

**THE DISCIPLINE COMMITTEE OF THE  
COLLEGE OF OPTICIANS OF ONTARIO**

Panel: Mr. Fazal Khan, Chair, Elected Optician Member  
Ms. Eve Hoche, Public Member  
Ms. Gloria Baltazar, Public Member

Between

College of Optician of Ontario

Mr. Robert Cosman, Counsel for the College

And

Ms. Melisse Willems, Counsel for the College

Mr. Arthur Kochberg, C-202

Member, Self Represented

Mr. Brendan Van Niejenhuis

Independent Legal Counsel

February 12, 2009

**DECISION AND REASONS**

The matter came on for hearing before a panel of the Discipline Committee on February 12, 2009 at the College of Opticians of Ontario in Toronto.

The Allegations

Counsel for the College submitted a copy of the Notice of Hearing (marked as Exhibit 1) which set out the allegations against Mr. Kochberg. It was alleged that Mr. Kochberg committed acts of professional misconduct as defined in section 1, paragraphs 2, 5, 24, 26, 26 and 28 of Ontario Regulation 216/94, as amended, promulgated pursuant to the *Opticianry Act*, S.O. 1991, c.34 (the "Act"), in that, on or about November 2006 through April 1, 2007 he:

- (a) Permitted, counselled or assisted persons who are not registered under the Act to perform an act that should be performed by a member, namely prescribing and/or dispensing for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers;
- (b) Contravened a standard of practice of the profession;



- (c) Submitted an account or charge for services that he knew or ought to have known was misleading;
- (d) Engaged in conduct or performed an act, in the course of practicing opticianry, that, having regard to all the circumstances, would reasonably be regarded by members of the College of Opticians as disgraceful, dishonourable or unprofessional.

The particulars of these allegations were described as follows:

- (i) As specified in the Affidavits of Investigation sworn and filed in the Ontario Superior Court of Justice, Court File No. 06-CV-322962PD2;
- (ii) As specified in the Green Shield Canada complaint dated February 12, 2007 and attachments thereto;
- (iii) As may be further specified in the disclosure to be made herein.

#### Member's Plea

Mr. Kochberg pleaded no contest to both the Facts and Findings as set out by the College. College Counsel advised the Panel of the meaning of a 'No Contest' plea. Mr. Cosman submitted a document titled College of Physicians and Surgeons of Ontario Rule Regarding Plea of No Contest. This was marked Exhibit 2.

Mr. Cosman explained that a 'Plea of No Contest' historically was imported into Canadian jurisdiction from the U. S. where it is a standard plea and has been adopted in some circumstances in Canada.

Referring to subsection 2 of Exhibit 2 Mr. Cosman indicated what the College would be referring to:

"Where a member enters a plea of no contest, the prosecutor shall state the facts alleged and the findings requested by the College, and the member or his or her representative shall state that the member does not contest those facts and findings for the purpose of the proceeding only."

At this point Mr. Kochberg agreed with the nature of the plea and confirmed that he pleaded "no contest" after hearing the College's description of the consequences of the plea.

#### Statement of Facts

Counsel for the College put before the Panel Exhibit 3 titled "Facts Alleged By The College Against Arthur Kochberg".



## FACTS

1. Arthur Kochberg was a member of the College of Opticians of Ontario, registration number C-202, until his certificate of registration was suspended on December 20, 2007.
2. Bruce Bergez controls the operations of a chain of optical stores operating under the name "Great Glasses." After Bruce Bergez was suspended by the College of Opticians on November 16, 2006, Mr. Kochberg was hired by him to be the optician in charge of the dispensing that takes place at the Great Glasses stores. Mr. Kochberg worked at Great Glasses under Mr. Bergez direction and control as the optician responsible for the practice of opticianry at Great Glasses stores.
3. From March 8-22, 2007, investigators for the College of Opticians attended, without prescriptions from optometrists or physicians, at the Great Glasses stores located at:
  - (a) 125 The Queensway, Etobicoke;
  - (b) 1865 Lakeshore Road, Mississauga;
  - (c) 2180 Itabashi Way, Burlington;
  - (d) 135 Upper Centennial Parkway, Unit#5, Stoney Creek;
  - (e) 95 Saginaw Parkway, Unit#6, Cambridge;
  - (f) 1070 Major Mackenzie Drive East, Richmond Hill;
  - (g) 1250 Steeles Avenue East, Milton;
  - (h) 300 King George Road, Brantford;
  - (i) 26-17 Worthington Street, Brampton
  - (j) 20-9200 Bathurst Street, Thornhill;
  - (k) 808 York Mills Road, Toronto;
  - (l) 119 Osler Drive, Unit#7, Dundas;
  - (m) 483 Hwy #8, Stoney Creek, and
  - (n) 285 Geneva Street, St. Catharines.
4. At each store, staff members, who are not opticians, optometrists or physicians, performed eye tests using the Eyelologic machine on the investigators and dispensed prescription eyeglasses to the investigators based on the refracting information from the eye tests without a prescription from a physician or optometrist.



5. Although Mr. Kochberg knew or should have known that dispensing must not take place without a prescription from a physician or optometrist, he followed Bruce Bergez' direction to him to counsel, permit and allow the staff members working at Great Glasses to dispense to the investigators without valid prescriptions but, rather, on the basis of the eye tests performed in the Great Glasses stores.
6. Further, each Great Glasses store for which Arthur Kochberg was responsible advertised "Free Eye Tests" to the public, which was misleading as the eye tests conducted at Great Glasses were not performed by persons authorized to do so. Mr. Kochberg knew or should have known that this advertising was misleading.
7. From approximately November 24, 2006 to January 26, 2007, Mr. Kochberg allowed staff members working at Great Glasses to sign Vision Claim Forms for insurance purposes on his behalf and indicate that he was the dispensing optician, even though he did not meet with or dispense to any of the patients for whom the forms were completed.
8. From approximately November 24, 2006 to January 26, 2007, Mr. Kochberg allowed invoices from Great Glasses to be issued under the name "FOO Optical", even though no such business entity is registered as is required by the *Business Names Act*, R.S.O. 1990, c.B.17.
9. On February 5, 2007, Mr. Kochberg, under the direction of Mr. Bergez, performed refractometry on Sharon Sicoli at Great Glasses, 1550 Upper James Street, Hamilton, Ontario, contrary to the standard of practice and directive of the College of Opticians of Ontario, issued by the Council of the College of Opticians on March 9, 2001, which was disseminated to the members on or about March 14, 2001, which prohibited members from performing refractometry until effective enforceable standards of practice for the performance of refractometry by opticians had been developed and adopted. Mr. Kochberg was aware of the standard of practice concerning refractometry at the time.

Mr. Cosman indicated that when a member enters a plea of no contest, the prosecutor shall state the facts alleged and the findings requested by the College and the member or his or her representative shall state that the member does not contest those facts and findings for the purpose of this proceeding only, which he did.

Mr. Kochberg confirmed to the Panel that he did not contest any of the facts alleged by the College. In addition, Mr. Kochberg confirmed to the Panel that he did not contest the findings of professional misconduct, based on those facts.

Mr. Cosman having already stated the facts to the Panel then admitted Exhibit 4-A, " Decision And Order On Findings" to the Panel.



## **DECISION AND REASONS:**

The panel reviewed and considered the Notice of Hearing, Exhibit 1, The College of Physicians and Surgeons of Ontario Rule Regarding Plea of No Contest, Exhibit 2, the Facts Alleged by the College Against Mr. Kochberg, Exhibit 3 and the voluntary plea of 'No Contest' by Mr. Kochberg.

Referring to Exhibit 2, section 3.02(1) subsections a, b and c, the Panel accepted as correct the facts alleged as set out in Exhibit 3, without hearing evidence and that these facts support the allegations of professional misconduct as contained in the Notice of Hearing.

The Discipline Committee finds the Member, Arthur Kochberg, has committed acts of professional misconduct as alleged in paragraphs (a), (b), (c), and (d) of the Notice of Hearing and as defined in section 1, paragraphs 1,5, 24, 26, 27 and 28 of Regulation 828/93, as amended, promulgated pursuant to the *Opticianry Act*, S.O. 1991, c.34, in that, on or about November 2006 through April 1, 2007, he:

- (a) Permitted, counselled or assisted persons who are not registered under the Medicine Act or Optometry Act to perform an act that should be performed by a member, namely, prescribing for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers;
- (b) Permitted, counselled or assisted persons who are not registered under the Medicine Act, Optometry Act or Opticianry Act to perform an act that should be performed by a member, namely, dispensing for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers;
- (c) Contravened a standard of practice of the profession in that he performed refractometry on Sharon Sicoli at Great Glasses, 1550 Upper James Street, Hamilton, Ontario, contrary to the standard of practice and directive of the College of Opticians of Ontario, issued by the Council of the College of Opticians on March 9, 2001;
- (d) Submitted an account or charge for services that he knew or ought to know was misleading; and
- (e) Engaged in conduct in the course of practicing opticianry, that having regard to all the circumstances would reasonably be regarded by members of the College of Opticians as disgraceful, dishonourable or unprofessional.



The Panel feels that such actions and conduct undermine the regulatory system that is in place to protect the public in the provision of professional opticianry and optometric services.

**PENALTY:**

After hearing and considering the submissions of Counsel for the College and of the Member on penalty, the panel deliberated and makes the following order on penalty and costs:

- (a) THE DISCIPLINE COMMITTEE ORDERS that Arthur Kochberg shall appear before the Panel to be reprimanded and the fact of the reprimand shall be recorded in the Register of the College.
- (b) THE DISCIPLINE COMMITTEE FURTHER ORDERS that Arthur Kochberg's certificate of registration shall be suspended for a period of fifteen (15) months, which shall include the suspension served to date from December 20, 2007.
- (c) THE DISCIPLINE COMMITTEE FURTHER ORDERS that the Registrar of the College is hereby directed to place the following specified terms, condition, or limitation on the Member's certificate of registration:
  - (i) If the Member resumes practice after the period of suspension, he will ensure that he adheres to all legal and professional requirements applicable to is practice including, but not limited to the following
    - (1) He will advise the College of his place of practice before resuming practice or changing his place of practice. In the event of a change of practice location, Arthur Kochberg shall not commence practice at the new location until he has advised the College of the location and his certificate of registration shall be suspended until he has advised the College of the location. For further clarity, the Member's place of practice is any dispensary where he physically works and dispenses to patients;
    - (2) He will not delegate dispensing except in accordance with the College's policy on delegation;
    - (3) He will refrain from conducting refractometry except in accordance with the College's published Standard of Practice on refraction;
    - (4) He will not dispense to a patient unless he has been provided with a valid prescription from a physician or optometrist for that patient;



- (5) He will take all reasonable steps necessary to ensure that no one who is not an optician, optometrist or physician dispenses eyeglasses or contact lenses at his place of practice; and
  - (6) He will not permit, authorize or otherwise allow anyone to sign or complete vision care insurance claim forms indicating that he is the dispensing optician when he did not so dispense to the patient concerned.
- (d) THE DISCIPLINE COMMITTEE ORDERS that the Registrar of the College is hereby directed to place the further following specified term, condition, or limitation on Arthur Kochberg's certificate of registration for a period of two (2) years;
  - (i) Arthur Kochberg shall permit a representative of the College to review the procedures and record keeping of his practice by permitting the representative to attend at his place of practice, without notice to him, and observe his practice and examine his records as the representative may require (the "Inspections"). The Inspections shall be conducted at the sole discretion of the College and shall not exceed a total of six (6) over a period not exceeding two (2) years. Arthur Kochberg shall pay to the College, within fifteen (15) days of each Inspection, costs in respect of each Inspection to a maximum of \$600 per Inspection.
- (e) THE DISCIPLINE COMMITTEE ORDERS that Arthur Kochberg shall pay to the College within 30 days of this order costs of the discipline proceeding fixed in the amount of \$5000.00 and that payment shall be made by the delivery to the College within 15 days of five (5) post-dated cheques each for \$1, 000, dated March 12, April 12, May 12, June 12 and July 12, 2009; and
- (f) THE DISCIPLINE COMMITTEE FURTHER ORDERS that, in the event that any of the cheques delivered pursuant to subparagraph (e), above, are not honoured, or if payment is not made under subparagraph (d), above, within thirty (30) days of the date in which it is due, (the "Default"), Arthur Kochberg's certificate of registration shall be suspended for a further period of one (1) week for each such Default in addition to the suspension ordered pursuant to subparagraph (b), above. Any additional suspension ordered against Arthur Kochberg is not intended to, and will not absolve him of the obligation to pay the entire amount of the costs ordered against him.

#### Penalty Decision and Reasons

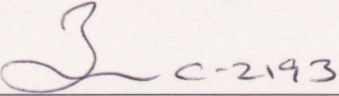
Counsel for the College advised the panel that they had prepared a Draft Order on Penalty and Costs and entered it as Exhibit 5 and went on to explain why the order was appropriate. The Panel took into consideration the fact that the Member agreed with the order being sought by the



College. In the Panel's view, the penalty and costs being sought by the College did not bring the administration of justice into disrepute and are appropriate in view of the misconduct found. Therefore, the Draft Order on Penalty and Costs was accepted by the Panel and the Draft Order on Penalty and Costs, Exhibit 5 was signed by all three Panel members.

Mr. Kochberg did not waive his right to appeal. Therefore no reprimand was administered at the conclusion of the Hearing. It is recommended that the Manager of the Discipline Committee of the College of Opticians of Ontario is to contact Mr. Kochberg to receive his reprimand before the members of the Panel.

I, Fazal Khan, chairperson, sign this Decision and Reasons on behalf of the panel members listed above.

 C-2193

Fazal Khan RO, Chair Discipline Panel