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## **CASE SUMMARY: MEDICAL SERVICES COMMISSION'S AUDIT PANEL'S REFUSAL TO RECEIVE AFFIDAVIT EVIDENCE OF THE APPELLANT PODIATRIST WAS A BREACH OF ITS COMMON LAW DUTY OF PROCEDURAL FAIRNESS**

Administrative law – Decisions of administrative tribunals – Ministry of Health Billing Integrity Program; Podiatrists – Professional governance and discipline – Billing matters; Hearings – Fairness; Judicial review – Evidence – Delay – Natural justice – Procedural requirements and fairness

*Hefnawi v. British Columbia*

Appeal from the decision of Panel of the Healthcare Practitioner Special Committee for Audit Hearings ordering repayment of over \$1.1 million and permanent cancellation of enrolment in MSP.

[2016] B.C.J. No. 265

2016 BCSC 226

British Columbia Supreme Court

February 16, 2016

N.P. Kent J.

The appellant, a doctor of podiatry, was enrolled with the Medical Services Plan (“MSP”). The appellant was audited by the Ministry of Health Billing Integrity Program. Following the audit, the Medical Services Commission (the “Commission”) issued notices under the Medicare Protection Act, RSBC 1996, c. 286, seeking recovery of approximately \$892,000 together with a statutory surcharge, interest, and costs, and indicated an intention to cancel the appellant’s enrolment in MSP.

On September 23, 2014, the Panel of the Healthcare Practitioner Special Committee for Audit Hearings (the “Panel”) issued its decision confirming breaches of various provisions of the Medicare Protection Act, ordering repayment of over \$1.1 million, and permanently cancelling the appellant’s enrolment in MSP.

The appellant appealed the Panel’s decision on the basis he was denied procedural fairness because the Panel refused to admit into evidence the appellant’s affidavit evidence. The events leading to the Panel’s refusal to admit the appellant’s affidavit evidence are summarized as follows.

On the commencement of the hearing before the Panel, the appellant was not in attendance. The Panel heard evidence from witnesses called by the Billing Integrity Program. After the Commission closed its case, the appellant’s counsel advised the Panel the appellant intended to give evidence personally at the continuation of the hearing.

At commencement of the continued hearing, the appellant was not present. The appellant's counsel advised he intended to submit the appellant's evidence by way of affidavit. Subsequently, the appellant's counsel advised the appellant's affidavit was not available and undertook to have the affidavit available on the following day.

On the following day, the appellant's counsel attempted to file a copy of an unsworn affidavit with leave to file a properly sworn affidavit once it was received. The Panel directed the appellant's counsel file a sworn affidavit. In the absence of a sworn affidavit, the Panel directed the matter proceed to argument.

Prior to the conclusion of argument, the appellant's counsel applied to re-open the appellant's case and to admit an affidavit. The affidavit had not been properly sworn by either a commissioner for taking affidavits or a notary public. Instead, the affidavit bore the stamp and signature of a Saudi Arabian lawyer. The Panel upheld the Commission's objection to the admissibility of the affidavit.

Following conclusion of the hearing, the appellant's counsel wrote to the Panel enclosing the sworn affidavit along with a cover letter from the lawyer before whom it was sworn. The appellant's counsel requested the hearing be re-opened to admit the appellant's affidavit and advised the appellant would be available for cross-examination on his affidavit on certain dates.

On September 23, 2014, the Panel released its decision, finding the appellant acted with actual knowledge and with intent to deceive the Commission and to obtain payments to which he was not entitled on multiple occasions throughout a five-year period.

The appellant appealed on the basis the Panel denied him procedural fairness by refusing to consider any of his evidence. On appeal, the court held by any standard, whether correctness, unreasonableness, or simply a question of fairness, the Panel's decision to refuse consideration of the appellant's affidavit was wrong.

The court stated that while the Panel may have been justifiably exasperated by the appellant's failure to attend the hearing, by tactics designed to delay, and by applications it considered "scurrilous," the effect of the Panel's refusal to entertain the appellant's explanation was a decision on the merits without the benefit of any evidence whatsoever from the appellant. The court characterized the stakes as very significant, with the appellant essentially being accused of fraud. These stakes militated in favour of procedural patience rather than refusing to consider the appellant's evidence. The court found it was open to the Panel to receive a defective affidavit subject to a properly sworn version being submitted at a later date or to admit the document as an unsworn statement to be given whatever weight the Panel considered appropriate.

The court quashed the Panel's decision. Given the potential for doubting the ability of the Panel to objectively and fairly entertain the evidence of the appellant, the court ordered the matter be remitted with directions to establish a new panel to conduct the hearing. Because the procedural fairness of which the appellant complained was triggered by unreasonable delay and a lack of forthrightness on his part, for which no sensible or fulsome explanation was offered, he was denied the costs of his appeal.

This case was digested by [Joel A. Morris](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact him directly at [jmorris@harpergrey.com](mailto:jmorris@harpergrey.com) or review his biography at <http://www.harpergrey.com>.