[2012] WASAT 210

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	MEDICAL ACT 1894 (WA)
CITATION	**:**	MEDICAL BOARD OF AUSTRALIA and McCARTHY [2012] WASAT 210
MEMBER	**:**	JUSTICE J A CHANEY (PRESIDENT) MS R MOORE (MEMBER) DR B MENDELAWITZ (SENIOR SESSIONAL MEMBER) DR E ISAACHSEN (SENIOR SESSIONAL MEMBER)
HEARD	**:**	16 OCTOBER 2012
DELIVERED	**:**	5 NOVEMBER 2012
FILE NO/S	**:**	VR 21 of 2011
BETWEEN	**:**	MEDICAL BOARD OF AUSTRALIA Applicant AND PETER McCARTHY Respondent

Catchwords:

Medical practitioners - Gross carelessness - Allegedly false statements in medical report - Turns on own facts

Legislation:

Medical Act 1894 (WA), s 13(1)(c)

Result:

Application dismissed

Summary of Tribunal's decision:

The Medical Board of Australia alleged that a consultant psychiatrist, Dr McCarthy, was guilty of gross carelessness by making three incorrect statements in a medical report. The medical report was prepared at the request of the patient's former employer for use in legal proceedings between it and the patient.
The Tribunal assessed the statements in their context, reviewed the relevant evidence in relation to each statement, and concluded that the Board's allegations were not established. The application was dismissed.

Category: B

Representation:

Counsel:

Applicant	:	Mr RW Richardson and Mr M Davies
Respondent	:	Mr PD Quinlan SC

Solicitors:

Applicant	:	Tottle Partners
Respondent	:	Clayton Utz

Case(s) referred to in decision(s):

Hewett v Medical Board of Western Australia [2004] WASCA 170

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 Dr Peter McCarthy is a consultant psychiatrist with many years experience. In 2006, he undertook a medical review of KR. The review was undertaken on instructions from KR's former employer, Australia Post, for the purpose of workers compensation proceedings brought by KR against Australia Post in the Administrative Appeals Tribunal.

2 Dr McCarthy reviewed KR on 22 September 2006. He subsequently provided a report, dated 14 December 2006, to Australia Post. The Medical Board of Australia (Board) contends that three statements contained in that report were false, and that by making those statements, Dr McCarthy was grossly careless. The alleged inaccuracies are said to be grossly careless because of the significance of the statements to KR's claim, and to his entitlement to receive workers compensation payments.

3 Two broad questions arise in relation to each of the allegedly incorrect statements. The first question is whether the statement is inconsistent with what KR told Dr McCarthy during the consultation on 22 September 2006. The second question arises only if the answer to the first question is yes. In that event, the question arises as to whether the making of the incorrect statement amounts to gross carelessness for the purposes of s 13(1)(c) of the *Medical Act 1894* (WA) (which was the applicable disciplinary provision applying to medical practitioners at the relevant time).

The first statement

4 The first statement made in the report to which exception is taken is a statement that '[KR] admitted that his depression settled somewhat in 1998.'

5 The grounds of complaint particularise why that statement is said to be grossly careless. They read:

> In fact, [KR] told [Dr McCarthy] words to the effect that:
>
> (i) Australia Post had paid for him to consult with Dr Ng between the early part of 1997 and June 1998;
>
> (ii) Dr Ng had told him during a consultation in June 1998, that general practitioner's [sic] at Woodvale Park Medical Centre would resume

> responsibility for his day to day psychiatric care, and would continue to prescribe Zoloft to him;
>
> (iii) during the early part of 1997, he had started to take Zoloft at a dose of a 150 mg daily;
>
> (iv) during 1998, he had regularly taken Zoloft in varying doses, but that as a general rule he had taken 225 mg daily; and
>
> (v) he remained depressed throughout 1998, despite regularly taking the Zoloft prescribed to him by Dr Ng, and general practitioner's [sic] at Woodvale Park Medical Centre.

6 In his witness statement, KR gave evidence that he said the words to the effect as set out above.

7 The report was 10 pages in length. The first seven pages, in which all three of the allegedly incorrect statements are found, recited the history obtained by Dr McCarthy and concluded with his opinion. The balance of the report was given over to answering specific questions which had been asked of Dr McCarthy by Australia Post. In these proceedings, there is no complaint as to the ultimate diagnosis reached by Dr McCarthy.

8 The first thing that can be said about the first allegedly incorrect statement is that it comprises merely the first clause in a much longer sentence. The full sentence reads as follows:

> [KR] admitted that his depression settled somewhat in 1998, but maintained that he continued to have fluctuating symptoms of anxiety and depression for the 6 years of his business, although it appeared his mood disorder was not sufficient to motivate him to continue specialist treatment.

9 Two paragraphs earlier in the report, the following is said:

> In 1998 he bought a bob cat and a truck and began working in his own business in April 1998 at house sites. He continued seeing Dr Fred Ng, Psychiatrist, who in his letter of 5 January 1998 reported that [KR] was making good progress on his anti-depressant medication Zoloft (Sertraline) at the high but manageable dose of 225 mgs per day. Dr Fred Ng described his Major Depressive disorder as being in remission, i.e. having settled in January, although in his letter of 17 February 1998 he indicated that [KR] had become demoralised again due to a lack of work.
>
> [KR] had ceased seeing his Clinical Psychologist Graham Guest and thus the Psychiatrist Dr Fred Ng indicated he adopted a more psychotherapeutic role in [KR's] management, while [KR] remained on his anti-depressant medication. In June 1998 [KR's] depression was in remission, and had remained in remission. It appears the opportunity to purchase his own bob

> cat and truck and to start his own business, had led to a settling of his psychiatric symptoms. His psychiatrist noted that [KR's] morale and self-confidence, and his traumas from his difficulties at Australia Post 'certainly continued to recede into the background'. He remained on his anti-depressant medication, his depression remained in remission, and he ceased seeing his psychiatrist sometime in 1998.

10 KR was cross-examined about his condition in 1998. When pressed, he reluctantly accepted that he had experienced some improvement as a result of his medication in 1998. He said that if his condition was 50% in 1997, it would have been 60% in 1998, and that he was 'managing things better with the help of the drugs'.

11 As his report indicates, Dr McCarthy had before him a substantial volume of earlier medical reports, including the reports of Dr Frederick Ng, KR's treating psychiatrist. In cross-examination, KR ultimately accepted that, if the statement had said that 'his depression settled somewhat in 1998 as a result of taking Zoloft', then he would agree with that statement.

12 That concession is sufficient to dispose of the first complaint. Taken in its context, Dr McCarthy's report made abundantly clear that KR was on antidepressant medication during 1998, as the passages set out above illustrate. Construed in its context, the clause to which objection is taken does not suggest that the depression was somewhat settled independently of the taking of antidepressant medication. Construed in its context, the effect of the statement is a proposition which KR accepts as accurate.

13 Even apart from that, it is difficult to see why the Board would pursue this aspect of the allegations. Dr Ng's report of 8 April 1998 stated 'I do believe that the major depression remains in remission due to the Zoloft'. Two months later, on 5 June 1998, Dr Ng reported a significant improvement in KR's psychological state which he said 'comes about as a result of feeling back in control of his destiny, and of being able to perhaps earn a living on his own accord'. He described KR's depression as 'remaining in remission'.

14 Later that month, on 22 June 1998, Dr Ng described the depressive order as 'currently in remission' and said that he had responded exceedingly well to treatment so that his major depression 'is now clearly in remission, and he is asymptomatic'. He described the prognosis as good.

15 Thus, the comment 'his depression settled somewhat in 1998' appears almost an understatement when measured against the contents of Dr Ng's reports, which Dr McCarthy had before him and read prior to seeing KR.

16 The particulars in the grounds for complaint seem to place some emphasis on the proposition that KR 'did not admit or say that his depression settled somewhat in 1998'. It may be, therefore, that the nub of the complaint is that the source of the statement was said to be KR's admission, rather than the rather compelling support for the proposition found in Dr Ng's contemporaneous reports. Although we do not consider that an error of that kind would be capable of being described as gross carelessness, the proposition invites consideration of the evidence as to precisely what was said by KR at the consultation in September 2006.

17 We have already noted the reluctant acceptance by KR that there was a degree of improvement, albeit whilst he was taking a substantial dose of antidepressant medication. Dr McCarthy's notes of the consultation, which extend over some 16 pages, touch upon matters going back to the difficulties KR had whilst employed at Australia Post during the mid 1990's, and show that events during 1997 and 1998 were discussed. We are not satisfied that there was no discussion of the improvement of KR's mood in 1998. We did not find KR's evidence particularly reliable. His reluctance to accept the proposition, strongly supported by Dr Ng's contemporaneous reports, that his symptoms had improved significantly in 1998 demonstrated, in our view, a tendency to recollect events in a way that support his complaint against Dr McCarthy.

18 That conclusion is not affected by the evidence of KR's wife, JR. She attended the consultation with her husband and Dr McCarthy in September 2006. She said that KR did not say that his depression settled somewhat in 1998. We accept that those words were not expressly stated by KR. The report does not suggest otherwise. The statement is a statement of a conclusion or summary of a conversation. As already indicated, we are not satisfied that there was no conversation concerning the improvement in KR's symptoms in 1998. We would add that JR's strongly expressed assertion during a cross-examination that there was not really any improvement in KR's symptoms during 1998, in the context of her later concession that KR's condition fluctuated over the years and that his condition did improve 'because of his medication', and in the context of Dr Ng's contemporaneous reports, demonstrated a tendency to recount her recollection in a way most favourable to her husband's complaint to the Board. That tendency adversely affected the reliability of her evidence.

19 The first complaint is not made out.

The second statement

20 The second statement in respect of which complaint is made was that 'He was somewhat vague whether he remained on medication …'. That was in reference to the years between 1998 and 2004.

21 The grounds of complaint particularise why this statement is said to be grossly careless. They read:

> In fact, [KR] told [Dr McCarthy) words to the effect that:
>
> (i) between April [1998] and February 2004, he had worked as a self employed Bobcat driver;
>
> (ii) whilst working [as] a self employed Bobcat driver, he had made approximately twelve applications for employment and four applications for income protection and workers cover (**Application**);
>
> (iii) he had stopped taking Zoloft every time he completed an Application because he thought that each Application was more likely to succeed if he could manage without taking Zoloft;
>
> (iv) he had resumed taking Zoloft within approximately three days of completing each Application;
>
> (v) he had consulted with Dr Ng in October 2003 after which time, his prescription of Zoloft was increased to 275 mg daily;
>
> (vi) with the exception of the periods of time when he stopped taking Zoloft, he had regularly taken Zoloft between 1998 and 2004 in varying doses of between 225 mg and 275 mg daily; and
>
> (vii) he had remained depressed between 1998 and 2004.

22 In his written statement of evidence, KR said that he used words to the effect of those set out above. When questioned, KR accepted that the reason he stopped taking Zoloft when he completed an application for employment or income protection insurance was that he wanted to be able to respond negatively to a question in an application form as to whether he was currently taking any medication. He said that the statement in his written evidence that he did that 'every time' he completed an application was a mistake, and that he only did that sometimes. He said that he undertook this course on the advice of a doctor and he knew that it was misleading to do so. He said sometimes he would forget to take his medication, and sometimes he would go off it because he could not be

bothered. He acknowledged that he told Dr McCarthy that there were times when he went off his medication.

23 Having heard KR's evidence as to the frequency and duration of his periods off medication for various reasons, we did not gain a clear picture of the full extent to which he took medication during the relevant period. We accept that he was prescribed medication frequently between 1998 and 2004, but as indicated, we have no clear picture of the extent to which he took himself off medication during that period. Having heard an elaboration by KR of his account of what he told Dr McCarthy about his history of taking medication, we do not consider that it is possible to conclude that Dr McCarthy's conclusion that KR was 'somewhat vague' can be characterised as false, and certainly not grossly careless.

24 It is not surprising that KR might have been reluctant to address fully and clearly his practice which he knew to be misleading. He was clearly uncomfortable discussing that aspect of his evidence under questioning from counsel. If he exhibited the same reticence in his discussion with Dr McCarthy, the use of the expression 'somewhat vague' might well be explained.

25 We should add that we do not consider the statement in the report to convey the proposition that KR used the expression 'somewhat vague' nor do we find it surprising that those words do not appear in Dr McCarthy's notes. They are words simply expressing an evaluative conclusion from a conversation, the actual words of which cannot, for obvious reasons, be remembered by anyone.

The third statement

26 The third allegedly false statement in the report was 'He has now ceased his Zoloft (sertraline) although it is not clear when and his current medication is the antidepressant Edronax (reboxetine), 4 mgs Mane (a low dose) and Celebrex intermittently for his pain'.

27 That statement is said to be false on the following basis:

> In fact, [KR] told [Dr McCarthy] words to the effect that:
>
> (i) his prescription medication was currently Zoloft 200 mg daily, and Edronax 4 mg daily and;
>
> (ii) he was currently taking Zoloft 200 mg daily and Edronax 4 mg daily, and that he had previously taken Celebrex for his back pain.

28 KR gave evidence that he said the words to the effect alleged by the Board.

29 Dr McCarthy accepted, not surprisingly, that he had no independent recollection of the discussion with KR. He relied on his notes to support the statement made in his report. At page 7 of the notes, the following appears:

> Ng from 2003 was on 275 Zoloft a day
>
> Now
>
> Zoloft 200 mg
>
> Edronax 4 mg mane
>
> Celebrex - off and on

30 Below that entry appears the word 'no' with a line connecting it to the entry 'Zoloft 200 mg'.

31 Dr McCarthy construed those notes as showing that, initially KR told him that he was now taking a 200 milligram dose of Zoloft, but that he then contradicted that causing Dr McCarthy to write the word 'no' in his notes.

32 Dr McCarthy was cross-examined in relation to that entry. He accepted the possibility that he may have misheard KR, although only on the basis that 'anything is possible'. He was, however, firm in his view that the notes indicated that KR had contradicted his initial advice that he was, at the time, taking Zoloft. Both KR and JR were adamant that KR was in fact taking Zoloft at the relevant time, and that he did not say otherwise during his consultation with Dr McCarthy.

33 Counsel for both parties accepted, and we agree, that the task for the Tribunal is not simply a question of deciding whose evidence is to be preferred. Both accepted that the Tribunal should be guided by the observations of Miller J in ***Hewett v Medical Board of Western Australia*** [2004] WASCA 170 at [119] - [121] where his Honour said:

> 119 It may be tempting in disciplinary proceedings for a tribunal to look to see who is telling the truth and who is lying, but there is a danger in following this path. It overlooks the fact that the ultimate question for a tribunal in these circumstances is whether the tribunal of fact is persuaded on the balance of probability that the allegations contained within the Notice of Inquiry have been made out. In *Briginshaw v Briginshaw* (supra), Dixon J (at 362 - 363)

formulated the appropriate reasoning processes that are required of a tribunal of fact sitting as the Board was in this case. His Honour said:

> '… Reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of the given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of the kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency … It is often said that such an issue as fraud must be proved 'clearly', 'unequivocally', 'strictly' or 'with certainty' … This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil case may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues … but, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.'

120 This well-known and oft-cited passage stresses the need for the Board in this case to have approached its task by considering carefully as the primary issue whether it was satisfied to the requisite standard that the complaints made by Y had been made out. There is a danger that in looking first to see who was telling the truth and who was lying, the Board may have obscured what was the essence of its inquiry.

121 To the extent that the Board focused upon the question of "who is telling lies" it appears, in my view, to have misapprehended and oversimplified the task before it. I shall make further reference to this in discussing the relevance of *Sinha v Health Care Complaints Tribunal* [2001] NSWCA 206.

34 In this case, quite properly, neither counsel suggested that any of the witnesses were 'telling lies'. The question remains, however, whether the Tribunal is satisfied to the requisite standard that the complaints are made out.

35 We are not satisfied that, in the relevant sense, that KR did not somehow convey to Dr McCarthy that, at the time of the consultation, he was not taking Zoloft. Precisely how that information may have been conveyed is not possible to distil. The reasons we are not satisfied that the third statement did not correctly state information provided to Dr McCarthy by KR are as follows:

i) No other interpretation of the notation 'no' which was clearly connected to the notation in relation to Zoloft is readily apparent.

ii) It was clear from KR's evidence that for varying reasons he temporarily ceased taking Zoloft. He said in evidence '… sometimes I'd forget to take them, sometimes I just couldn't be bothered taking them depending on my mood if I'd been drinking. I just wouldn't take them …'. It is a reasonable possibility that something was said by KR in that context which led Dr McCarthy to conclude that KR was not then taking Zoloft.

iii) As we have already noted, we have concerns as to the reliability of the evidence of both KR and JR so that its weight is reduced to the extent that we are unable to be satisfied to the requisite standard that the report was false.

36 It follows that the third complaint is not made out.

Dr McCarthy's response to the Medical Board

37 When KR's complaints were first referred to Dr McCarthy, he responded by letter to the Board. In that letter he described KR's complaints as 'vexatious, malicious, inappropriate and incorrect'. He said 'This man is currently behaving as he behaved on a number of fronts for many years and I don't imagine any response would reassure him'.

38 Dr McCarthy was cross-examined on those statements and it was put to him that they demonstrated an antipathy to KR which could only have emerged from his consultation with KR in September 2006, and provided

a context against which the allegedly incorrect statements had been made. Dr McCarthy denied that proposition.

39 We do not consider that those statements in Dr McCarthy's letter of response to the Board, unfortunate as they are, should lead us to the inference suggested by counsel for the Board. The comments can more easily be construed as demonstrating a sense of indignance on Dr McCarthy's part at the making of a complaint to his professional regulatory authority. Having said that, we would observe that the statements made by Dr McCarthy in his response were particularly unfortunate and ill-advised. No matter how unjustified a complaint might be thought to be, members of the public are entitled to bring their grievances to the appropriate authority, and to have them investigated. They are entitled to be treated with respect. Inflammatory responses respect neither the complainant nor the process. It is especially surprising to see comments of that nature made by a psychiatrist, albeit not the treating psychiatrist, in relation to a patient who has been treated over an extensive period for significant depression.

Conclusion

40 For the above reasons we find that the complaints of gross carelessness are not made out and the application should be dismissed. At the close of the hearing, counsel for Dr McCarthy foreshadowed an application for costs. The matter will be listed for directions on the question of costs.

Orders

1. The application is dismissed

2. The question of costs is listed for directions at 10 am on 13 November 2012.

I certify that this and the preceding [40] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUSTICE J A CHANEY, PRESIDENT