

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. Fagbemigun*, 2022 ONPSDT 11

Date: March 21, 2022

Tribunal File No.: 19-003

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Ayokunle Fagbemigun

FINDING REASONS

Heard: November 1, 3-5 and 8, 2021 and February 15, 2022, by videoconference

Panel:

Mr. David A. Wright (Tribunal chair)

Dr. Michael Franklyn

Dr. Paul Garfinkel

Mr. Mehdi Kanji

Appearances:

Ms. Elisabeth Widner and Ms. Simmy Dhamrait-Sohi, for the College

Dr. Fagbemigun, self-represented

RESTRICTION ON PUBLICATION

The Tribunal ordered, under ss. 45-47 of the Health Professions Procedural Code, that no one may publish or broadcast the names or any information that would identify patients referred to during the Tribunal hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this order.

Introduction

- [1] The College alleges that Dr. Fagbemigun committed professional misconduct in three ways. First, it says, he billed the Ontario Health Insurance Plan (OHIP) for thousands of tests and procedures he did not conduct, proved by the fact he did not purchase enough supplies to have been able to conduct that number of procedures. Second, it argues, he received a fee from a cardiac clinic for referring patients to it, proved by notes on a booking sheet and his own admissions in interviews with the College. Third, it submits, he failed to meet the standard of practice of the profession, most notably by conducting unnecessary tests and keeping inaccurate records in multiple patients' charts, proved by the report of an expert family physician.
- [2] Dr. Fagbemigun denies all the allegations. He says that he had enough supplies, and that the records the College relies upon, his history of orders from two suppliers, do not show all the supplies he received. He denies receiving referral fees from the cardiac clinic. He says his admission to collecting referral fees was not true and he made it because of the stress of the interview. He denies that he failed to meet the standard of practice. He emphasizes that the College's selection of charts for the expert to review was not random and disagrees with some of the expert's conclusions.
- [3] The College has proven the allegations. Dr. Fagbemigun was not a credible witness. His explanations were convoluted and far-fetched when analyzed in light of evidence strongly pointing to his dishonesty. He did not have documents, such as invoices or records of payment, that would support his claims. We accept the evidence of the College's expert. Identical entries in patient charts about details of symptoms cannot be accurate, routine administration of drug screening on patients as young as nine years old is not warranted and eight pregnancy tests in a year for a patient for whom there is no documentation of being sexually active is a waste of resources, assuming the tests were actually done.

Dr. Fagbemigun

- [4] Dr. Fagbemigun is a family physician practising in Etobicoke in a clinic where he is the only physician. Most of his patients are from Africa or the Caribbean. His wife, Abosede Fagbemigun, manages the clinic and there is a receptionist, Suman

Ravindra. He has been practising at this location since 2015. He previously practised in the Caribbean and in Manitoba before coming to Ontario in 2014.

- [5] The practice is high volume, and at the relevant time it was open six days a week. As described by Dr. Fagbemigun and his staff, there is a lot of drug use in the area and patients have been violent in the clinic. He says that many of his patients are very “demanding” and insistent about receiving certain tests or treatments.

Credibility

- [6] Before turning to the specific allegations against Dr. Fagbemigun, we make some general comments about his credibility. We must decide whether the College has shown that Dr. Fagbemigun is not telling the truth when he says that he conducted all the tests and procedures for which he billed OHIP, that he had enough supplies to do so and that he did not collect referral fees from Hart Medical. Dr. Fagbemigun’s defence rests nearly entirely on his word. This is not a case where Dr. Fagbemigun may be making a mistake in his evidence.
- [7] The College has put forward compelling evidence that suggests that Dr. Fagbemigun has been dishonest. He gave us little reason to believe what he said. Throughout his testimony, Dr. Fagbemigun would make definitive statements and would resist admitting that he was wrong even when there was proof that it could not be true. He contradicted himself. And he vacillated between saying his memory was perfectly clear and that he did not remember much about the same events.
- [8] For example, in answering a series of questions that College counsel asked him about an interview with College investigators in September 2019, Dr. Fagbemigun said the investigators had never told him the College was looking into his claim submissions to OHIP. When College counsel demonstrated that the investigator had shown him a chart six months earlier showing OHIP claim submissions, he stated that he could not remember specific charts and the investigator had not given him enough time to look at the charts nor allowed him to read the content. When counsel showed him a discussion in the transcripts that identified the chart, Dr. Fagbemigun said the transcript did not make sense and he was under so much pressure during the interview he could not recall what happened. He then stated emphatically that the investigator had not brought multiple copies of the chart and had just pushed a copy across the table to him. When counsel pointed out a

discussion in the transcript where the investigator referred to distributing multiple copies and his lawyer asked for a pause to review his copy, Dr. Fagbemigun said that he did not know what document his lawyer was looking at and could not remember any of the documents that he saw.

[9] As a second example, Dr. Fagbemigun testified he could not remember whether the investigators had asked him about urine drug testing supplies. Shortly afterwards, he stated emphatically that the investigator had never asked him whether he used products from any suppliers other than the one that had provided supplies they had looked at together. When College counsel showed him in the transcript that the investigator specifically asked him, “do you get your supplies anywhere else,” he stated that his understanding had been that the investigator had been referring to a specific type of urine test that they were looking at when the question was asked. When shown that he had answered no to the question, “do you use any other supplies for urine testing,” he stated that he had said it, but it was not true. He later returned to the position that the investigator never asked the question, despite having been shown, and admitting, that the question had been asked more than once.

[10] Dr. Fagbemigun even made false statements about what happened at the hearing. He testified emphatically that an investigator had said at a pre-hearing motion that a report of an inventory of his supplies had been lost. The investigator did not give any such evidence, as shown in the transcript.

[11] Dr. Fagbemigun’s testimony, considered as a whole, was not believable. As we will discuss in more detail below, his evidence on specific issues also lacked credibility.

Billing for Services Not Performed and Ineligible Services

[12] The College alleges that Dr. Fagbemigun billed OHIP for eight types of services he did not perform: urine pregnancy tests, urinalysis, rapid strep test, urine drug screen, ear syringing and/or extensive curetting, simple spirometry, flow volume loop and nerve conduction study. The College says that Dr. Fagbemigun only ever bought supplies for the first seven procedures from Medical Mart. It submits he only purchased supplies for the nerve conduction studies from Chris Wanek, the local distributor for the company that marketed the machine used for them, Neurometrix.

Medical Mart and Mr. Wanek's records show they did not provide enough supplies for Dr. Fagbemigun to conduct all the procedures for which he billed OHIP.

- [13] Exercising its investigatory powers under the Health Professions Procedural Code, Schedule 2 to the *Regulated Health Professions Act*, 1991, SO 1991, c. 18, the College obtained information from the Ministry of Health and Long-Term Care about Dr. Fagbemigun's OHIP claims and from companies about his purchases of supplies. Witnesses from the relevant organizations confirmed at the hearing the accuracy of the data the College gathered. Because the analysis is slightly different for the seven procedures where supplies came from Medical Mart and the test where supplies came from Neurometrix, we deal with each category separately.

Medical Mart Supplies

- [14] In a taped interview with the College's medical assessor and investigator, Dr. Fagbemigun said that he got all his supplies for point-of-care tests and ear curettage from Medical Mart. Five days later, the investigator, Mark Bellefontaine, wrote to Dr. Fagbemigun's lawyer, asking him to "confirm, for each test identified, that the equipment and supplies used, and ordered are as listed." He then listed each of the procedures and the equipment used, with each of the relevant descriptions ending with "Ordered through Medical Mart." The lawyer responded that the information in the letter was correct.
- [15] The data show that Dr. Fagbemigun did not receive enough supplies from Medical Mart to conduct the procedures for which he billed. The claims data cover the period from August 1, 2014 to September 29, 2018 and the order data for Medical Mart cover the period from October 27, 2014 to January 4, 2019. Given these differences in time period, and because supplies are ordered in batches and kept until they are used, a comparison will not show the exact number of claims for which there were no corresponding supplies ordered. However, given the large overlap in time and the vast differences in numbers in most cases, the lack of a precise comparison is not significant.
- [16] The following chart shows the disparities between the supplies and the number of OHIP claims he made:

Procedure	Number of OHIP Claims	Supplies Purchased from Medical Mart	Difference between OHIP Claims and Supplies Purchased
Urine pregnancy tests (test strips)	2,385	225	2,160
Urinalysis (test strips)	11,536	3,000	8,536
Rapid strep test (dipstick test kit)	6,085	125	5,960
Urine drug screen (drug of abuse test kit)	10,016	75	9,941
Ear syringing and/or extensive curetting (curettes and OtoClear Tips)	14,668	100 curettes 180 tips	14,338
Spirometry (disposable mouthpiece)	927	525	402
Flow volume (disposable mouthpiece)	1,248	500	748
Total billings with no corresponding supplies			42,085

[17] Comparisons of Dr. Fagbemigun's OHIP claims and those of other general practitioners (GPs) in Ontario for some of these procedures are also striking. For ear curetting, Dr. Fagbemigun made the most claims in 2016, 2017 and 2018 among the approximately 11,000 GPs who billed that code. In 2018, he made more than double the number of claims as the second highest biller; in 2017, it was almost triple. In 2016, 2017 and 2018, he was in the top 0.5% of those GPs who billed strep tests. The numbers for drug screening, while he is in the top 25% each

year, are not striking, and the College did not call comparison evidence about pregnancy, spirometry or flow volume tests.

[18] The College's investigator, Mr. Bellefontaine, did a more extensive analysis of Dr. Fagbemigun's claims for the year 2017. In that year, 84 patients purportedly had their ears syringed more than 10 times. One hundred and forty-four patients had more than five urinalysis tests. Twenty-three patents supposedly had more than five pregnancy tests in a year. Sixty-four patients had pulmonary function spirometry billed more than twice in a year.

Explanations

[19] Dr. Fagbemigun gave the following explanations during his testimony:

- He, or his wife on his behalf, orders or gets supplies from suppliers other than Medical Mart.
- He brought supplies from Manitoba when he started his practice.
- He received a box of free samples from Medical Mart in 2014.
- He swaps supplies with other physicians in the building when they run out.
- He gets free samples at conferences.
- Company representatives drop off free samples at his clinic.
- He uses a metal ear syringe that doesn't require disposable supplies.

[20] He has such a high number of ear syringe billings compared to others, among other reasons because other medical practitioners in his building frequently send patients with ear wax to him. His wife, who is his office manager, testified that she purchased medical supplies from a variety of suppliers based on price. Both his wife and his office manager testified about his attendance at conferences and the fact that representatives drop off supplies.

[21] Dr. Fagbemigun provided only two documents that provide any support for his evidence that his office purchased supplies for these point-of-care tests from many businesses. First, there is a report from Blossom Pharmacy. It appears to be a list of supplies that Dr. Fagbemigun's office purchased in four different orders in June 2017, September 2017, February 2018 and June 2018. It was printed in mid 2020.

It includes 52 pregnancy test boxes, with the quantities in each box not specified and 600 urinalysis test strips, together with other supplies not at issue here.

[22] Second, Dr. Fagbemigun provided a general ledger that lists, under the generic heading “Medical Supplies,” purchases at various pharmacies by cash (in 2014 and 2015) and cheque (2016 and 2017). Dr. Fagbemigun testified he does not have itemized invoices for these purchases and was unable to get any from the pharmacies. Dr. Fagbemigun obtained the cheques underlying these entries from his accountant but, he says, the accountant did not give him any itemized receipts. The ledger also shows that his practice used large amounts of petty cash.

[23] As we understand his explanation for the lack of any itemized receipts, early on he paid by cash or certified cheque. He did not keep the receipts or invoices because his accountant, he says, told him at the time that itemized receipts are not necessary for tax purposes as his business was not incorporated. Later he paid by credit card and did not keep the receipts or invoices either.

[24] There is no other evidence to support Dr. Fagbemigun’s claims of receiving free samples of point-of-care tests at conferences or in his office. In fact, Adeeb Matrouk from Medical Mart testified that there would have been a record on Dr. Fagbemigun’s account if he had received complimentary supplies from Medical Mart, and there was none.

[25] Dr. Fagbemigun entered as exhibits advertisements from other companies that sell medical supplies: a 2016 email from BioPacific Diagnostic Inc. advertising urine tests and faxes from other companies advertising mostly pandemic-related personal protective equipment. These do not help him, as they do not show any purchases and the companies do not appear on his general ledger.

[26] Dr. Fagbemigun also suggests that OHIP would have conducted spot check verifications with patients. There is no other evidence to support this assertion.

Interviews

[27] Dr. Fagbemigun’s explanations at the hearing contradict what he said during interviews with the College. Dr. Linda Klapwyk, the College’s expert witness, asked him where he gets his supplies for point-of-care testing. He answered that it was Medical Mart. Again in the same interview she asked him if he gets “the urine drug

screen kit” from Medical Mart. He answered yes. At a later interview, an investigator asked him directly whether he gets his supplies anywhere other than Medical Mart. He answered “no.” A different investigator asked if those were all the supplies he used for any type of urine testing. He said, “this is all we use.” At other points in the interview, he was asked about sources of supplies and did not mention any companies other than Medical Mart. At the end of that interview, the investigator confirmed with Dr. Fagbemigun that he got all his supplies for each point-of-care test from Medical Mart.

[28] As noted above, several days after the second interview, the lead investigator wrote to Dr. Fagbemigun’s lawyer. The letter listed the relevant tests and procedures and information about each. Each ended with the statement “Ordered through Medical Mart.” The letter asked for confirmation that the information in the letter was correct. The lawyer wrote back to confirm the information was correct.

[29] In cross-examination, Dr. Fagbemigun first insisted that College representatives never asked him whether he got supplies anywhere other than Medical Mart. When confronted with his answers to that question, Dr. Fagbemigun had two main explanations. The first was that he misunderstood the question, thinking it was only about the particular boxes of supplies in his office on that day or that the investigator had looked at. The second was that because he was nervous and the investigator was speaking to him aggressively, he made mistakes. These explanations are not credible. The investigators’ questions were clear, as were Dr. Fagbemigun’s answers. He gave the same answers multiple times to different people at different times. If he made an error in explaining the source of his supplies, he had many chances to correct it.

[30] If he used a metal ear syringe for so many patients as he testified, one would expect that he would have mentioned that when discussing the source of his supplies. He would have had to own multiple metal ear syringes or explain how one syringe could be sterilized between patients, given the high volume of procedures.

Conclusion: Medical Mart Supplies

[31] We find that Dr. Fagbemigun ordered most or all his supplies from Medical Mart and that he was telling the truth when he said that in his interviews with the investigators. His testimony before us was full of contradictions, lacked specifics

and had no evidence to support it. It is, in our view, highly unlikely that there would be no record of the many transactions necessary to obtain thousands of supplies.

[32] The ledger suggests that Dr. Fagbemigun bought medical supplies of some kind at pharmacies. The invoice from Blossom Pharmacy suggests that Dr. Fagbemigun purchased some supplies for drug screening and pregnancy testing on several occasions from a supplier other than Medical Mart. However, the ledger, which purports to include all of Dr. Fagbemigun's medical supply purchases, does not include any orders from Blossom Pharmacy nor any entries at all on the dates the Blossom Pharmacy purchases appear to have been made.

[33] During our deliberations and preparation of these reasons, we were concerned about how these pieces of evidence should affect our analysis of whether Dr. Fagbemigun was telling the truth during his interviews when he said that all his supplies for the tests and procedures came from Medical Mart. Accordingly, we reconvened the hearing for further submissions from the parties on this issue after final argument had concluded.

[34] Having considered those submissions, together with those made during final argument, we agree with the College that the ledger should be given little weight. It suggests only that the office bought medical supplies at businesses other than Medical Mart. But given the unusual absence of itemized receipts as part of the accounting process, it says nothing about whether the purchases included any of the supplies at issue in this case. What is more, it does not include the Blossom Pharmacy invoice, which is the only document that suggests any purchase of the specific supplies at issue here. This suggests that either the ledger or the invoice does not correctly document purchases of the supplies at issue for Dr. Fagbemigun's practice. Without evidence from someone who prepared it or can explain it, the ledger is entitled to little weight in our analysis of whether Dr. Fagbemigun is telling the truth when he says he bought supplies from other suppliers. At best, the Blossom Pharmacy invoice suggests there may have been an occasional purchase that was not significant enough to come to Dr. Fagbemigun's mind when he was asked about his suppliers. More likely, he did not make the Blossom Pharmacy purchases or use them in his practice, as we would expect them to have been documented in the ledger if that was the case.

[35] Our conclusion that Dr. Fagbemigun billed for tests he did not conduct is strengthened by the information from OHIP about his billing in relation to other family physicians. Of course, someone has to be the top biller in every category and being at the top is not misconduct. However, billing double or triple the next highest physician and the volume of OHIP claims for the same patients and procedures many times in the year support the conclusion that flows from the other evidence that he did not actually carry out all of these procedures.

Nerve Conduction Tests

[36] Dr. Fagbemigun owns a Diabetic Peripheral Neuropathy (DPN) check machine that measures the health of the sural nerve, which is a biomarker for peripheral neuropathy. The machine, made by Neurometrix, requires a disposable biosensor for each test. While the manufacturer recommends that the biosensor be used only for one patient (once for each leg), the machine allows the test to be done up to four times before the biosensor must be replaced.

[37] The evidence shows that Dr. Fagbemigun purchased 200 biosensors from the Canadian distributor of the product. He also received up to 40 biosensors as samples. Between 2016 and 2018 Dr. Fagbemigun submitted 3,894 claims for nerve conduction tests. Even if he used each biosensor on two patients, the biosensors he bought from the Canadian distributor, in addition to the samples received, allowed for 480 tests.

[38] Dr. Fagbemigun testified that he purchased some biosensors from another physician, whose exact name he cannot remember, who owned but was no longer using his machine. He said he got a discount of \$15 per sensor and paid a total of around \$4,000. That would be approximately 266 more sensors, far from enough to account for the nearly 4,000 tests.

[39] We do not accept Dr. Fagbemigun's testimony about this purchase from another physician. He raised this for the first time during the hearing, and never mentioned it during the investigation. He pointed to no cancelled cheque, ledger entry, email, receipt or other communication. Given this, and our general concerns about Dr. Fagbemigun's credibility, we find, on a balance of probabilities, that Dr. Fagbemigun did not buy biosensors from another physician. Dr. Fagbemigun billed OHIP for many nerve conduction tests he did not conduct.

[40] What is more, Dr. Fagbemigun billed for nerve conduction tests using OHIP codes that he knew, or should have known, he was not eligible to claim. The relevant portion of the OHIP Schedule of Benefits states that the codes he claimed “refer to procedures performed using intramuscular placement of a recording needle electrode. Claims for surface EMG or other EMG techniques are *not eligible for payment*” [italics in original]. There is no dispute that the Biometrix device does not use a needle. The Schedule also states that “[a] nerve conduction study is a procedure using direct electrical stimulation of relevant peripheral nerve(s) with corresponding measurement(s) of evoked latency, conduction velocity and amplitude...” The evidence of the company representative, Chris Wanek, is that the device measures amplitude and velocity. The company’s promotional literature, which Dr. Fagbemigun entered as an exhibit, says the same. There is no evidence it measures latency.

[41] Dr. Fagbemigun testified that he had called the Ministry of Health and been told that he could bill tests from the device under the billing codes he used. He described a woman with a “Filipino accent” putting him on hold and coming back and telling him it was acceptable. However, during an interview with the College, an investigator asked Dr. Fagbemigun whether he had told the Ministry about the specific device he was using and asked whether it was eligible. He said that he had not. Brady Olsen, a witness who works for a unit in the Ministry of Health that deals with inquiries about whether services are insured, looked for records of contact from Dr. Fagbemigun with his team and the other team that responds to inquiries and found none. Based on this evidence, we find that the Ministry never told Dr. Fagbemigun that tests from this device were eligible.

[42] Dr. Fagbemigun took the position that the tests were eligible under the code he claimed and that Mr. Olsen’s interpretation to the contrary, which Dr. Klapwyk shared, was wrong. Mr. Wanek, the company representative, testified that tests using the device were eligible under the fee code and that he had told Dr. Fagbemigun that. Dr. Fagbemigun also pointed to a letter to the College from his former counsel that put forward an interpretation of the Schedule of Benefits under which the tests would be eligible.

[43] In our view, the Schedule of Benefits is clear and there is no ambiguity. A nerve conduction test is not eligible unless it uses a needle and the machine measures

evoked latency. The Schedule of Benefits is a legal document that defines eligibility for health services payable by OHIP and physicians are responsible for ensuring the claims they submit are eligible. This is not a case where there is any reasonable dispute over whether the claims were eligible; the language of the Schedule makes clear they are not. Dr. Fagbemigun either failed to carefully check to make sure the claims he made were eligible or decided to bill for the tests even though he knew they did not fulfil the criteria.

Conclusion on Billing Issues

[44] In summary, we find that Dr. Fagbemigun:

- billed OHIP for thousands of tests and procedures that he did not conduct;
- billed OHIP for nerve conduction studies he knew or ought to have known he was not eligible to bill.

[45] This conduct would be reasonably regarded by members of the profession as disgraceful, dishonourable or unprofessional, which is professional misconduct under O. Reg. 856/93 under the *Medicine Act, 1991*, SO 1991, c. 30.

Referral Fees

[46] The College alleges that Dr. Fagbemigun received referral fees from Hart Medical Services, a cardiac test provider that used his office space, for referring patients to it. When the College searched Dr. Fagbemigun's office, investigators found "Booking Sheets" for Hart Medical Services for four different dates in 2018, listing patients' names, appointment times, the total number of patients seen, no-shows and the number who refused services.

[47] In two different interviews, Dr. Fagbemigun told College representatives that Hart Medical had paid him a fee per patient tested. He said that he was originally charging a flat rate for the room rental, but that was insufficient, so he initiated a switch to a fee of \$20 per patient that he referred and was seen. He said he was sometimes paid in cash and sometimes by cheque. Someone later told him that he should not be charging by the patient and then he returned to charging Hart Medical a flat rate.

- [48] In his testimony, Dr. Fagbemigun denied ever asking for a fee per patient. Dr. Fagbemigun says that Hart Medical paid him by cheque for the room rental. He says that a Dr. Shanehouse from Hart Medical used one of his rooms and staff for a brief period, in addition to the room Hart Medical generally used, but they never decided on rent. He says that one month Hart Medical gave him a \$500 cheque for rent and a second cheque for \$200. When he asked what the \$200 was for, he says the owner of Hart Medical, Tammy Singh, said that it was for Dr. Shanehouse's use of the second room and that perhaps Dr. Shanehouse had calculated it based on \$20 per patient. Dr. Fagbemigun says that he never received cash payments, only cheques.
- [49] As with his other admissions during the interviews, Dr. Fagbemigun says that he said things that were not true due to the stress of the interview. He does not explain why the stress of the interview would lead to him making up a detailed, untrue story that he was improperly taking referral fees.
- [50] When a College investigator phoned Hart Medical and spoke with Ms. Singh, she said that the company rented space from Dr. Fagbemigun to see patients he referred and paid him rent based on the number of hours it was using the space. Dr. Fagbemigun relies on this as evidence that he was not collecting a referral fee. There are two problems with this. First, Ms. Singh was not called as a witness. This evidence is hearsay and it has not been tested by cross-examination. It is therefore entitled to no weight. Second, Ms. Singh had good reason not to admit paying referral fees, as it would have suggested Hart Medical and perhaps its physicians acted improperly.
- [51] The College has proven on a balance of probabilities that Hart Medical paid Dr. Fagbemigun fees per patient referred. Dr. Fagbemigun admitted this during interviews with College representatives, and his explanations for why he would have done so if it were not true are not credible. The notes on the booking sheet, totalling up the number of patients who attended, are consistent with the calculation of such fees.
- [52] Taking referral fees is reasonably regarded by members of the profession as disgraceful, dishonourable or unprofessional. They give physicians improper incentives to refer patients for unnecessary treatment and to refer them to specific

providers based on the physician's self-interest rather than the patient's interests. The physician is being paid, not for work done, but for their referral decisions. Whether or not such fees actually influence referral decisions in a given case, referrals for a fee create a conflict of interest.

Failure to Meet the Standard of Practice

[53] The next allegation the College makes is that Dr. Fagbemigun failed to maintain the standard of practice of the profession, an act of misconduct under O. Reg. 856/93. The College alleges, relying on the expert opinion of Dr. Klapwyk, that Dr. Fagbemigun ordered or conducted tests that were not appropriate and kept incomplete and inaccurate documentation in patients' charts.

[54] Dr. Klapwyk has been practising family medicine since 2002. She also teaches and mentors medical students. We qualified her as an expert in the standard of practice of a family physician and OHIP billings.

[55] Dr. Klapwyk reviewed 40 charts that were not randomly selected. The first 20 charts were for patients under the age of 40 for whom Dr. Fagbemigun claimed the point-of-care tests or ear curetting at issue in this case. The second 20 were for patients under 40 whom he referred to Hart Medical for cardiac tests.

[56] Dr. Klapwyk noted that many charts used detailed "templates" that recorded identical information for multiple patients and/or multiple visits by one patient. One template used for more than one patient, for example, included "lower extremities burning pains and Numbness. No muscle weakness," as the subjective report, documented blood pressure of 141/82 and ended with a negative sural nerve conduction study of both extremities. Another, which purported to document an annual physical, includes "urinalysis: pH 6.5, nil Glucose, Nil Protein, nil ketones," "surgical scar tissue at the Vertex of the scalp," "tenderness of the paraspinal muscle. Restricted ROM across the LS-spine" and ended with a nerve conduction study showing no evidence of neuropathy in the right leg.

[57] Dr. Klapwyk concluded that Dr. Fagbemigun's documentation did not meet the standard of practice in 40 of 102 patient encounters she reviewed, due to the overuse of templates and the absence of a plan of care. We accept this evidence.

- [58] Dr. Klapwyk also had concerns about the frequency of urine drug screens for drugs of abuse, including in children as young as nine. In her view, of the 39 screens she was asked to review, only eight had any indication for conducting this test. Of the 66 nerve conduction studies that were documented, only two were appropriate in her opinion. She noted overuse of other point-of-care tests: one woman had eight pregnancy tests in about 13 months despite no indication of being sexually active or having had a pap smear and another had 11 rapid strep tests in three years, eight pregnancy tests in two years and nine urine drug screens. She also noted large numbers of ear curettages: 19 in three years for one patient, 16 in two-and-a-half years, 12 in 20 months and 15 in less than two years for others.
- [59] Dr. Klapwyk presumed that Dr. Fagbemigun had done the tests or ear curettages documented in the charts and found that many were not necessary. We accept her evidence that many recorded tests were not medically indicated. However, given our conclusion above that Dr. Fagbemigun billed OHIP for many procedures he did not conduct, we find it probable he did not actually do many of these tests. Indeed, Dr. Klapwyk identified some billings to OHIP with no corresponding chart entries, which supports the conclusion they were never done. Of course, documenting a non-existent test does not meet the standard of practice either. Whether he conducted a test or procedure that was not necessary or billed for one that never happened, he did not maintain the standard of practice of the profession.
- [60] In the 20 charts Dr. Klapwyk reviewed where Dr. Fagbemigun referred patients under 40 for cardiac tests or consultations with Hart Medical, most patients, she concluded, had no cardiac risk factors and were at very low risk for cardiac disease. In 11 of the 20 charts, Dr. Fagbemigun used an identical chart entry documenting chest discomfort, pain worse with activities, a specific blood pressure (120/70) and tenderness to chest wall palpitation. In others, he ordered cardiac testing for “abnormal lipid profile” when cholesterol readings were either completely normal or met low-risk targets. Where the basis for the test was an identical template or a reason contradicted by the chart, there was no justification for the test. What is more, in 17 of 20 charts, Dr. Fagbemigun ordered a stress echo, an echo and a cardiac consult. There is no need for a separate echo in addition to a stress echo because an echo is done at the stress echo. Dr. Klapwyk’s opinion,

which we accept, was that only 20 of 112 cardiac tests and consults could have been medically necessary.

- [61] Dr. Klapwyk also noted that Dr. Fagbemigun routinely conducted digital rectal exams of men between 18 and 32 without any indication of rectal or prostate issues. He acknowledged, in an interview with her, that he does so as a matter of course. This is, in her opinion, inappropriate. We accept that opinion.
- [62] Incorrect documentation in patient charts leads to a risk of harm and unnecessary referrals can cause patients anxiety, time and costs.
- [63] Dr. Fagbemigun argued that we could not conclude that he failed to meet the standard of practice of the profession because Dr. Klapwyk only examined 40 charts that were not selected at random. That has no bearing on our conclusion that the College has shown that he did not meet the standard of practice of the profession in the care of the patients whose charts Dr. Klapwyk reviewed. While, given the extent of Dr. Fagbemigun's failures, we think it is likely such problems existed throughout his practice, our conclusion is based on the evidence before us. We find that in treating this group of patients, Dr. Fagbemigun did not meet the standard of practice of the profession.
- [64] Dr. Fagbemigun argued Dr. Klapwyk's knowledge of the DPN check machine was inadequate for us to rely on her opinion of the appropriateness of the nerve conduction studies. We disagree. While Dr. Klapwyk has not used this machine, she informed herself about it and has expertise in the underlying medical conditions and physiology. Dr. Fagbemigun called no expert evidence to challenge her opinion.
- [65] Dr. Fagbemigun noted that there is a rare genetic condition, hypertrophic cardiomyopathy, that is common among the young Black population and can lead to cardiac arrest. He called no evidence that suggested such patients should be tested more readily than others or that the patients he referred for cardiac testing were Black. There is no reason to think that the identical template documentation was any more accurate for Black patients than for others.
- [66] The College has proved that Dr. Fagbemigun failed to meet the standard of practice in his care of numerous patients. What is more, we find that he did this intentionally

because he wanted to increase his income. Given that he was receiving a referral fee from Hart Medical, and the extent of the improper testing, we find it is more likely than not that Dr. Fagbemigun sent so many patients for unnecessary tests to increase the referral fees he received. He also used identical, inaccurate templates to make it appear as though testing was justified when it was not and to suggest tests had been conducted when they had not been. Dr. Fagbemigun, in other words, intentionally placed wrong information in his patients' charts in order to make his improper billing appear legitimate.

Conclusion

- [67] The College has proved the allegations. Dr. Fagbemigun billed for services he did not provide and took referral fees for referrals to a cardiac care provider. He put inaccurate information in patient charts and sent his patients for unnecessary tests that could cause them anxiety, time and inconvenience. He did this for his own financial gain, at the cost of his patients' care and the public health care system. He intentionally received many thousands of dollars to which he was not entitled.
- [68] The Tribunal Office will schedule a date to hear evidence and submissions on penalty and costs.

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. Fagbemigun*, 2022 ONPSDT 22

Date: June 9, 2022

Tribunal File No.: 19-003

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Ayokunle Fagbemigun

PENALTY REASONS

Heard: April 20, 2022, by videoconference

Panel:

Mr. David A. Wright (Tribunal Chair)

Dr. Michael Franklyn

Dr. Paul Garfinkel

Mr. Mehdi Kanji

Appearances:

Ms. Elisabeth Widner and Ms. Simmy Dhamrait-Sohi, for the College

Dr. Fagbemigun, self-represented

RESTRICTION ON PUBLICATION

The Tribunal ordered, under ss. 45-47 of the Health Professions Procedural Code, that no one may publish or broadcast the names or any information that would identify patients referred to during the Tribunal hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this order.

Introduction

- [1] We found that Dr. Fagbemigun intentionally billed the Ontario Health Insurance Plan (OHIP) for thousands of tests and procedures he did not provide or were not billable. He also accepted fees for referring his patients to a private provider for cardiac tests. He failed to meet the standard of practice of the profession because his documentation was inaccurate, he sent patients for unnecessary tests and documented tests that never happened. See *College of Physicians and Surgeons of Ontario v. Fagbemigun*, 2022 ONPSDT 11.
- [2] Dr. Fagbemigun stole from Ontario's publicly funded health care system and harmed patients for his own financial gain. The appropriate penalty for this misconduct is revocation of his certificate of registration, the maximum fine of \$35,000 and a reprimand. We also order Dr. Fagbemigun to pay the College \$72,590 in costs, calculated under the Tariff in the Tribunal's Rules of Procedure.

Penalty Principles

- [3] In this section of our reasons, we will set out the penalty principles in a somewhat different way than previous Tribunal decisions. It is not our intention to change the principles, but to express them in a way that enhances the guidance provided to parties, particularly self-represented physicians, in making arguments on penalty. We hope this will also make Tribunal reasons easier to understand for physicians, complainants, the public and the media. We think it is important to discuss in a general sense the weight given to different factors in the analysis, avoid the use of criminal law terminology as is done in other areas of professional regulation and use plain language.

Penalties and Reimbursements

- [4] The Tribunal can only order five kinds of penalties: revocation of the member's certificate of registration, suspension for a specified period of time, imposing terms, conditions and limitations on the member's certificate of registration, a fine of up to \$35,000 payable to the Minister of Finance and/or a reprimand: Health Professions Procedural Code, which is Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c. 18, s. 51(2) (Code).

- [5] Two other kinds of orders are often made at the same time as penalty orders, but they are compensation and not a penalty. Costs reimburse the College for part of the costs of the hearing, recognizing that the general membership of the College should not bear all the expenses of addressing the physician's misconduct. They are usually based on the number of days of hearing at a daily rate set out in the Rules of Procedure. The Tribunal can also order that the member compensate the College for the costs of therapy and counselling it has paid or may pay patients the member sexually abused, under s. 85.7 of the Code. If not paid, these amounts are automatically subject to postjudgment interest under ss. 127 and 129 of the *Courts of Justice Act*, RSO 1990, c. C.43. The current rate is available at <https://www.ontario.ca/page/prejudgment-and-postjudgment-interest-rates#section-4>.
- [6] The Code requires that the Tribunal revoke the certificate of registration of and reprimand a member who has committed certain acts of sexual abuse: Code, s. 51(5). In those cases, the Tribunal need not go through a detailed penalty analysis if these are the only penalties sought.

The Goals of Penalty

- [7] Several purposes or values should be considered throughout the analysis and underlie the analysis of individual factors. The most important goal of a penalty order is the protection of the public. The public must have confidence in the member, the profession and in the College's ability to govern the profession in the public interest. Patients place their physical and mental health, their bodies and lives in the hands of physicians. The public expects that every member of the medical profession will protect that trust by acting in the interests of their patients and the public, upholding the high standards of the profession.
- [8] Other penalty purposes support the goal of protecting the public. These include discouraging the member and other physicians from committing misconduct (specific and general deterrence), rehabilitating the physician, ensuring a safe return to practice where appropriate and expressing the Tribunal and the profession's disapproval of the misconduct.

Previous Cases

- [9] The law does not require a panel of an administrative tribunal to follow the decisions of other panels. That said, it is only fair that penalties in similar circumstances be similar and that penalties in different circumstances bear a principled relation to each other: *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018 ONCA 420 at para. 80.
- [10] That does not mean that penalties cannot change or evolve. Most important is that panels clearly explain to the parties, the complainants and the public in their reasons what makes this case like or unlike key precedents or why it has decided not to follow them, given the overall importance of consistency. This does not require an analysis of every case cited by the parties but situating the case in comparison with key Tribunal precedents is important, even if only to note that they do not help.

Relevant Factors

- [11] Every case is unique, and it is not possible or desirable to anticipate every relevant factor. This discussion focuses on the most common ones.

The Seriousness of the Misconduct

- [12] The seriousness of the misconduct is usually the most significant factor in deciding on any suspension or revocation of the member's certificate of registration. It is best considered first as it helps establish a general range of penalty. The analysis requires a close look at the physician's actions and the reasons for them.
- [13] Factors that are relevant to the seriousness of the misconduct include:
- what the physician did;
 - the motivations of the physician;
 - Intentional misconduct and misconduct for personal gratification or financial or other gain make the misconduct more serious.
 - The fact the physician knew or should have known the misconduct was wrong is also important.
 - the number of times the misconduct happened and how long it lasted;
 - the effects or potential effects of the misconduct on others.

Discipline History

- [14] A discipline history may lead to a heavier penalty. Following the principle of progressive discipline, penalties for misconduct increase when it happens again. Repetitive misconduct usually shows a physician has not “received the message” from previous discipline and also that there is an increased risk and therefore need for public protection.
- [15] We do not treat prior dispositions of the Inquiries, Complaints and Reports Committee as discipline history although they can demonstrate the physician’s knowledge of their obligations.

The Physician’s Actions Since the Misconduct

- [16] The next set of factors looks at any actions the physician has taken since the misconduct that may tilt the balance toward a less severe penalty. These are all mitigating factors. Considerations in this category include:
- the physician’s admission of misconduct or decision not to contest the allegations through a plea of no contest;
 - Contesting the allegations does not increase the penalty, However, physicians get credit or mitigation when they spare witnesses from having to testify and save the costs of a hearing. Admissions and decisions not to contest the allegations can therefore reduce the penalty.
 - work the physician has done to understand what they did wrong (insight) and avoid it happening in the future;
 - The Tribunal will consider steps the physician has taken, such as counselling, to obtain insight into what they did wrong and why it was wrong and work on strategies to avoid it happening again. Again, physicians are entitled to defend themselves and the failure to do such work or show insight does not count against them.
 - steps the physician has taken to make things right.

- If the misconduct was the failure to do something, has the member done it? If there was something that could be done to partly or fully fix or make amends for their actions, have they done that?

[17] These factors may move the scale toward a less serious penalty, but they do not make the penalty more serious if the physician has not done them. In more technical language, they are mitigating factors but their absence is not aggravating. A physician is entitled to defend allegations and disagree with the panel's decision without it being held against them.

Personal Circumstances of the Physician

[18] Personal circumstances existing at the time and that are linked to the misconduct may tilt the balance toward a less serious penalty. These mitigating factors include:

- physical and/or mental health issues;
- relevant experiences as an Indigenous or racialized person or member of another marginalized group;
- experiences of trauma;
- other personal circumstances, such as family or workplace stress.

Conclusion on Factors

[19] The existence of factors that increase or decrease the penalty does not mean that the penalty cannot be at the high end or the low end of the scale. For example, the physician may have taken many positive steps since the misconduct or have compelling personal circumstances, but the appropriate penalty will still be revocation.

Terms, Conditions and Limitations

[20] Terms, conditions and limitations are usually focused on rehabilitation or direct public protection. Among the most common tools are education, monitoring of various kinds and restrictions on the physician's scope of practice. They protect the public or the public's confidence in light of the nature of the misconduct and other evidence.

Reprimands

[21] This Tribunal, like many other health colleges in Ontario and in Canada, typically administers a reprimand in every case. A reprimand, the Tribunal has held, denounces the misconduct and deters the physician and others from future misconduct. In other contexts, such as American medical boards, the Law Society of Ontario and in employment law, a reprimand is a penalty on the lighter end of the spectrum similar to a warning, usually imposed only when there is no suspension or revocation: J. Morrison and P. Wickersham, “Physicians Disciplined by a State Medical Board” (1998), 217 JAMA 1891 (<https://jamanetwork.com/journals/jama/fullarticle/187649>); *Law Society of Upper Canada v. Desjardins*, 2016 ONLSTH 79 at paras. 22-23. The Tribunal’s approach to reprimands may be worth reconsidering in a future case or through changes to rules or practices, keeping in mind that some reprimands are mandatory under the legislation. In this case, we follow the current practice of issuing a reprimand in every case.

Application to this Case

No Evidence on Actions Since the Misconduct or Personal Circumstances

[22] During his argument on penalty, Dr. Fagbemigun strongly disagreed with our decisions, the conduct of the hearing and the College investigation. Those are matters that Dr. Fagbemigun can raise on appeal, but our hearing and this decision are to decide on the penalty for the misconduct we have found. Therefore, we have not addressed his submissions.

[23] Because Dr. Fagbemigun did not talk about any mitigating factors, the only relevant considerations on which we have evidence are the seriousness of the misconduct and the fact that Dr. Fagbemigun has no discipline history. We therefore have nothing to consider in relation to the last two groups of factors: the physician’s actions since the misconduct and personal circumstances.

Seriousness of the Misconduct

[24] Dr. Fagbemigun’s misconduct is extremely serious. He took hundreds of thousands of dollars from the health care system to which he was not entitled. He did so intentionally, and for his personal gain. He defrauded the government many times

over an extended period. The system of physician billings is based on trust in Ontario's medical profession to be honest in their claims. When a physician cheats, as Dr. Fagbemigun did, it harms the health care system and public confidence in the honesty and integrity of the profession.

[25] Dr. Fagbemigun's actions also harmed his patients. He conducted unnecessary tests, which caused some stress and anxiety, or he didn't give them tests when he recorded having done so in their charts. Their medical records were inaccurate. Sending patients for cardiac tests for which he got referral fees also betrayed their trust.

[26] As the English Court of Appeal said in *Bolton v. Law Society*, [1993] EWCA Civ 32 at para. 15, "[a] profession's most valuable asset is its collective reputation and the confidence which that inspires." Dr. Fagbemigun's planned, fraudulent actions impair the public's confidence in physicians' honesty and integrity when claiming public health care dollars and putting quality care of their patients ahead of their own interests. The Tribunal would be failing in its duty to protect the public if it allowed Dr. Fagbemigun to continue to practise medicine.

[27] This is consistent with the approach in other cases. Although cases in the early 2000s involved suspensions for OHIP fraud (see cases cited in *College of Physicians and Surgeons of Ontario v. Attallah*, 2020 ONCPSD 38, affirmed *Attallah v. College of Physicians and Surgeons of Ontario*, 2021 ONSC 3722 (Div. Ct.)), penalties have increased over the past 20 years. In 2002, the panel in *College of Physicians and Surgeons of Ontario v. Moore*, 2002 ONCPSD 16, (affirmed *Moore v. College of Physicians and Surgeons of Ontario*, 2003 CanLII 7722 (Div.Ct.)) stated that revocation should be the norm for substantial premeditated fraud. Older cases, therefore, have little influence on our decision. In accordance with *Moore*, more recent contested cases of deliberate OHIP fraud have led to revocation: *Attallah*; *College of Physicians and Surgeons of Ontario v. Gill*, 2021 ONCPSD 16, affirmed *Gill v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 49; *College of Physicians and Surgeons of Ontario v. Chandra*, 2018 ONCPSD 28.

Fine

[28] This Tribunal has no power to order Dr. Fagbemigun to repay the monies he took. That is a matter for the courts, if OHIP decides to pursue it. We do, however, have

the power to order a fine of up to \$35,000, payable to the Minister of Finance. Fines have not been used often at this Tribunal unless the member's misconduct involved wrongfully taking public money. The fine is not compensation, and the amount is far less than what Dr. Fagbemigun stole. However, the fine allows us to order some payment to the taxpayers of Ontario, from whom he took the money. We impose the maximum fine of \$35,000. In its proposed order, the College suggested that the fine should be payable on a later date than the College's costs. In our view, Dr. Fagbemigun should pay the public purse before the College.

Costs

[29] The College asks for a costs order of \$72,590, representing seven days at the tariff rate of \$10,370. We agree this is the proper costs order.

Order

[30] Therefore we order and direct:

- 1) the Registrar to revoke Dr. Fagbemigun's certificate of registration effective immediately;
- 2) Dr. Fagbemigun to pay a fine of \$35,000 to the Minister of Finance no later than July 11, 2022 and provide proof of this payment to the Registrar of the College within five days of making it.
- 3) Dr. Fagbemigun to pay the College costs of \$72,590 no later than September 9, 2022.
- 4) Dr. Fagbemigun to appear before the panel to be reprimanded.

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Tribunal File No.: 19-003

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Ayokunle Fagbemigun

The Tribunal delivered the following Reprimand
by videoconference on Tuesday, June 13, 2023.

*****NOT AN OFFICIAL TRANSCRIPT*****

Dr. Fagbemigun,

Your misconduct is serious and far reaching. You took kickbacks from a private cardiac test provider. You stole hundreds of thousands of dollars from OHIP for services you didn't provide. You profited by sending patients for tests they didn't need. We can only imagine the anxiety and stress this inflicted on them.

The public relies on physicians to be honest for Ontario's honour-based OHIP billing system to work. You breached the trust of the people of this province over an extended period. By taking resources from Ontario's already strained health care system you tarnished the reputation of the profession and the public's confidence in physicians.

We can only hope that you will reflect on what you did wrong and act differently in your future endeavours.