

**THE DISCIPLINE COMMITTEE OF THE COLLEGE  
OF OPTOMETRISTS OF ONTARIO**

Panel: Dr. Karin Simon, Chair  
Mr. Howard Kennedy  
Dr. Vivian Habib  
Dr. Mark Eltis  
Mr. Ravnit Dhaliwal

**B E T W E E N:**

The College of Optometrists	)	Ms. Julia Martin
of Ontario	)	Counsel for the College
	)	of Optometrists of Ontario
	)	
- and -	)	
	)	
	)	
Dr. Jon Barnes	)	Ms. Lisa Spiegel
	)	Counsel for the Member
	)	
	)	
	)	Ms. Julie Maciura
	)	Independent Legal Counsel
	)	
	)	<b>Heard on March 29, 2021</b>

**DECISION AND REASONS**

This matter came before a Panel of the Discipline Committee of the College of Optometrists of Ontario (the “College”) and was held electronically on March 29, 2021.

The purpose of the hearing was to consider allegations of professional misconduct referred by the Inquiries, Complaints and Reports Committee against Dr. Jon Barnes (the “Member”).

The five members of the Discipline Panel referred to above were in attendance, as well as the counsel for the Member, Ms. Lisa Spiegel, and the Member; Ms. Julia Martin, counsel for the College, accompanied by Ms. Mina Kavanagh, Director of Professional Conduct and Mr. Joe Jamieson, Registrar; and Ms. Julie Maciura, independent legal counsel to the Discipline Panel.

The hearing was called to order at 9:30 a.m. on March 29, 2021. The Chair introduced the Panel and the other people present in the room.

## ALLEGATIONS

College counsel took the Panel through the Notices of Hearing, which was filed as Exhibit 1.

The Notice of Hearing (Exhibit 1) made the following allegations against the Member:

1. You have committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the Health Professions Procedural Code (the “Code”) being Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991 C.18, and defined in the following paragraphs of *Ontario Regulation 119/94*:
  - a. paragraph 1.14 in that you have failed to maintain the standards of practice of the profession;
  - b. paragraph 1.24 in that you failed to make and maintain records in accordance with Part IV of *Ontario Regulation 119/94*;
  - c. paragraph 1.25 in that you falsified a record relating to your practice;
  - d. paragraph 1.26 in that you signed or issued, in your professional capacity, a certificate, report or similar document that contains a statement you knew or ought to have known is false, misleading or otherwise improper, or omitted statements or information that you knew or ought to have known should be included.
  - e. paragraph 1.28 in that you submitted or allowed to be submitted an account for professional services that you knew or ought to know is false or misleading; and
  - f. paragraph 1.39 in that you engaged in conduct or performed an act that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable, unprofessional or unethical.

Particulars of the allegations in the Notice of Hearing are as follows:

1. Dr. Jon Barnes is an optometrist who has practised in Ontario since in or about May 25, 1990.

### **Improper and False Billing**

2. From in or about 2008 to in or about 2017, Dr. Jon Barnes improperly billed the Ontario Health Insurance Plan (“OHIP”) as follows:
  - a. He submitted claims for services that do not constitute insured services under the *Health Insurance Act R.S.O 1990 c. H. 6* (the “HIA”), *Revised Regulation Ontario 552/90*, and the Schedule of Benefits for Optometry April 1, 2009 (the “Schedule”), including but not limited to prescription renewals, referral letters, frame selection and/or telephone advice, for the patients and on the dates listed at Schedule 1;

- b. He submitted claims using improper OHIP billing codes where the patient's condition was ineligible for the code used, the code was incorrect, or the code was invalid for the patients and on the dates listed at Schedule 2;
  - c. He submitted false claims for services that were not rendered to patients within days of having made another claim for them contrary to the HIA and the Schedule for the patients and on the dates listed at Schedule 3; and
  - d. He submitted false claims for services that were not rendered to patients where he did not see the patients at all and/or failed to maintain any record of having seen the patient contrary to the HIA and the Schedule for the patients and on the dates listed at Schedule 4.
- 3. Further particulars of the improper billing referred to in paragraph 2 are contained in the expert report dated October 22, 2019.

#### **Failure to Maintain Required Records**

- 4. Dr. Barnes failed to maintain the following records as required by Part IV of *Ontario Regulation 119/94*:
  - a. day sheets as required by section 8 of Ontario Regulation 119/94; and
  - b. the information required to be included in patient records by subsection 10(2) of *Ontario Regulation 119/94* was missing for patients listed at Schedules 1 to 4.

#### **Failure to Maintain Standard of Practice**

- 5. Some of Dr. Barnes' records for the patients listed at Schedules 1 to 4 are incomplete and/or incomprehensible.
- 6. Section 5.1 of the *Optometric Practice Reference* requires members to maintain records that are legible and complete and part of the care and management of patients that a member maintain complete and accurate records.
- 7. Dr. Barnes' recordkeeping deficiencies therefore constitute a failure to maintain the standards of practice of the profession.

(Because the Schedules contain patient names, the Schedules are not included here.)

Schedule 1 is entitled "Claims Submitted for Uninsured Services" and lists 44 claims.

Schedule 2 is entitled "Improper Codes used for Claims" and lists 41 claims.

Schedule 3 is entitled “False Claims Submitted for Services not Rendered within Days after another Claim” and lists 74 claims.

Schedule 4 is entitled “False Claims Submitted for Services not Rendered” and lists 27 claims.

## **AMENDMENT TO NOTICE OF HEARING**

College counsel, with the agreement of Member’s Counsel, asked the Panel to add reference to three claims to Schedule 1 of the NOH (as items 45, 46 and 47) that were inadvertently left out of that document. The Panel granted that request.

## **PUBLICATION BAN**

College Counsel requested a publication ban under subsection 45(3) of the *Regulated Health Professions Act, 1991* on the publication, broadcasting, or disclosure of the names of any patients and/or any information that would disclose the identity of any patients referred to in the hearing or in the documents referred to in the hearing. Member’s Counsel did not object.

The Panel ordered the publication ban as requested.

## **AGREED STATEMENT OF FACTS**

College counsel entered an Agreed Statement of Facts that was signed by the Member and a College representative and it was marked as Exhibit 2.

The Agreed Statement of Facts provided as follows:

1. Dr. Jon Barnes is an optometrist who has practised in Ontario since in or about May 25, 1990.
2. Dr. Jon Barnes admits that he engaged in professional misconduct as set out in the Notice of Hearing dated September 10, 2020, which is attached as Appendix “B” to this Agreed Statement of Facts, in that he committed acts of professional misconduct as provided by subsection 51(1) (c) of the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991 C.18, and defined in the following paragraphs of Ontario Regulation 119/94:
  - a. paragraph 1.24 in that he failed to make and maintain records in accordance with Part IV of Ontario Regulation 119/94;
  - b. paragraph 1.26 in that he signed or issued, in his professional capacity, a certificate, report or similar document that contains a statement he knew or ought to have known is false, misleading or otherwise improper, or omitted statements or information that he knew or ought to have known should be included.

- c. paragraph 1.28 in that he submitted or allowed to be submitted an account for professional services that he knew or ought to know is false or misleading; and
- d. paragraph 1.39 in that he engaged in conduct or performed an act that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable, unprofessional or unethical.

### **Improper and False Billing**

- 3. From in or about 2008 to in or about 2017, Dr. Jon Barnes improperly billed the Ontario Health Insurance Plan (“OHIP”) as follows:
  - i. He submitted claims for services that do not constitute insured services under the *Health Insurance Act* R.S.O 1990 c. H. 6 (the “HIA”), Revised Regulation Ontario 552/90, and the Schedule of Benefits for Optometry April 1, 2009 (the “Schedule”), including but not limited to prescription renewals, referral letters, and/or telephone advice, for the patients and on the dates listed at Schedule 1;
  - ii. He submitted claims using improper OHIP billing codes where the patient’s condition was ineligible for the code used, the code was incorrect, or the code was invalid for the patients and on the dates listed at Schedule 2;
  - iii. He submitted false claims for services that were not rendered to patients within days of having made another claim for them contrary to the HIA and the Schedule for the patients and on the dates listed at Schedule 3; and
  - iv. He submitted false claims for services that were not rendered to patients where he did not see the patients at all and/or failed to maintain any record of having seen the patient contrary to the HIA and the Schedule for the patients and on the dates listed at Schedule 4.
- 4. Further particulars of the improper billing referred to in paragraph 3 are contained in the expert report by Dr. [REDACTED], O.D., dated October 22, 2019, which is attached as Schedule 5 to this Agreed Statement of Facts.

### **Failure to Maintain Required Records**

- 5. Dr. Barnes failed to maintain the following records as required by Part IV of Ontario Regulation 119/94:
  - a. day sheets as required by section 8 of Ontario Regulation 119/94; and

- b. the information required to be included in patient records by subsection 10(2) of Ontario Regulation 119/94 was missing for patients listed at Schedules 1 to 4.

### **Dr. Barnes' Conduct**

If Dr. Barnes were to testify, he would state that at no time did he act with malicious intent to defraud OHIP. Despite his intent or the ultimate result, Dr. Barnes acknowledges that he improperly billed OHIP and failed to maintain records as required by Part IV of Regulation 119/94. Dr. Barnes admits the allegations within and regrets any negative impression he created in himself and the profession in the minds of the public.

(The Schedules to the Agreed Statement of Facts are not included here because they contain patient names. Schedule 1 had six claims deleted from it (that were originally included in the NOH). Schedule 2 had five claims deleted from it. Schedule 4 had eight claims deleted from it.)

### **Submissions of the Parties on Misconduct**

College Counsel took the Panel through the Agreed Statement of Facts and also took the Panel to the chart included in the expert report to Dr. [REDACTED], which is attached as Schedule 5 to the Agreed Statement of Facts. College Counsel demonstrated examples of each type of record keeping issue (such as the lack of day sheets) and billing issue (such as claims for services on days when no doctor was in the office).

College Counsel submitted that the onus was on the College to prove the case against the Member on the basis of the civil standard, which is a balance of probabilities. College Counsel submitted that the College had discharged that onus and that on the basis of the evidence contained in the Agreed Statement of Facts and Dr. Barnes' admission to the allegations of professional misconduct, the Panel could make the findings as requested by the parties, namely with respect to paragraphs 24, 26, 28 and 39 of section 1 of Ontario Regulation 119/94 under the *Optometry Act, 1991*.

Member's Counsel made no submissions with respect to finding other than to ask the Panel to refrain from using the word "guilt" in its reasons as in her opinion, that word was not appropriate for regulatory proceedings.

### **MEMBER'S PLEA**

The Member indicated that he admitted the facts and allegations in the Agreed Statement of Facts.

## **Finding on Misconduct**

After considering the Agreed Statement of Facts and the submissions of College counsel and the Member, the Panel found that the facts supported the findings of professional misconduct against the Member as set out in the Agreed Statement of Facts, more particularly, the conduct amounted to professional misconduct pursuant to paragraphs 1.24, 1.26, 1.28 and 1.39 of Ontario Regulation 119/94, under the *Optometry Act, 1991*, S.O. 1991.

## **REQUEST TO WITHDRAW CERTAIN ALLEGATIONS**

College Counsel advised the Panel that the College would be seeking to withdraw the allegations relating to paragraphs 1.14 and 1.25 of Ontario Regulation 119/94 in light of the admissions to the other heads of misconduct the Member made.

The College also asked that the names of patients that were struck through on the Agreed Statement of Facts be withdrawn from the Notice of Hearing as those names were mistakenly included in the Notice of Hearing.

The Panel granted those requests. The Panel accepted the withdrawal of paragraphs 1.14, and 1.25 of Ontario Regulation 119/94, under the *Optometry Act, 1991*, S.O. 1991 from the Notice of Hearing. Given that the Member was admitting to four heads of misconduct, the Panel was prepared to grant the request for the withdrawal of those others. Similarly, the Panel accepted the withdrawal of the names of patients that had inadvertently been included in the NOH.

## **Reasons for Finding of Misconduct**

The Member was present at the hearing and he agreed with the College that the conduct set out in the Agreed Statement of Facts, which he admitted engaging in, constitutes professional misconduct.

After considering the Agreed Statement of Facts and the submissions of counsel, the Panel found that the College proved the allegations on a balance of probabilities.

The Panel felt that the information included in the Agreed Statement of Facts and as presented by College Counsel clearly showed that the facts constituted the various heads or labels of misconduct to which the Member admitted. The Panel agreed that failing to keep records appropriately and submitting false or misleading accounts was serious conduct and constituted professional misconduct. The Panel made findings against the Member pursuant to paragraphs 1.24, 1.26, 1.28 and 1.39 of Ontario Regulation 119/94, under the *Optometry Act, 1991*, S.O. 1991.

After making its findings of misconduct, the Panel indicated that it was prepared to proceed to the penalty phase of the hearing.

## **JOINT SUBMISSION ON PENALTY**

College Counsel provided to the Panel a Joint Submission on Penalty (and Costs) that was signed by the Member and it was marked as Exhibit A.

The Joint Submission proposed the following Order (the document was revised during the hearing on the record to read as follows):

The Parties submit that the following is the appropriate penalty based on the findings made by the Panel of the Discipline Committee that Dr. Barnes engaged in professional misconduct as alleged in the Notice of Hearing:

1. That Dr. Barnes be required to appear before the Panel to be reprimanded at the conclusion of the discipline hearing on March 29, 2021;
2. That the College Registrar be directed to suspend Dr. Barnes' certificate of registration for a period of four (4) months to be served continuously and without interruption, commencing on May 31, 2021;
3. That the Registrar be directed to impose the following condition on Dr. Barnes' certificate of registration:
  - a) that he complete a practice coaching program with a practice coach in the area of OHIP billing and record keeping, by March 29, 2022, as follows:
    - a. he shall complete a total of six (6) practice coaching sessions of four (4) hours each, once a month for a period of six (6) months;
    - b. the practice coach shall be approved by the Registrar;
    - c. the practice coach shall attend Dr. Barnes' practice to review Dr. Barnes' record keeping and OHIP billing. Alternatively, the coaching sessions may be held virtually at the sole discretion of the practice coach should it be warranted by the public health situation;
    - d. the practice coach will determine what if any additional reading and review of materials Dr. Barnes will be required to undertake in preparation for the practice coaching/review sessions; and
    - e. the practice coaching shall be at Dr. Barnes' expense.



4. That the Registrar be directed to impose the following condition on Dr. Barnes' certificate of registration:

a) that he be required, at his own expense, to successfully complete and provide proof to the Registrar that he has done so, the Medical Record Keeping course (<https://www.cpd.utoronto.ca/recordkeeping/>), a one-day online interactive workshop available at the Temerty Faculty of Medicine, University of Toronto, by no later than March 29, 2022; and

5. That Dr. Barnes pay the College's partial costs in relation to this proceeding in the amount of \$20,000 payable to the College of Optometrists of Ontario in four (4) installments of \$5,000 by way of postdated cheques dated as follows which shall be mailed to College Counsel by April 1, 2021:

a. March 29, 2021;

b. November 31, 2021;

c. January 31, 2022; and

d. March 29, 2022.

The parties also indicated that Dr. Barnes had given his undertaking to the College to reimburse OHIP (with the assistance of the College for the administrative aspects of doing so) in the amount of \$4905.70.

### **College Submissions on Penalty**

College Counsel submitted that the relevant principles of penalty include general deterrence, specific deterrence, remediation and public protection. Counsel submitted that these principles would be served through the Joint Submission. The suspension would serve as a specific deterrent to Dr. Barnes and would also act as a specific deterrent to the rest of the profession.

The reprimand will meet all of the principles of sanction and will allow the Panel to articulate its view to the Member of his conduct. The practice coaching and record-keeping course are remediation for Dr. Barnes to try to reduce the likelihood of the conduct reoccurring in future.

Counsel advised that the College was also seeking partial costs in the matter, in the amount of \$20,000. She referred the Panel to the Table of Costs which demonstrated that the amount sought represented less than half of the total costs spent on the investigation and hearing in this matter. Counsel submitted that given Dr. Barnes' cooperation, a costs order of less than half was appropriate.

College Counsel took the Panel briefly through a number of previous decisions demonstrating that the penalties ordered in those cases were similar to the penalty the parties were jointly

submitting here: *College of Optometrists v Mah* (2014), *College of Optometrists v Ng* (2012), and *College of Optometrists v Stepec* (2012).

College Counsel advised the Panel that Dr. Barnes had previously appeared before the Discipline Committee but that the conduct in this current matter was either prior to or concurrent with the conduct in the first Discipline hearing, and so it should not be viewed as a true prior history, given that Dr. Barnes would not have been able to avail himself from any guidance from the Discipline Panel in that previous case.

College Counsel also reviewed the test for rejecting a joint submission as set out in *R. v Anthony-Cook*, reiterating that the public interest test is a very high test to meet before a panel can reject a joint submission.

### **Member Submissions on Penalty**

Member's Counsel referred the Panel to the Agreed Statement of Facts which makes it clear that the Member did not act maliciously and that this was not a case where the Member embarked upon a fraudulent scheme to defraud OHIP or to make money.

In Member's Counsel's submission the fact that the money at issue here amounted to less than \$5000 when the conduct occurred over nine years was actually a mitigating factor rather than an aggravating factor.

Member's Counsel submitted that because of delays in the College's investigation of this current matter, the Member's prior discipline finding should not be considered an aggravating factor against him. The timing of the conduct in this case was essentially overlapping with the conduct in the first decision. As well, the mentor/coach in the prior case found that the Member was remediable. The Member also unilaterally took steps to remediate his behaviour. Furthermore, there is no evidence before the Panel that the Member has engaged in misconduct since the previous hearing. Counsel also emphasized how stressful it is for a member to be under investigation by the College for so long.

In Member's Counsel's submission the Joint Submission was sufficient to meet the objectives outlined by College Counsel.

### **Decision on Penalty**

After deliberating, the Panel accepted the Joint Submission on Penalty (and costs) and made an order consistent with its terms.

## Reasons for Penalty

After deliberating and considering the submissions of counsel for the College and the Member, the Panel determined the penalty was fair and reasonable, being neither too lenient nor too onerous and made the Order as jointly submitted by the parties, keeping in mind that the test for rejecting a Joint Submission on Penalty as articulated by the Supreme Court of Canada in *R v. Anthony-Cook* is very high.

The Panel found that the cases provided by College Counsel were helpful in that they involved similar conduct resulting in penalties that included suspensions of a similar length as that sought here, as well as terms, conditions and limitations. While some of the cases provided by College counsel had slightly shorter periods of suspension, the Panel recognized that no two cases are alike. The Panel also took into consideration the mitigating factors in this case as outlined by College counsel.


The College's rules exist to ensure that the public is protected. The public of Ontario should be entitled to assume that members of the profession are accurately and carefully keeping records and submitting claims for payment from the public purse. Conduct such as this tends to diminish the reputation of the profession in the eyes of both the public and third party payors (in this case OHIP). The Panel believes that the totality of the penalty order is such that it will act as a general deterrent to other members of the profession and that its focus on rehabilitation will also help to ensure that the Member himself does not repeat this conduct in the future. The Panel trusts the remediation will be effective and recognizes that the Member is required to complete both a record keeping course as well as six practice coaching sessions of four hours each, once a month for a period of six months in order to review Dr. Barnes' record keeping and OHIP billing. This personalized coaching will help to ensure that remediation takes place and that the Member is meeting the standards of practice going forward.

The Panel was also of the view that the penalty appropriately took into consideration the mitigating and aggravating factors in this case. The mitigating factors include the fact that the Member admitted the allegations against him, and he cooperated fully with the College during the investigation of the matter and in preparation for the hearing, thereby saving time and resources.

The aggravating factors include the fact that the Member has one prior discipline finding against him, albeit the timing of that decision was such that the Member would not have had the benefit of the previous panel's decision at the time of the behavior that is the focus of this current hearing. Another aggravating factor is the length of time in which the conduct occurred; the conduct was not an isolated incident. That said the Panel agrees with Member's Counsel that the amount of money determined to have been billed inappropriately could have been higher given that the conduct occurred over nine years.

At the conclusion of the hearing the Panel administered the reprimand to the Member, a copy of which is attached to this decision.

Dated this 15th day of April 2021, at Toronto, Ontario.



Dr. Karin Simon, Chair

On behalf of:

Mr. Howard Kennedy  
Dr. Vivian Habib  
Dr. Mark Eltis  
Mr. Ravnit Dhaliwal

## **TEXT OF PUBLIC REPRIMAND**

**College of Optometrists of Ontario and Dr. Jon Barnes**

**March 29, 2021**

Dr. Barnes, the Panel after hearing the evidence, would like to express our concern with the gravity of the allegations. Specifically, we are a self-regulated profession with independence and with the moral imperative to act in a professional manner.

What we heard today with regard to improper billing and record-keeping over a period of nine years and involving many patients, concerns us. This constitutes for us a serious behavioural shortcoming.

The fact that you have admitted to the behaviour and agreed to rehabilitation is to your credit.

We expect you to fully comply with the terms of the penalty and previous remediation with regard to record keeping and proper billing practices.

Should you appear before the discipline committee again, the penalty would likely be significantly harsher. This panel views your conduct as unacceptable, unprofessional and unethical.

The Panel expects you to conduct yourself in accordance with the professional behaviour expected by members of this College.