



MEDICAL TRIBUNAL OF NSW

Deputy Chairperson: Judge A. Balla

Members Dr G Yeo
Dr P Tucker
Dr C Berglund, PhD

Matter no: 40002 of 2008

Complainant: Health Care Complaints Commission

Respondent: Dr Jason Jefferson Martin

Counsel for the Complainant: Ms G Furness

Counsel for the Respondent: Mr M Ainsworth

Judgment Date: 26 March 2009

Dr Martin is a general practitioner. In 2003 he became addicted to codeine. In 2004 he agreed to conditions being placed on his registration as part of the Impaired Registrants Program.

Dr Martin concedes he has breached those conditions. The Health Care Complaints Commission seeks to have his name removed from the Register.

The issues to be determined by the Tribunal are the following:

- whether Dr Martin has an ongoing impairment which detrimentally affects or is likely to detrimentally affect his capacity to practise medicine;
- the appropriate disciplinary Orders.

The First Complaint – Contravention of Conditions

Conduct leading up to the imposition of conditions on Dr Martin's registration

Dr Martin, who is now 37 has suffered from anxiety and depression for many years. He had been prescribed antidepressants in his last two years at high school, when he was in his fourth year of studying medicine and again when he was working as a resident.

In 2003 Dr Martin broke a rib in a car accident. He started taking Nurofen Plus to control the pain. At the time his wife was pregnant and he was under a lot of stress. He found that the codeine in the Nurofen Plus alleviated his anxieties. Over the next 12 months his dosage increased from 2 to 20 tablets a day. After his first child was born he developed a preoccupation with the baby's safety. He prescribed codeine in his wife's name and visited multiple pharmacies to fill the prescriptions.

On 28 May 2004 a pharmacist informed the Pharmaceutical Services Branch that Dr Martin was prescribing codeine tablets in his wife's name. An investigator then found prescriptions at several other pharmacies in the area. On 1 June 2004 Dr Martin admitted his addiction and his conduct.

On 4 August 2004 Dr Martin appeared before an Impaired Registrant's Panel and agreed to 17 conditions being placed on his registration including the following:

- Health condition 3 – Dr Martin was not to administer any substance detailed in schedule 4 or 8 of the NSW Poisons List or Schedule 1 of the Drug Misuse and Trafficking Act.

He was not to self administer any narcotic derivative, non-prescription compound analgesic or cold medication which was only to be taken at the direction of and prescribed by his treating doctor. He was to notify the Board nominated psychiatrist and the Board of any illness requiring the administration of any of those medications and within seven days of such prescription he was to provide the NSW Medical Board with written confirmation of such treatment from the treating practitioner.

- Health condition 9 – Dr Martin was to attend for thrice weekly urine drug testing in accordance with the Board’s protocol and send the test results to his treating and the Board appointed doctors and the Board.
- Health condition 10 – Dr Martin was to have blood taken for the measurement of carbohydrate deficient transferrin levels at monthly intervals and send the test results to his treating and the Board appointed doctors and the Board.

Conduct since 4 August 2004

During these proceedings Dr Martin admitted the particulars of the first Complaint (as amended). They are the following:

Breach of Health Condition 3

1. That he self-medicated and administered narcotic derivative non prescription compound analgesic and/or cold medications on 17 occasions between 20 December 2004 and 28 September 2007. The principal drug detected was morphine trace, although on two occasions pseudoephedrine was detected.

Dr Martin told the Board and some doctors that the positive results had been due to the accidental ingestion of poppy seeds in food and the use of Nurofen Plus for migraine.

However when he gave evidence he admitted that on those occasions when a morphine trace had been detected in his urine he had used Nurofen Plus for sinusitis headache. The two pseudoephedrine results had been caused by his taking Panadol sinus tablets for the same purpose.

Dr Martin conceded that he had deliberately lied when he had told the Board that either he could not explain the test result or that it was a result of the ingestion of poppy seeds. He said he thought that if he admitted the truth that he would be de-registered immediately.

2. That Dr Martin had failed to notify the Board of illness requiring the administration of those substances, and/or failed to provide the Board with written confirmation of the treatment from his treating practitioner within seven days of the prescription.
3. His urine tests were positive for Temazepam on four occasions in August 2004. Dr Martin conceded that he had taken Temazepam on each occasion prior to the samples being taken. It had been prescribed by his general practitioner Dr Simon Wilcox and Dr Martin had understood that Dr Wilcox would inform the Board. Dr Martin concedes that he failed to notify the Board that he had an illness requiring the administration of Temazepam and failed to provide the Board with written confirmation of such treatment.

Breach of Health Condition 9

4. Dr Martin was required to attend for urine testing three times a week. There was an ongoing issue with the samples provided being dilute or very dilute. The Protocol explains that this renders the test invalid.

Dr Martin concedes that there were 72 such samples between 24 December 2004 and 17 February 2008.

There was ongoing correspondence between the Board and Dr Martin in relation to this issue. By letter dated 2 May 2005 Dr Martin said *"The likely cause .. is the fact that I try to drink 2 to 3 litres of fluid per day ... I will cut this down from now on."*

However Dr Martin continued to provide dilute samples. By letter dated 19 June 2005 he told the Board that he drank at least 3 litres of fluid a day but would undertake to have the urine test in the morning so his samples would not be dilute.

In July 2005, he was again advised by the Board that some samples had been dilute. By letter dated 28 July 2005 Dr Martin said that the change of time for the giving of the sample had been unsuccessful so he would try and restrict his fluid intake.

On 26 September 2005, the Board advised him of five more dilute samples. He replied the next day and said he would endeavour to restrict his fluid intake further.

On 25 January 2006, the Board wrote to Dr Martin advising that 4 out of 12 recent samples had been dilute. His letter dated 6 February 2006 did not respond to the numbers of dilute samples.

On 26 July 2006 the Board wrote to Dr Martin advising of two dilute samples earlier that month and asking for an explanation. He responded that he did not remember the samples appearing dilute but he had taken the necessary steps to avoid it occurring again by further restricting his fluid intake.

On 2 March 2007 the Board wrote again advising that since September 2006 a number of samples had been dilute and providing a copy of the urine drug testing summary. In his reply dated 28 March 2007 Dr Martin said he had no explanation for the dilute samples but undertook to consume less fluid on the days he provided samples.

The Board wrote again on 7 June 2007 that it advised that since receiving his letter dated 28 March 2007 there had been three dilute samples and one very dilute sample. By letter dated 21 June 2007 Dr Martin said that a Vitamin B supplement was making his urine dark yellow so he had been unable to gauge whether the sample was dilute. He had ceased the medication and would no longer drink fluid on the day of the test until he had provided a sample.

When giving evidence in these proceedings Dr Martin conceded that in these letters he had deliberately misled the Board. He had not intended to cut down his fluid intake and had continued to drink the same level of fluid. He denied deliberately diluting his urine to avoid detection of further use of codeine phosphate.

5. Dr Martin conceded that he had contravened the condition by failing to actively avoid the consumption of foods containing poppy seeds. There is some inconsistency between this admission and his evidence in cross examination that his excuse based on poppy seed consumption was untrue.
6. Dr Martin failed to attend for urine drug testing on 78 occasions. A medical certificate was provided on 62 occasions and on 16 occasions he failed to provide a medical certificate.
7. Dr Martin failed to forward the urine drug testing results to the Board's nominated psychiatrist between 30 March 2007 and 21 November 2007.

Breach of Health Condition 10

8. Dr Martin failed to forward the CDT test results to the Board's nominated psychiatrist between 30 March 2007 and 21 November 2007.

Dr Martin and his treating doctors attributed his non-compliance with the conditions on his registration to his underlying anxiety and depression.

Dr Martin believes the conduct causing the breaches was a result of his anxiety and depression. He said he had had a poor attitude caused by negative thought processes. He resented having to conform to the conditions on his registration.

Dr Ilchef has been Dr Martin's treating psychiatrist since September 2004 and has seen him 30 or 40 times. He diagnosed a very severe generalised anxiety disorder, social phobia (social anxiety disorder), a major depressive disorder and opioid and alcohol abuse.

Dr Ilchef said that when he first started to treat Dr Martin he had been fairly evasive and displayed almost an oppositional attitude. He had not taken the conditions on his registration very seriously. He now attributes that behaviour to Dr Martin's depressive disorders clouding his judgment.

Dr Wuthrich has been Dr Martin's treating psychologist having seen him 43 times since November 2004. She implemented cognitive behavioural therapy to address his anxiety and depression.

Both Dr Ilchef and Dr Wuthrich identified a significant change in Dr Martin's attitude after a two week admission to the Northside Clinic in April 2007 for treatment of his depression. Dr Martin said he had asked to be admitted because he had experienced a period of acute mood deterioration associated with an increase in his use of alcohol to six to eight standard drinks a day. His medication was changed and after he was discharged he started to regularly attend the Doctors In Recovery group. He still attends that group.

In February 2008 Dr Martin started attending almost daily urine testing on the advice of his solicitor. That continued until early September 2008. Since then he has been attending at least 3 times a week. There has been only one dilute sample which was on 16 January 2009 (which is unexplained) and there have been no positive screens.

Dr Martin said that his attitude changed in around February 2008. In the preceding months his depression and anxiety had responded well to the change in the doses of his medications. He said he came to the understanding that he needed to comply with the conditions on his registration to progress from the Impaired Registrants Program and to remain practising as a doctor.

In assessing the weight of this evidence as to the change in Dr Martin's attitude the Tribunal takes into account a number of matters. The "significant improvement" described by his treating practitioners is not consistent with Dr Martin continuing to lie to the Board throughout 2007 and to provide dilute urine samples. The two treating practitioners have proceeded on the basis that Dr Martin told them the truth. However he did not disclose to them the extent of the behaviour underlying the first complaint. In addition they are not experts in the consequences of addiction.

Further, the Tribunal is not satisfied that Dr Martin was a reliable witness. He had lied to those in authority on several occasions over many years. The most significant admissions were only made when he gave evidence in these proceedings.

However the Tribunal has received evidence from Dr Wodak who was retained by the Health Care Complaints Commission. He is an expert in the treatment of alcohol and drug dependence. Dr Wodak is of the view that Dr Martin's prognosis is very positive based on the test results over the last 11 months and the descriptions given by Dr Martin's treating doctors.

Dr Pethebridge is the psychiatrist who has regularly reviewed Dr Martin for the Board since July 2004. He is a specialist in the rehabilitation of impaired doctors. He was of the view that the threat of suspension from practice precipitated the changes in Dr Martin's behaviour. Dr Pethebridge believes that Dr Martin's compliance over the past year is a good indication that he has a good prognosis. The regular consultations with his psychiatrist and psychologist have resulted in significant progress, in particular the cognitive behaviour therapy has assisted him to deal with his anxiety.

The Tribunal accordingly accepts that over the past 12 months Dr Martin has displayed a significant change in his behaviour and attitude. Over that year he has complied with the conditions on his registration and there is no evidence of his using any substance for which his urine has been tested.

The Second Complaint – Impairment

Impairment as defined in the dictionary to the Act in the following terms:

A person is considered to suffer from an impairment if the person suffers from any physical or mental impairment, disability, condition or disorder which detrimentally affects or is likely to detrimentally affect the person's physical or mental capacity to practise medicine. Habitual drunkenness or addiction to a deleterious drug is considered to be a physical or mental disorder.

Counsel for the Health Care Complaints Commission submitted that the appropriate interpretation of that section is to consider the condition or disorder from which the practitioner suffers and then decide whether that condition or disorder is likely to detrimentally affect the capacity to practise medicine. Whether or not there is treatment and whether or not the person is compliant with that treatment and it is effective then becomes a relevant consideration for determining the appropriate order to be made.

Counsel for Dr Martin submitted that the doctor's substance abuse, anxiety and depression are now managed and are not detrimentally affecting his practice of medicine. This could only occur if he ceased all treatment, become chronically depressed, displayed the features of his anxiety disorder and returned to using opioids. Many members of society with these conditions function well with treatment.

In the view of the Tribunal the definition requires us first to identify the physical or mental impairment, disability, condition or disorder and then determine whether it is likely to detrimentally affect the person's physical or mental capacity to practise medicine.

In this case the evidence establishes that Dr Martin has since an early age suffered from a generalised anxiety disorder associated with episodes of major depression. These conditions led to his abusing codeine to relieve his anxiety. He also has had issues with alcohol from time to time. We are satisfied there is a relevant condition as required by the definition.

The next issue is then whether these conditions are likely to detrimentally affect the person's physical or mental capacity to practise medicine. At this stage the anxiety and depressive symptoms are being controlled by medication. There is no evidence of substance abuse in the past year. Dr Martin said that the last time he drank a bottle of spirits over three days was eight or nine months ago.

However these factors do not mean that Dr Martin has been "cured". The evidence of Dr Wodak and Dr Pethebridge is to the effect that while there are promising signs, he is still in the early

stages. A very common outcome of all dependencies is relapse often for reasons that are completely uncertain and never known. The chance of relapse will only have significantly diminished in another 6 or 12 months. In this case, where the improvement has been precipitated by the threat of suspension or removal from the Register, the completion of these proceedings might result in Dr Martin resuming his earlier behaviour.

The Tribunal accordingly is comfortably satisfied that Dr Martin's condition is likely to detrimentally affect his capacity to practise medicine and that he suffers from an impairment as defined in the Medical Practice Act 1992.

Sections 36 and 37 of the Medical Practice Act 1992

The most significant breaches by Dr Martin were:

- his use of Nurofen Plus and Panadol Sinus from 20 December 2004 to 21 April 2006;
- consuming excessive fluids on 72 occasions from 24 December 2004 to 4 June 2007 so that the urine testing could not be undertaken.

These breaches were deliberate, occurred on many occasions and over a lengthy period. They were aggravated by the doctor's conduct in being untruthful with both the Board and Dr Pethebridge. In addition he misled Dr Pethebridge by failing to give him the test results as required by the conditions on his registration. As a consequence Dr Pethebridge was unable to properly advise the Board to enable it to make informed decisions about the management of Dr Martin in the Impaired Registrants Program.

Bearing in mind the high standard of proof required, the Tribunal declines to find that Dr Martin failed to attend at urine testing on some occasions and deliberately diluted his urine in order to mask ongoing codeine use. The Tribunal does however find that Dr Martin's deliberate conduct prevented the Board from properly monitoring his compliance with the conditions placed on his registration.

As set out in *Health Care Complaints Commission v McHue* NSW Medical Tribunal 14 December 2007, "Repeated wilful breaches of conditions are treated by the Medical Tribunal as a most serious finding against a practitioner containing as it does a grave criticism of the standard of the practitioner's conduct" (at paragraph 29).

The Tribunal finds that Dr Martin is guilty of unsatisfactory professional conduct within the meaning of Section 36 of the Medical Practice Act 1992.

The Tribunal is further satisfied that the conduct was of a sufficiently serious nature to justify suspension of the practitioner from practising medicine or the removal of the practitioner's name from the register and accordingly the Tribunal finds the practitioner guilty of professional misconduct within the meaning of Section 37 of the Medical Practice Act 1992.

Orders

The fact that Dr Martin's conduct was sufficiently serious to justify suspension or removal from the register does not mean that his name must be removed. This course was urged on the Tribunal by the Health Care Complaints Commission.

The legislation makes it clear that the full range of disciplinary powers is available to this Tribunal on a finding of professional misconduct. The discretion of the Tribunal is at large and will depend upon the circumstances of the individual case.

The purpose of disciplinary proceedings is to maintain proper ethical and professional standards in protection of the community and also to protect the good standing and reputation of the profession. The object of protecting the public includes deterring the practitioner from repeating his misconduct and deterring others who might be tempted to behave in a similar way. Deregistration may be necessary to protect the public from the risk of recurrence of further professional misconduct, deter the practitioner from repeating the misconduct, deter others, maintain the standards of the profession and maintain public confidence in the profession. Even in cases of serious misconduct deregistration does not necessarily follow if at the time of the hearing present unfitness has not been demonstrated. Present fitness to practice is a relevant consideration.

In assessing the appropriate Orders the Tribunal has taken a number of matters into account.

In 2004 Dr Martin was given an opportunity to remain in practice on certain conditions. As the Tribunal observed in the decision in *McHue* (supra, at paragraph 34) the Impaired Practitioners Program exists to enable doctors with health problems impacting on their ability to practise to avoid removal from the Register. However the Board through the Program cannot protect the public if a doctor does not comply with the conditions and ignores them with impunity.

For three years Dr Martin abused that opportunity. The Tribunal accepts that his attitude may at least in part have been caused by his depression and anxiety. In any event he has over the last year shown a willingness to participate in a process which firstly addresses his problems with counselling and treatment and secondly monitors his compliance with testing and reviews. His change in attitude did not extend to expressing any remorse or contrition for his earlier behaviour.

Balancing the many matters which this Tribunal must take into account the Tribunal has determined that this is not a case in which it should exercise its power to deregister Dr Martin or suspend his registration. The Tribunal has determined that the appropriate Orders are:

- a reprimand;
- conditions to ensure Dr Martin continues to obtain appropriate treatment and that his compliance is monitored.

In drafting the conditions the Tribunal has taken into account the slowness with which the past breaches were identified and addressed. In part this is due to the privacy restrictions preventing sharing of information between PALMS (which undertakes testing), the Health Care Complaints Commission, the NSW Medical Board and the Board appointed psychiatrist. Accordingly Dr Martin will be required to consent to the sharing of that information and to provide contact details to facilitate that sharing.

Next the Tribunal was concerned to address the situation where Dr Martin misses a urine test. In the past this has occurred for several reasons – when Dr Martin forgot to go to his usual appointment, when he went on holiday or when he was too ill to attend. Accordingly the Tribunal will impose an additional condition – that he attend monthly for Hair Drug Testing. This is not intended to replace urine drug testing for two reasons – firstly the Protocol says it is not an acceptable alternative and secondly the Protocol mentions that there can be a significant delay in the provision of the test result so it would not be desirable for it to be the only test.

Next the Tribunal was concerned at the failure of Dr Martin to provide medical certificates from his treating general practitioner for missed urine tests. This does not appear to be an express requirement in the Protocol. Accordingly the condition has been drafted to require any medical certificate to be provided by his treating general practitioner or one other nominated doctor who is approved by the Board. In the opinion of the Tribunal it would be preferable if the alternate doctor was situated within the same practice as the treating doctor to ensure that the medical records are centralised.

Next the Tribunal has determined that the conditions requiring Dr Martin to attend a Board nominated psychiatrist and a Review panel should be amended to provide that he next attend within 3 months to ensure that his progress after the completion of these proceedings is closely monitored.

Otherwise the conditions which the Tribunal will impose are similar to those which are currently in place.

Costs

Counsel for Dr Martin submitted he should not be required to pay costs because the matter could have been brought before the Professional Standards Committee.

This matter has been properly brought before the Tribunal. In circumstances where the breaches have been admitted and impairment found costs should follow the event.

Orders:

1. The Tribunal:
 - marks its strong disapproval of Dr Martin's conduct being his breach of the conditions on his registration and his misleading of the NSW Medical Board and its appointed psychiatrist; and
 - emphasises the importance of complying with such conditions to other doctors

by reprimanding Dr Martin pursuant to Section 61 of the Medical Practice Act.

2. Dr Martin's registration is subject to the following conditions. Practice Condition 1 and Health Conditions 1, 3 and 10 are Critical Compliance Conditions as defined in section 61 (3) of the Medical Practice Act 1992.

Practice Conditions

1.
 - a. Not to prescribe, possess, supply, administer, handle or dispense any drug of addiction (Schedule 8 drug).

- b. Any future change in Schedule 8 authority must be in accordance with the NSW Medical Board's protocol. This must include consultation with the NSW Medical Board prior to the submission of any variation application to the Pharmaceutical Services Branch of the NSW Health Department.
2. Not to undertake solo general practice work.
3. To advise the NSW Medical Board prior to changing the nature or place of his practice.
4. To authorise the NSW Medical Board to notify any prospective employer(s) of his Practice Conditions.
5. To provide the NSW Medical Board with a copy of his Practice Conditions signed by his current practice partners within seven days of receipt of these conditions, and/or by his employer prior to commencing any employment.

Health Conditions

1. To not prescribe for self-medication.
2. To attend for treatment by a general practitioner of his choice, currently Dr Aitken, at a frequency to be determined by Dr Martin and the treating practitioner. To authorise the treating practitioner to inform the NSW Medical Board of any failure to attend for treatment or termination of treatment, or if there is any significant change in health status (including a significant temporary change).
3. Not to self-administer:
 - a. Any substance detailed in Schedule 4 or 8 of the NSW Poisons List or Schedule 1 of the Drug Misuse and Trafficking Act.
 - b. Any narcotic derivative.
 - c. Any non-prescription compound analgesic or cold medication. Such medications must only be prescribed and taken at the direction of the treating practitioner.

except as provided in condition 4.

4. Dr Martin must notify the NSW Medical Board nominated psychiatrist and the NSW Medical Board, should he be prescribed or directed to take:
 - a. Any substance detailed in Schedule 8 of the NSW Poisons List or Schedule 1 of the Drug Misuse and Trafficking Act, or Appendix D of Schedule 4 of the NSW Poisons List.
 - b. Any narcotic derivative.
 - c. Any non-prescription compound analgesic or cold medication.

In addition within seven days of such prescription or direction he must provide the NSW Medical Board with written confirmation of such treatment from the treating practitioner.

5. To limit his alcohol intake to social consumption, defined by the NSW Medical Board as being not more than 2-3 standard drinks in any 24 hour period, with a minimum of two alcohol-free days per week. A standard drink contains not more than 10 grams alcohol.
6. To attend for treatment by a psychiatrist of his choice, currently Dr Ilchef, at a frequency to be determined by the treating psychiatrist. To notify the NSW Medical Board of the name of his treating psychiatrist within two weeks of any change of treating psychiatrist. To authorise the treating psychiatrist to inform the NSW Medical Board of any failure to attend for treatment, termination of treatment or if there is a significant change in health status (including a significant temporary change).
7. To continue taking any medication prescribed by his treating psychiatrist.
8. To attend for treatment by a psychologist of his choice, currently Dr Viviana Wuthrich, at a frequency to be determined by the treating practitioner. To notify the NSW Medical Board of the name of his treating psychologist within two weeks of any change of treating psychologist. To authorise the treating practitioner to inform

the NSW Medical Board of any failure to attend for treatment or termination of treatment, or if there is a significant change in health status (including a significant temporary change).

9. The extent of his professional medical duties is to be guided by his health status and the advice of his treating and Board-nominated practitioners.
10. a. To attend for thrice weekly Urine Drug Testing in strict accordance with the NSW Medical Board's protocol (a copy of which is included in the Participant's Handbook). Results of Urine Drug Testing to be forwarded to the Board-nominated and treating practitioners and to the NSW Medical Board. Such Urine Drug Testing to be at Dr Martin's expense.

b. If Dr Martin misses a test due to illness and seeks to provide an explanation pursuant to paragraph 3.5 of the NSW Medical Board's protocol, any accompanying medical certificate must be issued by his nominated treating general practitioner or one alternative general practitioner previously approved by the NSW Medical Board.
11. To attend for monthly Hair Drug Testing at a facility approved by the NSW Medical Board. The results of all tests to be forwarded to the treating and Board-nominated practitioners and to the NSW Medical Board. Such Hair Drug Testing to be at Dr Martin's expense.
12. To have blood taken for measurement of Carbohydrate Deficient Transferrin (CDT) levels at monthly intervals in strict accordance with the NSW Medical Board's protocol. The results of all tests to be forwarded to the treating and Board-nominated practitioners and to the NSW Medical Board. Such testing to be at Dr Martin's expense.
13. To authorise the facilities undertaking the testing set out in Health Conditions 10, 11 and 12 to provide the results of the tests to the Board-nominated practitioners and to the NSW Medical Board. Dr Martin also authorises the facilities, on receiving a request from the Health Care Complaints Commission, to provide the results of the tests to the Health Care Complaints Commission.

14. To attend for review by the Board-nominated psychiatrist, initially on a three monthly basis, and subsequently as directed by the NSW Medical Board, at the NSW Medical Board's expense.
15. To attend a Review Interview at the NSW Medical Board in three months or as otherwise directed by the NSW Medical Board.
16. To authorise the NSW Medical Board to forward copies of any Board Review Interview reports and other information relevant to his impairment to the Board-nominated practitioners and his treating practitioners. To notify the NSW Medical Board immediately of any change in treating practitioners so that copies of these documents may be provided to them.

The Medical Tribunal is the appropriate review body for the purposes of s.92 and 93 of the *Medical Practice Act 1992*.

3. A contravention of Practice Condition 1 or Health Condition 1, 3 or 10 to result in the deregistration of Dr Martin pursuant to section 61(3) of the Medical Practice Act 1992.
4. Dr Martin to pay the costs of these proceedings.