

ix. Need to maintain public confidence in the profession

Mr. Saleem argued that this factor was likely an aggravating factor for the Hearing Tribunal, in that in order to maintain public confidence an organization must be able to regulate and demand the cooperation of its members or the public will obviously lose confidence. Given that the finding of a failure to cooperate was quashed, Mr. Saleem submitted that this should be a neutral factor rather than an aggravating one.

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

Mr. Saleem acknowledged that Ms. Elbayomy's conduct was well outside the range of permitted conduct, but the Hearing Tribunal relied on her failure to cooperate and that finding was quashed. This factor should therefore be reassessed as less aggravating.

xi. Range of sentences in similar cases

Mr. Saleem then referenced several prior College discipline decisions. He first referred to the cases of Tuyen Huynh and Loi Nguyen, heard together in 2010. Mr. Saleem argued that the regulated members were found to have had insufficient quantities of medications on hand to match the amounts that they billed to dispense over a period of one and a half years. They therefore failed to maintain adequate and complete records of medications obtained and dispensed. Mr. Nguyen had cooperated with ABC's investigation, but Ms. Huynh was found not to have cooperated. While there was no evidence, or finding of the value of the missing medications there was a discrepancy of approximately 12,800 products. The Hearing Tribunal accepted joint submissions on sanctions for both regulated members. Mr. Nguyen received a reprimand, \$2,000 fine and he was required to pay 50% of the costs of the investigation and hearing over a period of 4 years. He was also ordered to complete the College's jurisprudence

examination within 4 months, otherwise he would be prohibited from acting as a licensee for 4 months, or until he had passed the jurisprudence exam, whichever was longer. Ms. Huynh received a reprimand, \$3,500 fine and an order that she pay 50% of the costs of the investigation and hearing over a 4 year period. Ms. Huynh was also prohibited from acting as a licensee for 2 years, or until she had passed the College's jurisprudence examination, whichever was longer. The parties did not agree on publication and the Hearing Tribunal ordered publication with names. Mr. Saleem argued the case was an example of how the failure to cooperate with an investigation should impact sanctions. The fact that the finding of Ms. Elbayomy's failure to cooperate with the College was quashed should be a mitigating factor in determining an appropriate suspension.

Mr. Saleem then referred to the case of Mohamed Haggag from 2019. In this case the regulated member admitted allegations that he submitted approximately \$85,000 worth of claims for nutritional products to ABC without being able to provide the required supporting invoices; he created or allowed for the creation of incorrect dispensing records, dispensed drugs when not authorized to do so, wrote and dispensed incomplete prescriptions, failed to act ethically or honestly with ABC and failed to ensure the pharmacy was maintaining adequate systems. The Hearing Tribunal accepted a joint submission on sanctions providing for a 4 month suspension, with 3 months held in abeyance; a total fine of \$30,000; a prohibition on serving as an owner, proprietor or licensee of a pharmacy for 3 years and a requirement to pay 50% of the investigation and hearing costs to a maximum of \$15,000. He was also required to share the Hearing Tribunal's decision with the licensee of any pharmacy at which he worked for 3 years. Mr. Saleem argued the Haggag case was quite similar to Ms. Elbayomy's case, with the exceptions of the quantity and duration of the unsupported claims. Mr. Saleem also pointed out that Mr. Haggag had not cooperated or acted ethically with ABC and this was an aggravating factor. He said that Ms. Elbayomy did cooperate and that should be considered a mitigating factor.

Mr. Saleem then referred to two cases concerning regulated member Si Nguyen. In Si Nguyen #1 which was decided in 2019, the member admitted and was found to have submitted at least \$100,000 worth of claims for which he failed to provide supporting invoices in an insurer audit; failed to cooperate with the insurer's audit; and for which he did not have sufficient stock to have provided to patients. He also admitted and was found to have created false dispensing records and to have failed to create and maintain required pharmacy records. The Hearing Tribunal imposed a reprimand, a 12 month suspension, a combined fine of \$30,000, a prohibition on serving as a licensee or proprietor or pharmacy owner for 5 years and an order that Mr. Nguyen pay the costs of the investigation and hearing within 2 years. He was also required to provide the Hearing Tribunal's decisions to any pharmacy employer or licensee for 5 years, and to complete the College's jurisprudence examination.

In Si Nguyen #2, which was also decided in 2019 and concerned claims made to a different insurer, the member admitted and was found to have submitted approximately \$124,000 worth of claims without the required supporting invoices; for which the drugs were not dispensed to patients; and for which the pharmacy did not have sufficient stock to account for the claims. Mr. Nguyen was also found to have created false patient transaction records. The Hearing Tribunal accepted a joint submission on sanctions which provided for Mr. Nguyen to receive a suspension of 24 months, or until he had completed the Centre for Personalized Education for Professionals'

("CPEP") Probe course, whichever took longer; a combined \$20,000 fine; a 5 year prohibition on serving as a pharmacy licensee, owner or proprietor; 1 year of direct supervised practice upon reinstatement; and payment of costs of the investigation and hearing within 2 years. The order for Mr. Nguyen's suspension provided that the 24 months would commence the day following the end of his 12 month suspension imposed in Nguyen #1 and his suspensions would therefore run consecutively. The order prohibiting Mr. Nguyen from serving as a licensee, owner or proprietor for 5 years was also to run consecutively with his prior 5 year prohibition.

Mr. Saleem pointed out that unlike Mr. Nguyen, Ms. Elbayomy did not engage in unprofessional conduct with more than one insurer. Her conduct was only with respect to ABC. When ABC contacted her she acknowledged her conduct and began repaying the money.

Lastly, Mr. Saleem referred to the case of Mr. Ahmed Atique. Mr. Atique was found to have submitted approximately \$1,500,000 worth of claims without being able to provide the required supporting invoices, over a period of two years and eight months. He was also found to have created false dispensing records. Mr. Atique was suspended for 3 years, or until he had completed the College's ethics and jurisprudence exam and the CPEP Probe course; required to pay a combined fine of \$40,000; required to complete 1 year of supervised practice on reinstatement; prohibited from serving as a pharmacy licensee, owner or proprietor for 10 years and required to disclose the Hearing Tribunal's decision to any pharmacy employer or licensee for 5 years. He was also responsible for the costs of the College investigation and hearing.

Mr. Saleem argued that Ms. Elbayomy's proven unprofessional conduct fell between that in the Haggag and Nguyen #1 cases. She had little practical experience at the time of her unprofessional conduct and she has since repaid ABC in full.

The recent prior cases demonstrate that a suspension of up to 18 months would be reasonable for Ms. Elbayomy, however she has already been suspended for 14 months. In terms of fines, Mr. Saleem suggested that \$10,000 in relation to allegation 1, \$5,000 for each of allegations 2 and 3 and \$2,500 for allegation 4 would be fair, for a total of \$22,500. In terms of a prohibition on serving as a licensee, proprietor or owner, he suggested 5 years from April 2019. For costs Ms. Saleem suggested that Ms. Elbayomy should be responsible for 50% of the investigation, hearing and appeal costs to a maximum of \$25,000 per hearing, or \$50,000 in total. Mr. Saleem said that Ms. Elbayomy's technical abilities were not in issue so there was no need for her to complete the CPEP Probe course, or for supervised practice, but the College's ethics and jurisprudence exam would be reasonable to order. Her supervisory abilities had been called into question, but the prohibition on acting as a proprietor, owner or licensee would address that.

Mr. Saleem argued that Ms. Elbayomy really had no choice but to appeal as the Hearing Tribunal relied so heavily on her failure to cooperate. He argued that Ms. Elbayomy had to close her pharmacy and she has not worked in some time. He cautioned that the Appeal Panel should be careful not to make costs so high as to make the appeal process unattainable by average members of the profession. He suggested that she be permitted to amortize her payments over 36 months, or longer if the Appeal Panel orders any higher amounts.

Submissions on behalf of the Complaints Director

On behalf of the Complaints Director, Mr. Jardine submitted that Ms. Elbayomy's sanctions appeal raised three questions: first, whether the Hearing Tribunal's sanctions decision was reasonable; second, whether the sanctions should be varied in light of the Appeal Panel's decision to quash one finding of unprofessional conduct and to permit the introduction of new evidence; and third, what costs should be awarded by the Appeal Panel in respect of the merits appeal and the sanctions appeal.

Mr. Jardine explained that this case presented an opportunity for the Appeal Panel to provide important guidance to the College. The College has had several recent cases of a similar nature, with large volumes of unsubstantiated claims to insurers, some evidence of repayment to those insurers and no proven failure to cooperate. It is seemingly common for regulated members of the College who are involved with making unsubstantiated claims to make efforts to repay the insurers and then suggest that this is a mitigating factor on sanctions. This case presents an opportunity to clarify whether paying back monies obtained improperly is a mitigating factor and whether cancellation, or a very long suspension is the appropriate regulatory response.

Mr. Jardine confirmed the Complaints Director was asking the Appeal Panel to uphold the sanctions imposed by the Hearing Tribunal other than the fine attributable to allegation 5 and to reduce the costs by 20% down from just over \$33,000 to \$26,000 to account for the decision to quash allegation 5. In terms of the appeal costs the Complaints Director sought an order for Ms. Elbayomy to pay \$50,000. This was likely to represent 50% or less of the likely actual appeal costs. Alternatively, if the Appeal Panel elected not to uphold the order for cancellation, the Complaints Director proposed that the order for cancellation be replaced by the following orders:

- i. Ms. Elbayomy shall serve a 36 month suspension, running from April 4, 2019;
- ii. Ms. Elbayomy shall practice under direct supervision for 1 year after returning to the clinical pharmacist register, with the supervising pharmacist to provide a report to the Complaints Director confirming satisfactory completion of the supervised practice;
- iii. Ms. Elbayomy shall successfully complete the College's ethics and jurisprudence examination and the CPEP Probe course prior to being reissued a pharmacy practice permit with the College; and
- iv. If Ms. Elbayomy does not successfully complete the College's ethics and jurisprudence examination and the CPEP Probe course within 1 year of the completion of the 36 month suspension, her registration with the College shall be cancelled.

Mr. Jardine highlighted objectives of discipline proceedings that the Appeal Panel should keep in mind. He argued that discipline sanctions are aimed primarily at the protection of the public. Orders imposed by Hearing Tribunals and Council Appeal Panels should make clear to the regulated member whose conduct is at issue, to the profession as a whole and to the public that unprofessional conduct is unacceptable. This will preserve the standing and integrity of the profession by demonstrating the College is fulfilling its duty to protect the public. Discipline

orders are also required to be fair to the regulated member, by taking into consideration any relevant factors that are favourable to the member. Discipline orders must also be designed to deter similar unacceptable conduct in the future, both by the regulated member in question (specific deterrence) and by other regulated members of the College (general deterrence).

Mr. Jardine then reviewed the application of relevant *Jaswal* factors to the specific facts of Ms. Elbayomy's case.

i. Nature and gravity of the proven allegations

Mr. Jardine submitted that the remaining findings of unprofessional conduct are serious. He highlighted the Hearing Tribunal's conclusions that the submission of false claims seriously undermines the integrity of the pharmacy profession and that Ms. Elbayomy profited from it. Mr. Jardine also highlighted the Tribunal's conclusion that creating false dispensing records was very serious. Even without evidence of actual patient harm there is a potential for harm.

ii. Age and experience of the member

Mr. Jardine noted that Ms. Elbayomy was registered for approximately 5 years and she was a licensee for almost 3 years. She had sufficient experience to know that her conduct was improper and 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. The number of times the offences were proven to have occurred

Mr. Jardine submitted that there were a number of proven charges and Ms. Elbayomy's conduct was repeated over a lengthy period of time. The Appeal Panel's decision to quash the finding on allegation 5 has not changed this.

iv. The role of the member in acknowledging what has occurred

Mr. Jardine acknowledged that the new evidence permitted by the Appeal Panel's preliminary decision demonstrates that Ms. Elbayomy did pay back amounts claimed by ABC to be owing. However, the Hearing Tribunal concluded there was no evidence that Ms. Elbayomy acknowledged her conduct, or that it was unprofessional. She did not correspond with the College besides advising that she was closing her pharmacy. In oral arguments Mr. Jardine submitted that just paying back monies that Ms. Elbayomy and her pharmacy were not entitled to receive should not be seen as an acknowledgement of unprofessional conduct.

v. Whether the offending member had already suffered other serious financial or other penalties as a result of the allegations having been made

Mr. Jardine pointed out that the Hearing Tribunal found that there was no evidence that Ms. Elbayomy had suffered any penalties, financially or otherwise. She voluntarily allowed her practice permit to expire. Nothing but her own failure to renew prevented her from practicing until the Hearing Tribunal cancelled her registration with the College in its decision on sanctions.

vi. The impact of the incident on the offended patient

Mr. Jardine acknowledged that there was no evidence of impacts on patients, but the Hearing Tribunal noted that there was a potential for impacts to patients if incorrect information in their patient records had been relied upon.

vii. The presence or absence of mitigating circumstances

Mr. Jardine submitted that the Hearing Tribunal found no evidence of mitigating circumstances. He acknowledged the newly admitted evidence of Ms. Elbayomy's payments to ABC, but he reiterated that these were payments to which Ms. Elbayomy was not entitled in the first place. There was no evidence that Ms. Elbayomy or her pharmacy paid any interest or penalties on the monies.

viii. The need for specific and general deterrence

Mr. Jardine highlighted the Hearing Tribunal's conclusion that a strong message should be sent to Ms. Elbayomy if she ever returns to practice, and to the profession as a whole that such conduct will lead to very serious consequences. Mr. Jardine explained that the Tribunal's conclusion remained appropriate even without the finding on allegation 5.

ix. The need to maintain public confidence in the integrity of the profession

Mr. Jardine referenced the Hearing Tribunal's conclusion that Ms. Elbayomy's proven unprofessional conduct seriously undermined the integrity of the pharmacy profession. Mr. Jardine explained the importance of this integrity, submitting that insurers such as ABC rely on pharmacists in approving millions of dollars' worth of claims each day. If they couldn't do so the health care system would be severely compromised.

x. The degree to which the conduct is clearly outside the range of permitted conduct

Mr. Jardine pointed to the Hearing Tribunal's conclusion that Ms. Elbayomy's proven conduct was far beyond the permitted range. The Tribunal highlighted her "repeated pattern of dishonest interactions with an insurer" and the creation of "false dispensing records". Mr. Jardine submitted that despite the Appeal Panel's decision to quash the finding on allegation 5, Ms. Elbayomy's proven unprofessional conduct still demonstrated an unwillingness to comply with the fundamental duties and standards that apply to pharmacists and licensees.

xi. Range of sentences in similar cases

Like Mr. Saleem, Mr. Jardine also referenced the cases of Si Nguyen #1 and #2. Between the two cases, Mr. Nguyen was found to have submitted approximately \$224,000 in claims that could not be substantiated with inventory invoices, he created false dispensing records for medications that were not provided to patients and he failed to properly maintain pharmacy records. Mr. Jardine explained that the Hearing Tribunal did not consider Mr. Nguyen's conduct in Nguyen #2 to have been repeat unprofessional conduct, because it was completed before the investigation in Nguyen #1. Nevertheless, the suspensions in the two cases were ordered to run consecutively. This meant that Mr. Nguyen was suspended for a total of 36 months. The Hearing Tribunal in Nguyen #2 stated that it might have cancelled Mr. Nguyen's registration and

practice permit if he had repeated his unprofessional conduct after being sanctioned by the Hearing Tribunal.

Mr. Jardine submitted that in comparison, Ms. Elbayomy was found to have submitted just under \$300,000 in unsupported claims, made false dispensing records, dispensed drugs when not authorized, and failed to create or retain original prescriptions. The Complaints Director submitted that the totality of Mr. Nguyen's sanctions are a relevant reference point for the sanctions that should be imposed on Ms. Elbayomy.

On the impact of the new evidence, the TD bank cheque details confirming repayments to ABC, the Complaints Director submitted that this does not warrant any reduction in sanction. Mr. Jardine acknowledged that the Hearing Tribunal appeared to place weight on Ms. Elbayomy's failure to pay monies back to ABC, but he said that repaying money to which Ms. Elbayomy was not entitled in the first place does not constitute a penalty and should not be seen as a mitigating factor. Sanctions should not be significantly reduced for a regulated member who wrongfully obtains funds but pays them back once their unprofessional conduct is discovered. If that were so it would not deter other members of the profession from similar conduct.

The Complaints Director submitted that the following sanctions should be imposed by the Appeal Panel on Ms. Elbayomy:

1. Ms. Elbayomy shall pay a fine of \$10,000 in respect of each of the proven allegations in the Appeal Panel's decision (allegations 1, 2, 3 and 4) for a total fine of \$40,000;
2. A 10 year prohibition under the *Pharmacy and Drug Act* prohibiting Ms. Elbayomy from being an owner, proprietor or licensee of a pharmacy;
3. Ms. Elbayomy's registration shall be cancelled, or, in the alternative, be suspended for a period of 36 months starting on the date of the Hearing Tribunal's written decision on sanction dated April 4, 2019;
4. If the Appeal Panel chooses to suspend Ms. Elbayomy, the following conditions should also be imposed:
 - a. Ms. Elbayomy must practice under direct supervision for one (1) year after she returns to the clinical pharmacist register, with the supervising pharmacist to provide a report to the Complaints Director confirming satisfactory completion of the supervised practice;
 - b. Ms. Elbayomy shall register for and successfully complete the Alberta College of Pharmacy's Ethics and Jurisprudence Exam and Centre for Personalized Education for Physician's (CPEP) Probe Course, at her own expense, prior to being reissued a pharmacy practice permit with the College; and
 - c. If Ms. Elbayomy does not successfully complete the College's Ethics and Jurisprudence Exam and CPEP Probe course within 1 year of the completion of the 36 month suspension, her registration with the College shall be cancelled;

5. Ms. Elbayomy shall pay 80% of the costs of the investigation and initial hearing to a maximum of \$26,000;
6. Ms. Elbayomy shall pay 80% of the costs of this appeal to a maximum of \$50,000; and
7. An order directing that Ms. Elbayomy must repay the fines and costs imposed on a monthly payment schedule acceptable to the Hearings Director, with payments to start on a date set by the Appeal Panel.

The Complaints Director accepted that the decision to quash the finding on allegation 5 should have some impact on the sanctions. Mr. Jardine submitted that the fine of \$10,000 imposed by the Hearing Tribunal for allegation 5 should be eliminated. This left the \$10,000 fines for each of the findings that were upheld and the Complaints Director submitted that these were warranted and should remain in place. Mr. Jardine also argued that the Hearing Tribunal's costs order should be reduced by 20% since one out of the five findings of unprofessional conduct was quashed on appeal.

On the issue of cancellation, the Complaints Director submitted that if the Appeal Panel was not prepared to maintain the order for cancellation, then a 36 month suspension was appropriate. The Hearing Tribunal found that a severe sanction was equally warranted for Ms. Elbayomy's proven inappropriate billing, her creation of false pharmacy records and the failure to respond. While the finding of a failure to respond had been quashed, the remaining findings still warranted a severe sanction. Mr. Jardine explained that section 37(2) of the *Pharmacist and Pharmacy Technician Regulation* provides that a regulated member who has their registration cancelled as a result of discipline may re-apply after 36 months. While cancellation and a 36 month suspension may therefore appear to have the same effect, in practice they are different. If a Hearing Tribunal or Appeal Panel imposes a suspension, it can also impose conditions that must be met before reinstatement can occur. In contrast if cancellation is imposed, then the Hearing Tribunal and Appeal Panel have no ability to impose conditions on reinstatement. Any new application to become a regulated member after 36 months would be reviewed and decided upon by the College's Competence Committee.

The Complaints Director argued that the 10 year prohibition on acting as an owner, licensee or proprietor was warranted because pharmacies are not simply retail outlets. They are the primary point of access for patients to a highly regulated system of drug distribution. Licensees are tasked by statute and regulation to personally manage, control and supervise the practice in a licensed pharmacy in accordance with legislation, codes and standards. These requirements exist because this aspect of the health care system can only function by relying on licensees' honesty and integrity. Breaches of these requirements must attract serious consequences to deter both the individuals involved, as well as the profession as a whole. In this case, Ms. Elbayomy was acting as both proprietor and licensee when she fundamentally failed to meet these requirements. It is appropriate that she be prohibited from occupying these positions again for 10 years. It would also be consistent with the Nguyen decisions.

The Complaints Director submitted that the proposed orders for 1 year of direct supervised practice, the College's Ethics and Jurisprudence Exam and the CPEP Probe course were intended to protect the public and maintain the integrity of the profession if and when Ms. Elbayomy returns to pharmacy practice in the future. These proposed orders are directed at rehabilitation

rather than further penalizing Ms. Elbayomy. They will provide some evidence that Ms. Elbayomy has undertaken an appropriate amount of self-reflection and that she understands and is prepared to work within the ethical and legal framework under which pharmacists practice in Alberta.

On the issue of appeal costs, the Complaints Director submitted that requiring a professional to pay all or part of the investigation and hearing costs is common, referring to *Lysons v. Alberta Land Surveyors' Association*, 2017 ABCA 7 at para. 13. He also pointed to *Alberta College of Physical Therapists v. Fitzpatrick*, 2015 ABCA 95 at paras. 8-9 in which the Alberta Court of Appeal accepted representations of counsel that costs in discipline proceedings in 2013 could be approximately \$23,000 per day of hearings. The Complaints Director then acknowledged that Ms. Elbayomy was partially successful in her appeal, in that the Appeal Panel quashed the finding of unprofessional conduct on allegation 5. Ms. Elbayomy should therefore not pay 100% of the appeal costs, which would include the costs of the preliminary applications. However, the Complaints Director argued that most of Ms. Elbayomy's grounds of appeal amounted to unfounded attacks on the conduct, integrity and honesty of the Complaints Director. These were all unwarranted and dismissed. It would be inappropriate for all the resulting costs of the appeal to fall to the College and its regulated members to bear.

The Complaints Director submitted that Ms. Elbayomy should pay 80% of the costs of the appeal to a maximum of \$50,000. He explained that as of June 11, 2020 the appeal costs were approximately \$82,000, but this did not include the costs of preparing written submissions for the sanctions appeal or attending the sanctions appeal hearing on July 6, 2020, nor would it include the Appeal Panel's costs. As a result the overall costs of the appeal will exceed \$100,000 and Ms. Elbayomy's obligation to pay costs of the appeal will be capped at \$50,000. This was intended to avoid imposing an undue financial burden, since Ms. Elbayomy will also be responsible for \$40,000 in fines, \$26,000 in investigation and hearing costs for the hearing before the Hearing Tribunal and the costs of the CPEP Probe course.

4. DECISION

The Appeal Panel makes the following orders pursuant to section 82 of the *Health Professions Act*:

- 1) Ms. Elbayomy shall pay a fine of \$10,000 in respect of each of proven allegations 1, 2, 3 and 4 for a total fine of \$40,000;
- 2) For 10 years following the date of this written decision, Ms. Elbayomy shall be prohibited from acting as an owner, proprietor or licensee of a pharmacy under the *Pharmacy and Drug Act*;
- 3) Ms. Elbayomy's practice permit shall be suspended for a period of 36 months starting from the date of the Hearing Tribunal's written decision on sanctions dated April 4, 2019, and Ms. Elbayomy's practice permit shall be subject to the following conditions:

- a. Ms. Elbayomy must practice under direct supervision for one (1) year after she returns to the clinical pharmacist register, with the supervising pharmacist to provide a report to the Complaints Director confirming satisfactory completion of the supervised practice;
 - b. Ms. Elbayomy shall register for and successfully complete the Alberta College of Pharmacy's Ethics and Jurisprudence Exam and Center for Personalized Education for Physician's (CPEP) Probe Course, at her own expense, prior to being reissued a pharmacy practice permit with the College; and
 - c. If Ms. Elbayomy does not successfully complete the College's Ethics and Jurisprudence Exam and CPEP Probe course within 1 year of the completion of the 36 month suspension, her registration with the College shall be cancelled.
- 4) Ms. Elbayomy shall pay costs of the investigation and initial hearing in the amount of \$26,000;
 - 5) Ms. Elbayomy shall pay 80% of the costs of this appeal to a maximum of \$50,000.

Schedule of Payment of Fines

The Appeal Panel considered the request to provide Ms. Elbayomy time to pay the fines and costs, and therefore orders the following schedule of payments:

1. Within 3 months of the date of this written decision Ms. Elbayomy shall pay the combined fine of \$40,000; and
2. Commencing within 4 months of the date of this written decision, Ms. Elbayomy shall pay 80% of the appeal costs to a maximum of \$50,000 plus \$26,000 in investigation and hearing costs, payable on a monthly schedule acceptable to the Hearings Director to be paid in full within 27 months of the date of this written decision.

5. REASONS FOR DECISION

The Appeal Panel has carefully considered the record of the hearing, the newly admitted evidence, the Appeal Panel's decision on the merits of the appeal and the parties' submissions in relation to Ms. Elbayomy's sanctions appeal. The Appeal Panel has the power under section 89(5)(c) of the *Health Professions Act* to quash, confirm, or vary any order of the Hearing Tribunal.

The parties agreed that the standard of review applicable to this sanctions appeal is reasonableness. The Appeal Panel must therefore assess whether the Hearing Tribunal's sanctions orders were reasonable. This requires the Appeal Panel to consider the Hearing Tribunal's sanctions decision and its reasons to determine whether the decision is transparent, intelligible and justified. However, the Appeal Panel permitted the introduction of new evidence in its September 9, 2019 preliminary decision. The preliminary decision held that the Appeal Panel would consider the impact of the newly admitted TD Bank cheque details on Ms. Elbayomy's sanctions. The Appeal Panel also quashed the finding of unprofessional conduct in relation to allegation 5 in its April 24, 2020 decision on the merits of the appeal. The Appeal Panel has decided to vary the Hearing Tribunal's sanctions orders because the Hearing Tribunal's sanctions orders are not justified in light of the new evidence and the decision to quash the finding on allegation 5.

Ms. Elbayomy's proven unprofessional conduct was extremely serious. The Appeal Panel agrees with the Hearing Tribunal's conclusion that Ms. Elbayomy received substantial monetary benefits from submitting claims to ABC that she was not entitled to make. She also created false dispensing records and a risk of patient harm, in addition to other findings of unprofessional conduct for dispensing drugs without authorization and failing to create or retain original prescriptions. Ms. Elbayomy committed very serious breaches of the Code of Ethics, the Standards of Practice and she failed to act honestly and with integrity. Her conduct seriously undermined the integrity of the profession of pharmacy.

Honesty and integrity are essential for healthcare professionals such as pharmacists and pharmacy technicians. If the public cannot trust regulated members of the College to act with honesty and integrity, then the highly regulated system by which the public obtains access to necessary drugs and other pharmacy services would fail. The College cannot allow this. The College is mandated by the *Health Professions Act* to govern its regulated members in a manner that protects and serves the public interest, including by establishing, maintaining and enforcing its Code of Ethics and Standards of Practice. The public depends on the College to address the problem of regulated members abusing the drug benefits system for their own financial gain, while placing patients at risk in the process.

In this case the Appeal Panel has reviewed several previous cases of similar unprofessional conduct. We are gravely concerned. While the vast majority of pharmacists and pharmacy technicians are highly professional, honest and ethical people, the cases we have reviewed, including this one, demonstrate that there is a pattern of unprofessional conduct here. We must make it clear not just to Ms. Elbayomy, but to the whole pharmacy profession that what we see happening can happen no longer. We cannot countenance the submission of drug claims when the pharmacy is unable to demonstrate through invoices and documentation that it had the inventory to dispense the drugs. We cannot accept the creation of false dispensing records, the dispensing of drugs without authorization or the failure to create or retain required pharmacy records either. Regulated members who engage in this type of conduct should understand that the Appeal Panel views it as fundamentally inconsistent with the obligations of a professional and fundamentally inconsistent with continuing in the profession of pharmacy. These things simply cannot co-exist even when the money is later paid back.

This case is difficult. It is the first case of its kind that has come before the Appeal Panel. While we have provided guidance for any future cases above, we must respect the need for fairness to

Ms. Elbayomy by considering the specific circumstances, mitigating factors, the range of sanctions in previous similar cases and the need for proportionality.

There is no question that Ms. Elbayomy's proven unprofessional conduct was very serious. We have described this above and need not repeat it. On the other hand, we must acknowledge that the Hearing Tribunal placed considerable emphasis on its finding that Ms. Elbayomy failed to cooperate with the Complaints Director's investigation. It held that Ms. Elbayomy shut off all contact with the College and thereby evaded accountability for her unprofessional conduct. The Tribunal also held that Ms. Elbayomy's unprofessional conduct culminated in her failure to comply with the investigation, and that she demonstrated an unwillingness to comply with the fundamental duties of a pharmacist and licensee raising a concern about the College's ability to regulate her. The Hearing Tribunal concluded, "[g]iven that Ms. Elbayomy is not willing to cooperate with an investigation of her College, it is appropriate that her registration be cancelled." The Appeal Panel must consider that the finding of a failure to cooperate has been quashed and the Hearing Tribunal's rationale for cancellation is no longer justifiable. The Appeal Panel did not agree with Mr. Saleem's suggestion that Ms. Elbayomy did comply with the investigation. There was a lack of evidence of a failure to cooperate, but that does not equate to active cooperation.

The Appeal Panel placed little weight on the fact that Ms. Elbayomy had only been actively practicing pharmacy since January 2017, as explained by Mr. Saleem. There was no dispute that Mr. Elbayomy became a licensee in 2015. She had sufficient experience to know her professional obligations, and in any event honesty and integrity are not qualities that are only acquired through experience. Honesty and integrity, as well as knowledge of the Code of Ethics, and the Standards of Practice for Pharmacists and Pharmacy Technicians are the most basic requirements for all regulated members of the profession to know.

There was no dispute that Ms. Elbayomy has no prior discipline history.

Mr. Saleem submitted that the Hearing Tribunal found there was no evidence that Ms. Elbayomy had acknowledged her unprofessional conduct or made any efforts to repay ABC, but he said that the newly admitted TD Bank cheque details demonstrated that this was untrue. He argued that Ms. Elbayomy's repayment of ABC should be seen as restitution and taking responsibility from an early stage. He argued the Appeal Panel should treat this as a mitigating factor. Mr. Jardine argued that repaying monies that Ms. Elbayomy was never entitled to receive was not an acknowledgement of her unprofessional conduct, nor should it be considered a mitigating factor. If that were so it would send the wrong message to other regulated members.

Ms. Elbayomy repaid ABC the monies it calculated she had wrongfully received. This was an acknowledgement that her pharmacy should not have received it. The question is whether it constituted an acknowledgment of unprofessional conduct and should be treated as mitigating on the issue of sanctions. Ms. Elbayomy is not required to admit or acknowledge that her conduct was unprofessional at any stage of the proceedings. If she does, through either her words or actions then that acknowledgment can be treated as a mitigating factor. In this case Ms. Elbayomy repaid ABC, but the Appeal Panel placed little weight on that act as a mitigating factor in determining sanctions. In the Appeal Panel's assessment, something more than just repayment of wrongfully obtained monies would be required in order create a mitigating factor. The Appeal Panel did not feel that Ms. Elbayomy demonstrated insight into the unprofessional

nature of her conduct, or that she demonstrated efforts at the rehabilitation that underlies the treatment of such acknowledgments as mitigating.

The Appeal Panel noted that Ms. Elbayomy closed her pharmacy and that she has not since worked in the field of pharmacy. The Appeal Panel considered that this would have had a significant financial impact, but it was not the result of any action taken or penalty imposed by the College or a third party as a result of the allegations having been made. Ms. Elbayomy closed her pharmacy and voluntarily chose not to renew her practice permit. The Appeal Panel did not consider this a significant mitigating factor.

The parties agreed that there was no evidence of actual patient harm, but the recording of incorrect information in patients' healthcare records created at least a risk of patient harm. It is no answer to regulatory proceedings to assert that no one was harmed so there is no problem. The College's mandate is to protect and serve the public interest in the present and for the future. The Appeal Panel considered that sanctions should be imposed to address this risk of patient harm in case Ms. Elbayomy ever returns to pharmacy practice in the future.

On the issue of deterrence, Ms. Elbayomy argued there was no basis to say that sanctions imposed in similar past cases were inadequate for specific and general deterrence. There was no suggestion that previously disciplined members of the College had re-offended for example. She argued that the sanctions should be defined by the Haggag and Nguyen #1 cases. Mr. Jardine argued that the sanctions should be severe in order to have the necessary deterrent effect on Ms. Elbayomy and the profession as a whole. The Appeal Panel agreed with Ms. Elbayomy that proportionality with similar past decisions is important, but the Appeal Panel considered that it was also important to consider the Nguyen #2 and Atique cases.

On the need to maintain public confidence, the Hearing Tribunal held that self-regulating professions must regulate their members in a way that maintains the public's confidence in the integrity of the profession. To do so they must have processes that are open, transparent and accountable. The Hearing Tribunal concluded that Ms. Elbayomy's conduct seriously undermined the integrity of the profession and should attract serious consequences. Ms. Elbayomy argued that the Hearing Tribunal must have treated this factor as aggravating based on the inclusion of the finding of her failure to cooperate. Mr. Jardine submitted that the Hearing Tribunal determined that Ms. Elbayomy's conduct undermined the integrity of the profession because the public rely on pharmacists' integrity in approving millions of dollars' worth of drug claims each day.

It isn't clear whether the Hearing Tribunal relied on the finding of a failure to cooperate in its analysis of this factor, but the Appeal Panel accepts that it likely did. The Appeal Panel has considered that there are four findings of unprofessional conduct remaining, and one very serious finding been quashed. The Appeal Panel nevertheless believes that the remaining findings are very serious and still warrant severe sanctions in order to maintain the necessary public confidence in the integrity of the profession.

On the degree to which the conduct was outside the range permitted, Mr. Saleem acknowledged the remaining unprofessional conduct was well outside the range, but he said this factor should be reassessed as less aggravating based on the quashing of allegation 5. Mr. Jardine pointed to the Hearing Tribunal's finding that Ms. Elbayomy engaged in a "repeated pattern of dishonest

interactions with an insurer” and the creation of “false dispensing records”. Mr. Jardine submitted that despite the Appeal Panel’s decision to quash the finding on allegation 5, Ms. Elbayomy’s proven unprofessional conduct still demonstrated an unwillingness to comply with the fundamental duties and standards that apply to pharmacists and licensees. The Appeal Panel has considered this factor in light of our decision to quash the finding on allegation 5. The Appeal Panel believes a severe sanction is still warranted.

Lastly, on the range of sanctions imposed in similar cases, the Appeal Panel did not agree with Mr. Saleem that Ms. Elbayomy’s sanctions should fall between those imposed on Mr. Haggag and Mr. Nguyen in Nguyen #1. In Haggag, the impugned claims were valued at approximately \$85,000 and there was a joint submission on sanctions. In Nguyen #1 the impugned claims were valued as at least \$100,000. Ms. Elbayomy’s case was more severe. The value of her impugned claims was approximately \$300,000. Ms. Elbayomy’s case is more comparable to Nguyen #1 and Nguyen #2 combined, in which the sanctions were ordered to run consecutively.

The Appeal Panel considered the newly admitted evidence that Ms. Elbayomy repaid ABC and re-weighed the objectives of sanctions and the *Jaswal* factors in light of the four remaining findings of unprofessional conduct. The Appeal Panel concluded that the fine imposed by the Hearing Tribunal for the finding on allegation 5 should be overturned since that finding was quashed. Mr. Saleem suggested that the amount of the fines for allegations 2, 3 and 4 should be reduced, but the Appeal Panel saw no reason to deviate from the amounts determined by the Hearing Tribunal. The Appeal Panel felt those amounts were reasonable in the circumstances.

The Appeal Panel also considered whether cancellation was still justified. The Appeal Panel considered that Ms. Elbayomy’s conduct was very close to warranting cancellation, but ultimately determined that on the specific facts and circumstances of this case it was not. The Appeal Panel wishes to emphasize again that this was the first case of this type to come before it. The Appeal Panel has provided guidance above for any future cases like this, but in this case the Appeal Panel concluded it would be appropriate to sanction Ms. Elbayomy in a manner similar to the combined sanctions imposed on Mr. Nguyen.

The 10 year prohibition on serving as an owner, proprietor or licensee of a pharmacy is consistent with Nguyen #1 and #2 and appropriate in this case as well. The Appeal Panel did not agree that only a 5 year prohibition as imposed in Nguyen #1, or some other term of prohibition, would be sufficient. Ms. Elbayomy was the licensee of her pharmacy and responsible for the claims that were at issue in this case. She failed in the significant duties and responsibilities of that role and a 10 year prohibition will provide her with the time to consider whether she will ever again be prepared to undertake them.

A 36 month suspension is a very significant suspension. It is the same length of time that a cancelled member of the College must wait before seeking to re-apply. It too is consistent with Nguyen #1 and #2. 36 months of suspension will protect the public and provide Ms. Elbayomy a long period of time in which to consider whether she is prepared to undertake the significant responsibilities of being a regulated member of the College. It will also provide sufficient time for her to complete the remedial aspects of the sanctions. The Appeal Panel considered whether a shorter suspension would be sufficient, but Ms. Elbayomy’s proven unprofessional conduct was so serious that this 36 month period of public protection and introspection is warranted.

The Appeal Panel also accepted the Complaints Director's suggestions for conditions on Ms. Elbayomy's practice permit. One year of direct supervised practice upon her return to the clinical register is warranted in this case. Ms. Elbayomy asserted in this appeal hearing that she suffered from a lack of experience as she only began practicing as a clinical pharmacist in 2017. While the Appeal Panel did not accept that experience is necessary to act honestly and with integrity, one year of direct supervision will ensure that Ms. Elbayomy understands and can demonstrate the technical aspects of creating and maintaining accurate pharmacy inventory records, prescription and dispensing records and submitting accurate drug benefit claims.

Similarly, the requirement that Ms. Elbayomy successfully complete the College's Ethics and Jurisprudence examination will demonstrate that she has a basic understanding of the ethical and legal considerations to practice as a member of the Alberta College of Pharmacy. The CPEP Probe course is not a technical pharmacy course, but rather facilitates participants to understand why they committed unprofessional or unethical behaviour and to assist them to recommit to professional ideals. The Appeal Panel considers these requirements sufficiently important for Ms. Elbayomy to be able to continue as a regulated member of the College that her failure to comply with these aspects of the sanctions should result in her cancellation.

For the investigation costs and the costs of the initial hearing before the Hearing Tribunal, Mr. Saleem argued that Ms. Elbayomy should only be responsible for 50%, to a maximum of \$25,000. Mr. Jardine suggested that the costs order should be varied so that Ms. Elbayomy was responsible for 80% of the investigation and hearing costs, which he submitted should be rounded down to \$26,000. The Appeal Panel accepted that Ms. Elbayomy should be responsible for \$26,000 in investigation and hearing costs, being approximately 80% of the investigation and hearing costs since one allegation of unprofessional conduct was quashed. The hearing proceeded efficiently on November 29, 2018. The Complaints Director was the only witness other than the Hearings Director who testified to the efforts to serve Ms. Elbayomy with notice of the hearing. The Hearing Tribunal issued its written decision on the merits and then received written submissions on sanctions from the Complaints Director. There were no unnecessary witnesses or procedural matters to increase the overall costs.

For the appeal costs Mr. Saleem again suggested that Ms. Elbayomy should be responsible for 50% to a maximum of \$25,000. He argued that the Hearing Tribunal relied heavily on its finding that she had failed to cooperate so she had no choice but to appeal. Mr. Jardine acknowledged that Ms. Elbayomy's appeal had been partially successful because the finding on allegation 5 was quashed, and agreed she should not pay 100% of the appeal costs. Mr. Jardine submitted that Ms. Elbayomy should pay 80% of the appeal costs to a maximum of \$50,000. The Appeal Panel accepted that Ms. Elbayomy should pay 80% of the costs of the appeal to a maximum of \$50,000. Ms. Elbayomy advanced many grounds of appeal resulting in a complex appeal hearing. All but one ground was dismissed. Her application to introduce new evidence was also partially successful. Her partial success warrants a reduction in her share of the appeal costs, but the Appeal Panel considered that on balance it would be appropriate for Ms. Elbayomy to bear 80% of the costs of the appeal capped at \$50,000. The Appeal Panel understands that the appeal costs were estimated at \$82,000 in June, 2020, which was before the sanctions hearing. That means that the appeal costs will very likely exceed \$100,000, but Ms. Elbayomy will still only be responsible for \$50,000 in appeal costs.

The Appeal Panel considered the overall financial obligation imposed by these sanctions on Ms. Elbayomy. The \$40,000 fine, \$26,000 in investigation and hearing costs and the \$50,000 in appeal costs amount to \$116,000 payable over the next 27 months. The Appeal Panel was not provided with evidence of Ms. Elbayomy's financial position so it is unable to evaluate whether this financial obligation would cause undue financial hardship. The Appeal Panel considered Ms. Elbayomy's request for time to pay these fines and costs and directed the above payment deadlines in order to avoid undue financial hardship.

DATED this 14th day of September, 2020

Signed by the Chair on behalf of the Council of the Alberta College of Pharmacy

[Dana Lyons]

Dana Lyons, Chair