



Dr. Alfred ERNST

Council Decision

Date Charge(s) Laid:	September 20, 2014
Outcome Date:	September 13, 2019
Hearing:	August 28-29, 2018 April 4, 2019
Disposition:	Reprimand, Suspension, Conditions, Costs

The Council of the College of Physicians and Surgeons imposes the following penalty on Dr. Alfred Ernst pursuant to *The Medical Profession Act, 1981* (the "Act"):

- 1) Pursuant to Section 54(1)(e) of the Act, the Council hereby reprimands Dr. Ernst. The format of that reprimand will be determined by the Council. Dr. Ernst is required to appear before a scheduled meeting of the Council to be present to have the reprimand administered in person.
- 2) Pursuant to Section 54(1)(b) of the Act, the Council hereby suspends Dr. Ernst for a period of two months, commencing October 14, 2019;
- 3) Pursuant to section 54(1)(g) of The Medical Profession Act, 1981, Council requires that that Dr. Ernst successfully complete an ethics course, other than the previously taken "Probe Program" by CPEP, on professionalism to the satisfaction of the Registrar. Such course shall be completed at the first available date. The programs "Medical Ethics, Boundaries and Professionalism" by Case Western Reserve University and "Medical Ethics and Professionalism" by Professional Boundaries Inc., are ethics programs acceptable to the Registrar.
- 4) Pursuant to section 54(1)(i) of the Act, the Council directs Dr. Ernst to pay the costs of and incidental to the investigation and hearing in the amount of \$80,215.72. Such payment shall be made in equal installments over the course of 6 months. The first payment shall be due on October 14, 2019.
- 5) Pursuant to section 54(2) of the Act, if Dr. Ernst should fail to pay the costs as required by paragraph 4, Dr. Ernst' licence shall be suspended until the costs are paid in full.
- 6) Council reserves to itself the right to reconsider and amend the time within which payment of costs must be made set out in paragraph 4 and the right to reconsider and amend the requirements of the retraining or education set out in paragraph 3. Such reconsideration shall only be done if requested by Dr. Ernst.

UPDATE:

Dr. Ernst has appealed the finding of unprofessional conduct and the penalty. The suspension ordered by the Council was stayed by court order pending the outcome of the appeal.

IN THE MATTER OF SECTION 46 OF *THE MEDICAL PROFESSION ACT*,
1981. PENALTY HEARING FOR DR. ALFRED ERNST

Mr. Colin Hirschfeld Q.C. appearing for Dr. Ernst

Ms. Rochelle Wempe appearing for the College of Physicians and Surgeons
of Saskatchewan

Reasons for Decision

Introduction and Background

Dr. Alfred Ernst is a family physician practicing in Rosetown, Saskatchewan. In 2008, while serving as a locum physician in Nipawin, Dr. Ernst provided medical services for which billings were submitted. The nature of these billings was flagged by the Joint Medical Professional Review Committee (JMPRC). The JMPRC identified the billings as inappropriate and referred the matter to the College for consideration of discipline. Following investigation of the facts involved, the College laid the following charges against Dr. Ernst on 20 September, 2014.

*You Dr. Alfred Ernst are guilty of unbecoming, improper, unprofessional, or discreditable conduct contrary to the provisions of section 46(l), and/or 46(p) of **The Medical Profession Act, 1981** S.S.1980-81 c. M-10.1 and bylaw 8.1(b)(iii) of the bylaws of the College of Physicians and Surgeons of Saskatchewan, by excessive billing.*

The evidence which will be led in support of this charge will include one or more of the following:

- (a) you caused or permitted excessive billing for your services by claiming first-patient surcharges when the circumstances did not justify the charge;*
- (b) you caused or permitted excessive billing by charging code 91 S when the circumstances did not justify the charge; and*
- (c) you caused or permitted excessive billing by charging code 881 L when the circumstances did not justify the charge;*

(d) you failed to exercise due diligence to ensure that you billed appropriately for first-patient surcharges, and/or Code 91S and/or code 881L.

A discipline hearing committee (DHC) was convened to adjudicate this matter. Various factors resulted in considerable delay in advancing this matter to the DHC. The delay was contested by counsel for Dr. Ernst via an application argued in February 2017. Arguments were heard and a decision was rendered permitting the DHC to proceed. The DHC was convened in August 2018. Subsequent to the DHC convening, the chair of the DHC was appointed to the Bench. As a result, counsel for the College and for Dr. Ernst agreed to the appointment of a new DHC chair. The new DHC chairperson was subsequently granted permission, by mutual agreement of counsel involved, to review the transcripts of the initial hearing prior to convening a final hearing day in April 2019. The DHC found Dr. Ernst to be guilty of the charges laid. A penalty hearing was subsequently held.

Penalty Decision

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Factors in Establishing Penalty

The factors which are frequently considered in imposing an appropriate penalty are outlined in **Camgoz v. College of Physicians and Surgeons**, 1993 CanLII 8952 (SK.Q.B.)

<https://www.canlii.org/en/sk/skqb/doc/1993/1993canlii8952/1993canlii8952.html?res ultIndex=3>

- a) the nature and gravity of the proven allegations;
- b) the age of the offending physician;
- c) the age of the offended patient;
- d) evidence of the frequency of the commission of the particular acts of misconduct within particularly, and without generally, the Province;
- e) the presence or absence of mitigating circumstances, if any;
- f) specific deterrence;
- g) general deterrence;
- h) previous record, if any, for the same or similar misconduct,
- i) the length of time that has elapsed between the date of any previous misconduct and conviction thereon, and, the member's (properly considered) conduct since that time;
- j) ensuring that the penalty imposed will, as mandated by s. 69.1 of the Act, protect the public and ensure the safe and proper practice of medicine;

- k) the need to maintain the public's confidence in the integrity of the respondent's ability to properly supervise the professional conduct of its members;
- l) ensuring that the penalty imposed is not disparate with penalties previously imposed in this jurisdiction in particular, and in other jurisdictions in general, for the same or similar act of misconduct.

Information Considered by Council in Establishing Penalty

- 1) Written submissions and arguments brought by the Registrar's Office (Info 148_19, Info 183_19)
- 2) Written submissions and arguments brought by Counsel for Dr. Ernst (Info 172_19)
- 3) Verbal address to Council by Dr. Ernst

The Position of the Registrar's Office

Ms. Wempe presented arguments emphasizing the DHC was convinced Dr. Ernst deliberately perpetrated fraudulent billings. Specific attention was drawn to the pertinent paragraphs of the DHC decision. She argued Council should not follow the two cases cited by Dr. Ernst on penalty (Dr. Kabongo, CPSS 2015 and Dr. Paikan, CPSO 2002-2002 ONCPSD 49). She submitted, these cases were distinguishable from the present case because in both instances there was no finding of fraudulent intent. The history of prior interventions by the JMPRC with respect to incorrect billing practises was discussed. Ms. Wempe emphasized Dr. Ernst had prior opportunity to engage in more scrupulous billing but he deliberately ignored the rules as they apply to billings. It was made clear to Council that penalty must be based on the findings of the DHC as opposed to any other considerations that may be raised.

Ms. Wempe presented arguments specific to the consideration of progressive discipline in this matter. Arguments were heard and case law was presented in support of Ms. Wempe's contention that Dr. Ernst's subsequent acts of professional misconduct, which had been previously adjudicated, demonstrated a pattern of deliberate dishonesty and dishonorable conduct. Dr. Ernst's prior discipline based on his 2016 submission of inaccurate information to a health authority was felt to demonstrate a particularly similar theme of dishonesty.

Specific emphasis upon *Peet v. Law Society of Saskatchewan* 2019 SKCA 49 was made as case law in support of progressive discipline despite the fact the events in question predate the majority of Dr. Ernst's other discipline matters and findings of misconduct.

Arguments were made in support of the paying of costs as described in written submissions from the Registrar's Office. The extent of the costs was discussed including specific support for the expert witness costs as they related to Dr. Ernst's refusal to allow CPSS staff to extract the applicable chart data required by the DHC to validate the JMPRC concerns. Council was also urged to take note that the DHC qualified and accepted the expert's evidence.

Case law presented included:

Merchant v. Law Society of Saskatchewan 2014 SKCA 56

Peet v. Law Society of Saskatchewan, 2014 SKCA 109

College of Physicians and Surgeons of Ontario v. Peirovy, 2019 ONCPSD 12

Dr. Tineyi Chikukwa, CPSS – 2018

Dr. David Opper, CPSS – 2015

Dr. Thomas Chambers, CPSS-2009

R. v. Sreedar, 1986 CanLII 2919 (SKCA)

The Position of Counsel for Dr. Ernst

Mr. Hirschfeld presented arguments on several fronts. Arguments were heard suggesting progressive discipline does not apply in this matter. Mr. Hirschfeld contends the Peet decision is specific to a pattern of similar or near identical conduct, and such similarity does not exist in the current matter. Consequently, he argued, Council should not endorse the use of progressive discipline in this case.

Arguments were presented discussing the gravity of the proven allegations. Mr. Hirschfeld contends there was no pre-meditated scheme at play nor long-standing pattern of conduct. The billings submitted were submitted for actual services rendered to actual patients and the quality of care provided was not in question. Consequently, he argued, Council should consider no suspension as was imposed in the Kabongo and Paikan cases.

It was argued past interactions with the JMPRC were primarily corrective rather than punitive as no fines were levied by the JMPRC for billing issues arising in 1980, 1985, or 1994.

Mr. Hirschfeld presented his considerations with respect to mitigating circumstances. The age and length of service of Dr. Ernst were suggested to be mitigating factors. In addition, the nature of service provided in Dec 2008 was offered as a mitigating factor. Considerable attention was paid to the fact the billings involved in this matter were just over \$519, and therefore of little significance.

Arguments were presented with respect to the payment of costs. Mr. Hirschfeld contended the expert witness was not required. Consequently, expert witness costs should be borne by the College. Further, it was argued, the costs attributed to College internal legal services were unfair and unreasonable and the matter did not likely require the amount of time billed by College legal staff. It was suggested costs in the range of \$80,000.00 could be perceived by other members of the College as punitive and therefore prevent them from raising a defense against charges of misconduct. This would serve as a deterrent to effective regulation.

Specific arguments were heard contesting the applicability of the case law submitted for consideration by the Registrar's Office.

The Position of Dr. Ernst

Dr. Ernst, like all physicians before Council, was given the opportunity to address Council. He was specifically advised by the President he was under no obligation to personally address Council. He elected to do so.

Dr. Ernst argued his services to the people of Nipawin were essential due to a critical shortage of medical providers at the time. He further argued he was under considerable duress as he was unable to accompany his wife on a shopping trip for the time in question. Council recognizes he was referring to planned and presumably necessary Christmas shopping and not a minor, random shopping excursion.

Dr. Ernst subsequently spoke to matters not known to have been presented to the DHC concerning the fact billings were submitted in error based on geographic confusion relating to the layout of the various clinical areas of the Nipawin Hospital where patients were seen. As the transcripts of the DHC hearing were not

scrutinized by Council, it is unclear as to whether his submissions raised new information. We do note paragraph 21 of the DHC decision referenced Dr. Ernst stating he was called back to the hospital on two or three occasions because he had missed a patient.

Dr. Ernst was noted to be aggressive in his stated intent to 'set the record straight' on the matters already adjudicated by the DHC.

Reasons for the Penalty Decision

Mitigating factors

The Council was unable to identify any significant mitigating factors. Council does not traditionally consider the impact on patient care when considering penalty as this would argue against suspension in almost all cases. Similarly, the nature of the practise at the time of misconduct cannot be accepted as a mitigating factor in this case. It was admirable of Dr. Ernst to provide short term locum care for a community in need, but this in no way mitigates the DHC findings of deliberate submission of inaccurate billings for the services rendered.

Dr. Ernst has taken an ethics course in 2016 which was suggested to be a mitigating factor. He has subsequently been disciplined for misconduct and is under investigation for further potential misconduct. As a result, the previously attended ethics course cannot be considered an educational success.

The prolonged delay in getting this matter before a DHC was suggested to be a mitigating factor in determining penalty. The delay in question was multifactorial and involved delay both from the College and Dr. Ernst. As a result, this was not considered to be a mitigating factor.

Finally, it was suggested the fact no fine was levied by the JMPC for any of the 4 investigations should serve as a mitigating factor. The benevolence of a distinct regulatory committee can not necessarily be extrapolated as a mitigating factor in this matter. The fact the JMPC advanced this matter for discipline rather than applying punitive measures (other than repayment) can, and was, considered as an aggravating factor despite arguments to the contrary by Mr. Hirschfeld.

Aggravating Factors

The Council specifically determined not to apply principles of progressive discipline in this matter. As a result, the matters of misconduct identified subsequent to the matter at hand were given no weight as they related to potential suspension.

Significant weight was attributed to the 3 prior investigations and findings of the JMPRC against this physician. The fact that no fines were levied does not lessen the significance of prior findings of billing errors. It was felt to be inexplicable that any clinician, having been previously investigated for billing irregularities, no less than 3 times, would deliberately submit erroneous billings in such a flagrant manner as described in this matter. The *de minimus* arguments failed to sway the DHC of the gravity of this matter, and similarly failed to sway Council.

Dr. Ernst's address to Council was seen as a significant aggravating factor. Rather than accepting the findings of the DHC and offering some suggestion of contrition, or even an admission of wrongdoing, Dr. Ernst argued in his own defense. This demonstrated to Council he remains resolute as to the inadvertent or accidental nature of this matter and the relative insignificance of his conduct based on the low dollar value involved.

Points of Specific Deliberation

Council applied significant vigor to the discussion of this penalty decision. The Council was far from unanimous in its eventual decision to disregard principles of progressive discipline. Ms. Wempe's arguments with respect to the thematic similarity between the events in question and subsequent 2016 matters were compelling. Although Dr. Ernst's subsequent conduct showed a disregard for complying with the rules, Council did not believe there was a similar enough link to the 2008 conduct to include it in our potential suspension considerations. We agree with the Court in Peet 2019, progressive discipline is contextual and may not always apply. It was the considered decision of Council, in the spirit of abundant fairness to Dr. Ernst, to address this penalty as an isolated matter with no weight given to subsequent repeated findings of professional misconduct.

The decision of the DHC in this matter was damning. The DHC decision articulates clearly that the billings submitted by Dr. Ernst were done so deliberately, despite ample opportunity for Dr. Ernst to have ensured due diligence was applied to all matters of billings both by himself, as the most responsible

party, and by his office staff. There is no room left for debate as to the intentional nature of the misconduct. Paragraph 70 of the discipline decision regarding first patient surcharges articulates this matter:

70. We have concluded from all of the evidence that Dr. Ernst, with full knowledge of the circumstances under which he could legitimately charge a first patient surcharge, recorded this charge when he knew it to be false. He alone determined these surcharges. This is not a matter of error on the part of Ms. Ernst or nurses at the hospital as Dr. Ernst suggested.

Paragraph 74 of the discipline decision speaks to similar intent with respect to the other billings in question.

It is the assumption of Council, unless convinced otherwise, costs shall be paid by the physician rather than the membership at large in cases where the physician is found to be guilty by a DHC. Council was not convinced otherwise. As such, costs are to be paid by Dr. Ernst in this matter in the amount of \$80,515.72. This slightly reduced amount takes into account Dr. Ernst should not be held responsible for the April hearing date as it was not his fault a new member of the panel had to be appointed and another date set for argument.

In the matter of an ethics course, the testimony of Dr. Ernst to the Council was the deciding factor. Despite having attended an acceptable ethics course prior to these proceedings, Dr. Ernst steadfastly argued in his own defense. Consequently, Council concluded Dr. Ernst has no concept whatsoever of ethical behavior as it pertains to this finding of professional misconduct. As a result, a 'refresher' course is indicated as the initial course obviously fell well short of the mark.

Finally, in the matter of the suspension. There is ample case precedent for the application of a suspension in cases of fraudulent behaviour of a physician with respect to billings. In this case, counsel for Dr. Ernst presented *de minimus* argument to both the DHC and Council. The issue most pressing is not the dollar amount of the billings involved, rather it is the intent to deliberately and repeatedly submit billings known to be erroneous. The fact that the billings in question are of such a ridiculously low monetary value was considered by Council to be an aggravating factor. It demonstrates a willingness on the part of Dr. Ernst to defraud the people of Saskatchewan even in the context of only obtaining slightly over

\$500 in the process. In the context of the penalty imposed specific to costs, this speaks to an almost pathological intent to defraud.

Similarly, there are few physicians in the province who have been before the JMPRC once, never mind 4 times. Considering, he had three prior ‘warnings’ by way of forced repayment of erroneous billings, it was inconceivable to Council that Dr. Ernst had not put in place safeguards and processes in his practice to ensure appropriate billings. The DHC in this matter was similarly perplexed by the fact Dr. and Mrs. Ernst testified to not having galvanized appropriate billing processes despite the prior 3 interactions with the JMPRC. This incredible disregard for corrective action and opportunity reinforced to Council the matter at hand was far more significant than the dollar value defrauded. It is for these reasons that a substantial suspension was applied.

Approved by the Council of the College of Physicians and Surgeons of
Saskatchewan: 30 November, 2019