Federal Court  Cour fédérale

Date: 20130325

Docket: T-905-12

Citation: 2013 FC 304

Ottawa, Ontario, March 25, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DAVID WILLIAM SHORTREED

Applicant

and

WARKWORTH INSTITUTION
(CHIEF OF HEALTH SERVICES)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under section 18.1 of the *Federal Courts Act* RSC 1985 c F-7 for an order of *mandamus* compelling Warkworth Institution, Chief of Health Services, to supply the Applicant with orthotic footwear, assessed and obtained in accordance with the *Corrections and Conditional Release Act*, SC 1992, c 20 (Act). The Applicant also requests:

- A writ of prohibition preventing the Respondent from using unregistered, non-professional services in lieu of "health care, provided by registered health care professionals," in accordance with section 85 of the Act;

- A declaration that the excessive delay in the Respondent's performance of its statutory duty under the Act to provide the Applicant with orthotic footwear constitutes a breach of a statutory duty;

- The costs of this application.

BACKGROUND AND DECISION UNDER REVIEW

[2] In 1989, the Applicant was assessed by an orthopedic surgeon at the Kingston Penitentiary as having a leg length discrepancy that needed to be treated with orthopedic shoes. Approximately every year between 1989 and 2008, the Applicant received a pair of orthopedic shoes which were purchased from a non-institutional supplier.

[3] In October 2008, the Applicant was transferred to the Warkworth Institution. By an inmate's request dated 30 April 2009, the Applicant inquired about the procedure to obtain his next pair of shoes (Applicant's Record, page 34). On 26 May 2009, the Applicant was called to Health Services and informed that he had been booked to see the institutional doctor (Applicant's Affidavit, Applicant's Record, page 36). By an inmate's request dated 11 January 2010, the Applicant requested that the purchase of his orthopedic shoes be expedited. A response, dated 12 January

2010, stated that the request had been sent to orthotics and was on a waitlist (Applicant's Record, page 38).

[4] On 20 April 2010, the Applicant had a visit with Dr. McKeough. The doctor's notes state: "(3) needs new shoes (4) RN on Rob Knell. Please contact Walkwell in Kingston to verify last model of shoes. Discuss c NM and be sure to order same" (Applicant's Record, page 40). By letter dated 28 July 2010, the Applicant wrote to the warden at Warkworth, asking if something could be done because he had not received new shoes (Applicant's Record, page 42). By letter dated 24 August 2010, the Applicant wrote to a different warden repeating this request (Applicant's Record, page 44). By letter dated 16 September 2010, Warden G. Chartrand responded to the Applicant's letter of 28 July 2010, stating that the shoes had been ordered and would be received in ten to fourteen days (Applicant's Record, page 46).

[5] By an inmate's request dated 29 November 2010, the Applicant asked Rob Knell, the Chief of Health Care, when he would receive his shoes. Mr. Knell responded on 14 December 2010, that "clinic is in January" (Applicant's Record, page 48). By a "health care rep follow up request" dated 9 March 2011, the Applicant's question about his shoes was noted. Health Care Services, via P. Cormier, responded on 23 March 2011, that an appointment had been booked (Applicant's Record, page 50).

[6] By an Offender Complaint received by the Institution on 11 May 2011, the Applicant made a complaint about the ongoing failure to provide him with a new pair of orthopedic shoes (CTR, page 17). On 16 June 2011, Robert Knell, Chief of Health Services upheld the complaint:

> [h]ealth services is not responsible for the purchasing of footwear, in your case you need a specially designed orthotic shoe to allow you to maintain your current health status. This will be paid for and provided by health services (CTR, page 16).

[7] The Offender Complaint Response further stated that the corrective action would be completed within 30 working days (Applicant's Record, page 54). Doctor's notes signed by R. Knell and dated 16 June 2011, also state that the Applicant requires running shoes and slippers and that "HCA is to order ASAP" (Applicant's Record, page 56).

[8] A First Level Offender Grievance was received by the Institution on 3 August 2011, and upgraded to a Second Level Grievance. The grievance stated that the Applicant's complaint (which had been upheld by Mr. Knell on 16 June 201), had not been complied with in the 30-day limit (CTR, page 15). The Institution upheld this grievance on 28 August 2011, but stated that "there is no corrective action deemed necessary as the Institution was reminded of the above noted policy [regarding timeframes] during the investigation" (CTR, pages 12-13).

[9] The Applicant submitted a Third Level Grievance which was received by the Institution on 14 October 2011. The Applicant alleged that the original complaint had been upheld but that the corrective action had still not been completed (CTR, page 19).

[10] Mr. Brian Blasko began as Interim Chief of Health Services at the Warkworth Institution on 11 October 2011 (Applicant's Record, page 20). On 8 November 2011, Mr. Blasko wrote an e-mail to other Institution employees stating:

> [i]n review of the essential service guidelines the footwear is to be purchased by the SIS department and Health Services is responsible for the alternations required. The shoes and slippers have not been ordered by Health Services. Health Services would be required to pay for shoes if they had to be built by a shoe maker for reasons of

> deformity such as club work but not for a brand or style recommended by a contract physician.
>
> I will speak with the contract physician on here next visit to Warkworth.
>
> If SIS would purchase the footwear required I would do a consult for an specialist to have the lifts applied as per the essential services guidelines [*sic* throughout]. (CTR, page 29).

[11] At some point in November 2011, the Applicant was visited by Bob Cameron, Chief of Institutional Services, who told him the he would be supplying the footwear (Applicant's Record, page 98). On or around 8 December 2011, Tammy Robinson, assistant to Brian Blasko, arranged for a consultation between the Applicant and a certified orthotist, Ron Boutilier. In January 2012, Mr. Boutilier met with the Applicant. Mr. Boutilier's opinion was that the Applicant has a leg length discrepancy which requires the use of an orthotic lift which could be fitted in an institutional shoe (Affidavit of Brian Blasko, Applicant's Record, pages 8-9).

[12] On 5 January 2012, Henry de Souza, Director General, Clinical Services, wrote a memorandum to the Director of Offender Redress in which Mr. de Souza stated that Clinical Services had consulted with the acting Chief of Health Services and that the Applicant required an orthotic that could be added to an institutional shoe, and that the Applicant does not require specially designed shoes (CTR, pages 27-28). The letter further stated that an appointment with an orthortics specialist had been scheduled for January, 2012.

[13] By letter dated 11 January 2012, the Applicant wrote to Mr. Blasko, explaining that he had spoken with the Chief of Institutional Services who said that a pair of institutional shoes had been sent to Health Care for modification. The Applicant stressed that the shoes he needed were on file with two suppliers and requested an interview before the shoes were sent out for modification

(Applicant's Record, page 64). Mr. Blasko's response to written discovery states that the Applicant's footwear needs were assessed by Mr. Boutilier, while Institutional Services sized the Applicant for institutional shoes. Mr. Blasko also stated that Institutional Services does not make decisions or advise Health Services with respect to diagnosis or treatment (Applicant's Record, page 19).

[14] On 3 February 2012, Mr. Boutilier met with the Applicant to give him the modified institutional shoes he had prepared. The Applicant refused to try on the shoes even though Mr. Boutilier informed him that the shoes could be further modified (Applicant's Record, pages 11-12).

[15] On 21 February 2012, the Applicant was informed that the timeframe estimated for a response to his grievance would not be met, but that a final response would be provided by 4 April 2012 (CTR, page 4). A Third Level Offender Grievance Response (the Decision) was issued on 8 March 2012, by Anne Kelly, Senior Deputy Commissioner (the "Senior Deputy Commissioner"). The letter stated as follows:

> The current CHS explained that no shoes (or orthotics) had been ordered for you since the response to the above-noted complaint [that of 17 June 2011]. Following a review of your medical file, Clinical Services indicated that you require orthotics that may be added to institutional shoes. You do not medically require specially designed shoes.
>
> […]
>
> As you do not require a specially designed shoe, Institutional Services is responsible for providing you with regular shoes at the Institution.
>
> Although the response to your complaint incorrectly noted that you required a specially designed orthotic shoe, it did not remove the necessity of completing the corrective action, as you still required orthotics that could have been added to the appropriate institutional shoes. In the absence of completing the necessary steps that were

> required in order to ensure that you received the appropriate shoes (including orthotics) pursuant to CD 081, paragraph 45 are referred to above, this part of your grievance is upheld.
>
> Since then, staff advised you that you had an appointment with Health Services on 2012-02-03 to receive a pair of institutional shoes which included the appropriate orthotic lift. However, staff indicated that you refused to accept them. Nonetheless, given that WI has customized a pair of institutional shoes to accommodate your medical needs, no further action is required for this part of your grievance (CTR, pages 7-10).

[16] The Commissioner rejected the Applicant's request with respect to slippers because that issue had not been raised in the initial complaint (CTR, page 9).

ISSUES

[17] The Applicant submits the following issues in this application:

a) Is the Applicant entitled to a writ of *mandamus*?

b) Is the Applicant entitled to a writ of prohibition?

c) Is the Applicant entitled to declaratory relief?

d) In light of CSC policy, is the interpretation by the Deputy Commissioner of the term "specially designed shoe" a correct interpretation?

e) Does the Act, in particular sections 85, 86 and 88, permit the Deputy Commissioner or the Chief of Health Services to use SIS as a health care service in place of an orthotist – a registered health care professional who is bound by professionally accepted medical standards?

f) Alternatively, does the Applicant have the right under the Act to have an orthotist or other appropriate medical professional determine his final footwear needs without the interference of Institutional Services?

STANDARD OF REVIEW

[18] The Supreme Court of Canada, in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[19] The Applicant submits that the Senior Deputy Commissioner's interpretation of the term "specially designed shoe," which ran counter to the use of that term by a medical professional, lies in the statutory framework, and as such is reviewable on the standard of correctness (*Bonamy v Canada (Attorney General)* (2010), 378 FTR 71 at paragraph 50 [*Bonamy*]). The determination of the scope and limits of the Act is correctness (*Bonamy* at paragraph 49).

[20] The Respondent submits that the Senior Deputy Commissioner's finding that the Applicant does not require specially designed shoes as part of his essential health care is a finding of fact, reviewable on the standard of reasonableness (*Yu v Canada (Attorney General)*, 2012 FC 970 at paragraphs 15-16; *Kim v Canada (Attorney General)*, 2012 FC 870 at paragraph 33). I agree with the Respondent that this is a finding of fact, and thus reviewable on a standard of reasonableness.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above,

at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[22] The following provisions of the Act are applicable to this proceeding:

Definitions	**Définitions**
85. In sections 86 and 87,	**85.** Les définitions qui suivent s'appliquent aux articles 86 et 87.
"health care" « *soins de santé* »	« soins de santé » *"health care"*
"health care" means medical care, dental care and mental health care, provided by registered health care professionals;	« soins de santé » Soins médicaux, dentaires et de santé mentale dispensés par des professionnels de la santé agréés.
"mental health care" « *soins de santé mentale* »	« soins de santé mentale » *"mental health care"*
"mental health care" means the care of a disorder of thought, mood, perception, orientation or memory that significantly impairs judgment, behaviour, the capacity to recognize reality or the ability to meet the ordinary demands of life;	« soins de santé mentale » Traitement des troubles de la pensée, de l'humeur, de la perception, de l'orientation ou de la mémoire qui altèrent considérablement le jugement, le comportement, le sens de la réalité ou l'aptitude à faire face aux exigences normales de la vie.
"treatment" "treatment" means health care treatment.	

Obligations of Service

86. (1) The Service shall provide every inmate with

(a) essential health care; and
(b) reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community.

Standards

(2) The provision of health care under subsection (1) shall conform to professionally accepted standards.

Service to consider health factors

87. The Service shall take into consideration an offender's state of health and health care needs
(a) in all decisions affecting the offender, including decisions relating to placement, transfer, administrative segregation and disciplinary matters; and
(b) in the preparation of the offender for release and the supervision of the offender.

[…]

88. (1) Except as provided by subsection (5),

(*a*) treatment shall not be given to an inmate, or continued once started, unless the inmate voluntarily

Obligation du Service

86. (1) Le Service veille à ce que chaque détenu reçoive les soins de santé essentiels et qu'il ait accès, dans la mesure du possible, aux soins qui peuvent faciliter sa réadaptation et sa réinsertion sociale.

Qualité des soins

(2) La prestation des soins de santé doit satisfaire aux normes professionnelles reconnues.

État de santé du délinquant

87. Les décisions concernant un délinquant, notamment en ce qui touche son placement, son transfèrement, son isolement préventif ou toute question disciplinaire, ainsi que les mesures préparatoires à sa mise en liberté et sa surveillance durant celle-ci, doivent tenir compte de son état de santé et des soins qu'il requiert.

[…]

88. (1) Sous réserve du paragraphe (5), l'administration de tout traitement est subordonnée au consentement libre et éclairé du détenu, lequel peut refuser

gives an informed consent thereto; and

(*b*) an inmate has the right to refuse treatment or withdraw from treatment at any time.

de le suivre ou de le poursuivre.

Marginal note:Meaning of "informed consent"

Note marginale :Consentement éclairé

(2) For the purpose of paragraph (1)(*a*), an inmate's consent to treatment is informed consent only if the inmate has been advised of, and has the capacity to understand,

(2) Pour l'application du paragraphe (1), il y a consentement éclairé lorsque le détenu a reçu les renseignements suivants et qu'il est en mesure de les comprendre :

(*a*) the likelihood and degree of improvement, remission, control or cure as a result of the treatment;

a) les chances et le taux de succès du traitement ou les chances de rémission;

(*b*) any significant risk, and the degree thereof, associated with the treatment;

b) les risques appréciables reliés au traitement et leur niveau;

(*c*) any reasonable alternatives to the treatment;

c) tout traitement de substitution convenable;

(*d*) the likely effects of refusing the treatment; and

d) les conséquences probables d'un refus de suivre le traitement;

(*e*) the inmate's right to refuse the treatment or withdraw from the treatment at any time.

e) son droit de refuser en tout temps de suivre ou de poursuivre le traitement.

Marginal note:Special case

Note marginale :Cas particulier

(3) For the purpose of paragraph (1)(*a*), an inmate's

(3) Pour l'application du paragraphe (1), le

consent to treatment shall not be considered involuntary merely because the treatment is a requirement for a temporary absence, work release or parole.

consentement du détenu n'est pas vicié du seul fait que le traitement est une condition imposée à une permission de sortir, à un placement à l'extérieur ou à une libération conditionnelle.

Marginal note:Treatment demonstration programs

Note marginale :Programme d'expérimentation

(4) Treatment under a treatment demonstration program shall not be given to an inmate unless a committee that is independent of the Service and constituted as prescribed has

(4) Tout traitement expérimental est interdit sauf dans le cas où un comité constitué conformément aux règlements et n'ayant aucun lien avec le Service, d'une part, juge le programme d'expérimentation valable sur le plan médical et conforme aux normes d'éthique reconnues, d'autre part, s'assure auparavant du consentement libre et éclairé du détenu au traitement.

(*a*) approved the treatment demonstration program as clinically sound and in conformity with accepted ethical standards; and

(*b*) reviewed the inmate's consent to the treatment and determined that it was given in accordance with this section.

Marginal note:Where provincial law applies

Note marginale :Lois provinciales

(5) Where an inmate does not have the capacity to understand all the matters described in paragraphs (2)(*a*) to (*e*), the giving of treatment to an inmate shall be governed by the applicable provincial law.

(5) Le traitement d'un détenu incapable de comprendre tous les renseignements mentionnés au paragraphe (2) est régi par les lois provinciales applicables.

ARGUMENTS

The Applicant

Mandamus

[23] The Applicant submits that the requirements of *mandamus* are met. First, there is a public legal duty to act. Section 85 of the Act states that health care is to be provided by registered health professionals. Subsection 86(2) of the Act provides that health care shall conform to professionally accepted standards. Paragraph 88(1)(*a*) of the Act provides that treatment shall not be given unless the inmate voluntarily gives informed consent. "Shall" is intended to be interpreted as mandatory (*Baron v Canada*, [1993] 1 SCR 416 at paragraph 31 [*Baron*]).

[24] Second, the duty is owed to the Applicant because he has been properly diagnosed with a specific medical need and has made the appropriate request (*Dragan v Canada (Minister of Citizenship and Immigration)* (2003), 227 FTR 272 at paragraphs 40-44 [*Dragan*]). Due to his leg-length disparity and bone density problems the Applicant is directly affected, and Warkworth Institute is required to deliver health care services to him in a lawful manner.

[25] Third, the Applicant requested the performance of the duty several times, has been waiting more than three years, and the duty was refused both in the form of an unreasonable delay and in the form of services unlawfully provided by unregistered medical staff contrary to sections 85, 86 and 88 of the Act.

[26] Fourth, no other adequate remedy is available to the Applicant, and the Applicant has exhausted every other remedy, including a Level 3 grievance. The order sought will be of practical value as the orthotic footwear is medically required to keep the Applicant's spine straight and to

avoid back and foot pain. A *mandamus* order is the only practical way to protect his right to be assessed and treated in a lawful manner in accordance with the Act (*Dragan*, paragraph 46).

[27] Fifth, there is no equitable bar to the relief sought as the Applicant has not been responsible for any delays and comes to court with clean hands (*Dragan*, paragraph 47).

[28] Sixth, the balance of convenience rests with the Applicant.

The Reasonableness of the Decision of the Senior Deputy Commissioner

[29] The Applicant does not make submissions which refer explicitly to the "reasonableness" of the Senior Deputy Commissioner's decision. However, the submissions take issue with the Senior Deputy Commissioner's approach. The Chief of Health Services determined that the Applicant required a "specially designed orthotic shoe" as determined by the National Essential Health Services Framework. The Senior Deputy Commissioner came to the opposite conclusion when applying this same policy. As in *Krause v Canada* (1999), 236 NR 317, the Senior Deputy Commissioner's actions and the abdication of health services by the Chief of Health Services are contrary to the Act, and constitute a failure to perform their duty.

[30] In this case, the term "specially designed shoe," as determined by a health care professional, was contradicted by a higher ranked non-medical official. The shoes worn by the Applicant are "specially designed shoes" as set out in the National Essential Health Services Framework. The Applicant fits squarely into this general national policy as determined by the Chief of Health Services in response to the Applicant's complaint. First, the national policy provides that an individual "must have a diagnosis for condition orthotics are being provided" [*sic*]; the Applicant

has been diagnosed with a condition requiring orthotic footwear. Second, the policy also states that only orthotics to maintain or improve current health status will be paid for; the Applicant was not asked at any time to pay for these shoes. Third, the specially designed shoes are designed to improve and maintain the Applicant's current health status. Fourth and fifth, the Applicant does not fit into the two other categories listed in the policy, those of "over the counter orthotics" or "simple orthotics." Sixth, the Applicant fits into the category of "specialty orthotics." The Deputy Commissioner is thus attempting to define a term which not only contradicts the Chief of Health Services but is inconsistent with the national policy.

[31] The Applicant submits that the Deputy Commissioner's determination that the Applicant's shoes are not "specially designed shoes" is incorrect (*MacKay v Canada (Attorney General*), 2010 FC 856). The Deputy Commissioner's determination improperly extracted a health care service and placed it in the hands of Institutional Services. Medical services must remain in the hands of health care professionals. The Applicant submits that the Chief of Health Services' determination should stand as correct while the Deputy Commissioner's should be declared invalid.

[32] The Applicant also raises the issue of whether the Act permits the Chief of Health Services or Deputy Commissioner to use Institutional Services in place of an orthotist. In addition to the Act, Commissioner's Directive 800 and the National Essential Health Services Framework also provide that inmates are to be provided health care which conforms to professionally accepted standards. These two sources are relevant to understanding the scope and limits of the Act (*Nguyen v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 232).

[33] While the Applicant is with Health Services, he is a patient. He is not a patient when visiting Institutional Services. When a patient refuses treatment at Health Services, an alternate treatment

shall be provided if possible (paragraph 88(2)(*c*) of the Act, Commissioner's Directive 803(9)). All medical services must be made by health care professionals (National Policy, pages 8, 10). The Deputy Commissioner cannot arrogate to herself the authority to direct, alter or change medical treatments (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at paragraphs 29, 36; Sir William Wade, *Administrative Law* (New York: Oxford University Press, 1994) at 358-359). Institutional Services is not authorized to provide health services. Institutional Services is governed by section 70 of the Act, section 82(3) of the *Corrections and Conditional Release Regulations* (SOR/92-620) (the "Regulations"), and Commissioner's Directive 352 (*McMaster v Canada* (2009), 352 FTR 255 at paragraphs 22-24). The Applicant thus asks the Court to declare the actions of the Deputy Commissioner in directing Institutional Services to assess the footwear needs of the Applicant as medically invalid.

The Respondent

The Reasonableness of the Decision of the Senior Deputy Commissioner

[34] The Respondent first sets out the statutory framework. Section 86 of the Act provides that Correctional Services Canada is to provide inmates with "essential health care." Commissioner's Directive 800 sets out that essential health services includes urgent health care, which is required if the condition is likely to "affect the inmate's ability to carry on the activities of daily living." According to the National Essential Health Services Framework (NEHSF), shoes are not an essential health service. Institutional shoes are provided to offenders. Orthotics, such as insoles and lifts, are provided when prescribed by a medical professional. The issue is thus whether the Applicant requires non-institutional orthotic footwear.

[35] The Respondent says that the Applicant's demands for non-essential treatment go beyond CSC's mandate in respect of health care, as determined by Parliament. The Applicant has been diagnosed with a leg-length discrepancy requiring treatment to maintain his current health status. Based on a review of the Applicant's medical history and the opinion of Mr. Boutilier, the Applicant is best treated through the use of a lift in the Applicant's left shoe.

[36] While there was a delay in the provision of modified shoes, the Applicant's medical needs have now been accommodated and CSC is now in compliance with its statutory obligations to provide the Applicant with essential health care. On 3 February 2012, the Applicant refused the institutional footwear modified by Mr. Boutilier and his offers to stretch the shoe. As noted in the NEHSF, positive health outcomes are a shared responsibility between providers and offenders; it is not reasonable for the Applicant to complain that he has not received essential health care after having refused appropriate treatment.

[37] The Applicant also complains that medical services have been provided by non-medical professionals, namely employees of Institutional Services. Institutional Services provided a pair of modified shoes in accordance with measurements taken by Mr. Boutilier. Those shoes were modified by Mr. Boutilier to meet the Applicant's needs. At no point has an employee within Institutional Services made decisions relating to the Applicant's diagnosis or treatment. At all times material to this matter, the Applicant has received medical treatment from licensed medical professionals.

[38] The Respondent submits that the Senior Deputy Commissioner's decision was reasonable. She found, based on the expert medical evidence before her, that the Applicant does not require specially designed shoes. The decision relied on information provided by Mr. Blasko, and based on

his review and knowledge of the Applicant's file, including the opinion of Mr. Boutilier (CTR, pages 27-28). Mr. Boutilier's opinion is that the Applicant requires the use of an orthotic lift in his left shoe, and that this treatment can be adequately delivered by a modified institutional shoe.

[39] There was no medical evidence before the Senior Deputy Commissioner that the Applicant's condition cannot be adequately treated or will deteriorate through the use of a modified institutional shoe. The Decision is consistent with the expert opinion of Mr. Boutilier, whose opinion was given after consultation and assessment of the Applicant's needs. As such, the Decision falls well within the range of acceptable outcomes and should be upheld.

ANALYSIS

[40] There is a great deal in the background of this matter that is unsatisfactory and unexplained. In particular, significant delays have occurred in responding to the Applicant's medical needs and he has from time to time been given conflicting information. The Respondent's affidavit is sworn by Mr. Brian Blasko, who was employed as Interim Chief of Health Services at Warkworth from 11 October 2011 to 5 April 2012. It was Mr. Blasko who assessed the Applicant's request for specially designed shoes in late 2011 and who arranged for the Applicant to see Mr. Ron Boutilier on or around January 2012. Mr. Boutilier is a Certified Orthotist and, apparently, he saw the Applicant and assessed his footwear needs. The Respondent concedes there have been extensive delays in addressing the Applicant's medical needs, but says that the Respondent is now in compliance as found by the Senior Deputy Commissioner in her Third-Level Grievance decision.

[41] The Applicant says that his judicial review application is not about the decision of the Senior Deputy Commissioner and that he is seeking to compel the Respondent to fulfill statutory obligations to provide him with the footwear he requires for his medical condition, and which he received for many years until 2009. The Applicant's complaint against the Respondent, however, can be, and has been, dealt with by the internal grievance procedure that resulted in the decision by the Senior Deputy Commissioner. Only if that decision is found to contain a reviewable error can the Court consider the remedies and relief available under subsection 18(1) of the *Federal Courts Act*. If the Grievance decision is reasonable, then it means the Applicant's complaints about previous conduct have been addressed.

[42] Mr. Blasko says that he received confirmation from Mr. Boutilier that the Applicant's footwear needs "could be accommodated by institutionally-issued footwear." Acting upon this medical advice, Mr. Blasko then had Mr. Boutilier modify institutionally issued shoes for the Applicant.

[43] None of this explains why it took from 30 April 2009 until February 2012, for Warkworth Health Care to get around to addressing the Applicant's health care needs, or why he was given assurances by Mr. Rob Knell, a former Chief of Health Services, that his specially-designed shoes had been ordered and would arrive in 10 to 14 days.

[44] Notwithstanding these background problems, the Applicant's complaint has now proceeded through three levels of CSC's internal offender grievance process and the Senior Deputy Commissioner has rendered a decision in reply to the Applicant's Third-Level Grievance. That decision confirms Mr. Blasko's decision that the Applicant does not need the specially-designed shoes he had been receiving for some 19 years and that his medical needs can

be met by modifying institutional shoes, as advised by Mr. Boutilier. The Applicant has been offered appropriately customized and modified institutional shoes, but he has refused to accept them. Hence, the decision concludes that no further action is required.

[45] Throughout his submissions, the Applicant argues that Mr. Blasko and the Deputy Commissioner have not acted in accordance with the direction of a registered health care professional – i.e., an Orthotist – in assessing his medical needs and providing a solution. This lies at the heart of this application. The Applicant takes the position that Mr. Blasko is the one who made the decision about the Applicant's medical needs and he is not a qualified health-care professional as required by the governing legislation. Mr. Blasko says that he relied on the opinion of Mr. Boutilier, who is a certified Orthotist. The Applicant says he takes no issue with Mr. Boutilier's qualifications or his ability to assess the Applicant's medical needs, but he says that he was not assessed by Mr. Boutilier and that Mr. Blasko, in referring to Mr. Boutilier, is simply using him as a front for a decision that Mr. Blasko made himself, and that he is not qualified to make. On this crucial issue, the Court is left to deal with the evidence on point that has been placed on the record by both sides.

[46] In his affidavit sworn for this application, the Applicant provides the following evidence about his interaction with Mr. Boutilier:

> On February 3, 2012, I was called to Health Care to see Mr. Ron Boutilier, an orthotist, to try on shoes. These were shoes that were sent to Health Care from SIS to be modified: Shoes that were never tried on or properly fitted or sized in accordance with my medical needs or input from me. The result was that these shoes did not fit and consequently were rejected.
>
> I recall seeing Mr. Boutilier on an earlier occasion, possibly in the latter half of 2011. He agreed with my stated needs but informed me that in his position, he could only suggest to Warkworth

> Institution Health Care what my needs were and would note them in my file.

[47] In his affidavit, at paragraphs 11-15, sworn for this application, Mr. Blasko describes how he went about assessing his Applicant's needs, and the reliance he placed upon the opinion of Mr. Boutilier:

> In my capacity as Interim Chief of Health Services at Warkworth Institution, I was responsible for assessing the Applicant's request for specially designed shoes. On or around December 8, 2011, my assistant, Tammy Robinson, acting on my request, arranged for a consultation between the Applicant and a Chiropodist, Mr. Ron Boutilier. On or around January 2011, Mr. Boutilier met with the Applicant at Warkworth Institution.
>
> I am informed by Mr. Boutilier, and to do verily believe that, it is his opinion that the Applicant has a leg-length discrepancy, and requires the use of an orthotic lift in his left shoe. The orthotic lift can be used with the institutional shoe.
>
> Based on my review of the Applicant's medical file, and in light of the opinion of Mr. Boutilier, I verily believe that the Applicant does not require specially designed shoes to maintain his current health status. While the Applicant has previously been told otherwise by CSC employees, I believe this was in error.
>
> On or around January 2012, I spoke with Joanne Barton, Project Officer at CSC Headquarters in Ottawa. Ms. Barton informed me that she was collecting information on behalf of Mr. Henry de Souza, Director General, Clinical Services, for the purposes of responding to the Applicant's Third Level Grievance. I informed Ms. Barton that while the Applicant requires an orthotic lift in his left shoe, there is no medical reason for the Applicant to have specially designed shoes. I further informed her that the Applicant had not received a new pair of specialized footwear since April 2009 and that, since this time, there is no indication of adverse health impact in his medical records.
>
> Mr. Boutilier prepared a pair of institutional shoes with an orthotic lift specific to the Applicant's medical needs. On February 3, 2012, Mr. Boutilier met with the Applicant to provide the modified institutional shoe that was made for him. The Applicant refused to try these shoes on, stating that the toe box on the left shoe is too

> narrow for his needs. Mr. Boutilier informed the inmate that the toe box can be stretched medially and laterally, but the Applicant refused this as well. Attached hereto and marked as Exhibit "C" is a true copy of Mr. Boutilier's notes from his appointment with the Applicant on February 3, 2012.

[48] Mr. Blasko's affidavit is not entirely satisfactory regarding the role of Mr. Boutilier in assessing the Applicant's medical needs. However, the Applicant queried him on this issue in written examination, and Mr. Blasko swore to the following in response:

> 1. The Consultation Report prepared by Mr. Ron Boutilier on February 3, 2012 states that the Applicant refused to try on the shoes that were modified in accordance with his medical needs. To clarify, Mr. Boutilier is a Certified Orthotist. I was mistaken when I referred to Mr. Boutilier as a Chiropodist in my affidavit.
>
> …
>
> 3. Yes. I spoke with Mr. Boutilier on July 26, 2012 about the Consultation Report prepared by him on February 3, 2012.
>
> 4. The Applicant's footwear needs were assessed by Mr. Boutilier, not Institutional Services. After I received confirmation from Mr. Boutilier that the Applicant's medical needs could be accommodated by the institutionally-issued footwear, I requested that Institutional Services size the Applicant for institutional shoes. Those shoes were modified by Mr. Boutilier in accordance to the Applicant's needs.
>
> 5. No. The Applicant's footwear needs were assessed by Mr. Boutilier, not Institutional Services.
>
> …
>
> 16. I learned that the Applicant is being treated for osteoporosis through this Application for Judicial Review. In my review of the Applicant's medical file, I have not noted any entries requesting modified footwear for treatment of the Applicant's bone density problem.
>
> …

> 21. I am unfamiliar with size of shoes that have provided to the Applicant in the past. I am informed by Mr. Boutilier and do verily believe that he measured the Applicant's feet and, in his opinion, the Applicant is a size 9.5 shoe with EEEE width. The institutional shoe provided to the Applicant was size 10 with EE width. Mr. Boutilier informed me that this discrepancy would not negatively impact the Applicant as Mr. Boutilier could stretch the toe box of the shoes by several sizes, if needed.
>
> 22. With respect to diagnosis, the Applicant has been diagnosed with a leg length discrepancy and there is no contrary diagnosis in the Applicant's medical file. There is also consensus that the Applicant's leg length discrepancy is best treated through the use of a lift in the Applicant's left shoe. The Applicant has previously been treated with a modified non-institutional shoe. In December 2011, Mr. Boutilier advised that a modified institutional shoe is suitable for treatment of the Applicant's leg-length discrepancy.
>
> …
>
> 26. In December 2011, Mr. Boutilier advised me that a modified institutional shoe is suitable for treatment of the Applicant's leg-length discrepancy. Mr. Boutilier further informed that the institutional shoe could be stretched, if needed, to accommodate the Applicant's needs.
>
> 27. During my tenure at Warkworth Institution, Mr. Boutilier was a contract provider of orthotic and shoe-related health services to the institution. Mr. Boutilier is a Certified Orthotist. He provides treatment and advice in that capacity.

[49] Mr. Blasko is clear in his affidavit and in his responses to the Applicant's questions that the Applicant's footwear needs were assessed by Mr. Boutilier — a Certified Orthotist — who advised that the Applicant's medical condition could be dealt with by using customized and modified institutional footwear. This is certainly a change from the way the Applicant has been treated in the past, but there is nothing to suggest that Mr. Boutilier is not qualified to assess the

Applicant's footwear needs (the Applicant agrees he is), or that his assessment was unreasonable or incorrect, or indeed that the Applicant's footwear needs cannot be dealt with in accordance with Mr. Boutilier's advice. The Applicant is simply refusing to accept this professional assessment and asserting that he should continue to receive specially-made shoes. It is clear that the Applicant has been provided in the past with specially-prepared shoes as prescribed by the doctors who have examined him. However, I have nothing before me to say that his needs cannot be met in the way that Mr. Blasko, based upon advice from Mr. Boutilier, says that they can be met by customizing an institutional shoe. I can see why the Applicant takes issue with this change, but I can only assess the appropriateness of the change on the basis of the evidence before me. The Applicant says that Mr. Boutilier did not assess his needs and that Mr. Blasko is manipulating the situation. To accept this would mean that I would have to accept that Mr. Blasko was lying under oath, because he clearly says that "In December 2011, Mr. Boutilier advised that a modified institutional shoe is suitable for treatment of the Applicant's leg-length discrepancy" and that "Mr. Boutilier further informed me that the institution shoe could be stretched, if needed, to accommodate the Applicant's needs." The evidence is clear that Mr. Blasko was advised by Mr. Boutilier that both of the Applicant's medical needs — his leg-length discrepancy and his need for EEEE width shoes to deal with the pain and osteoporosis problem — can be dealt with by customizing an institutional shoe. There is nothing before me to suggest that Mr. Blasko is not being honest about what he was advised by Mr. Boutilier.

[50] The evidence shows that Mr. Boutilier prepared a pair of institutional shoes with an orthotic lift specific to the Applicant's needs and then returned to the Applicant for a fitting. The Applicant said the shoes were too narrow in the toe box, but Mr. Boutilier informed the Applicant that the toe box could be stretched by several sizes, both medially and latterly as

required. There is no evidence to suggest that the shoes offered to the Applicant could not have been further modified to meet his needs. The Applicant simply refused to cooperate and refused the treatment and insisted upon specially-designed shoes paid for by CSC.

[51] As the NEHSF makes clear, positive health-care outcomes are a shared responsibility between providers and offenders. In refusing the treatment offered, without any evidence that it would not meet his medical needs, the Applicant has declined to fulfill his obligations. The evidence before me is that the Applicant's medical condition can be dealt with in the way recommended by Mr. Boutilier, a certified orthotist. The Applicant obviously disagrees with this and when I asked him at the oral hearing why he refused to try a modified shoe he just said he knew it would not work. But the Applicant is not a medical practitioner, and he says that Mr. Boutilier is fully qualified to assess his needs. The evidence before me is that Mr. Boutilier has done just that and has advised Mr. Blasko that those needs can be met with a customized institutional shoe.

[52] The Applicant complains that medical services have been provided to him by non-professionals, namely, employees of Warkworth Institutional Services. What the evidence shows, however, is that Warkworth Institutional Services provided a pair of institutional shoes for modification in accordance with the advice and measurements taken by Mr. Boutilier. Those shoes were modified by Mr. Boutilier to meet the Applicant's needs. I agree with the Respondent that at no point has an employee within Warkworth Institutional Services made decisions relating to the Applicant's diagnosis and/or treatment, nor has Warkworth Institutional Services been used as a means of circumventing the Applicant's rights as a patient. Direction on the treatment of the Applicant's medical needs came from Mr. Boutilier.

[53] The Senior Deputy Commissioner found, based on the expert medical evidence before her, that the Applicant does not require specially designed shoes as part of his essential health care. This decision was made in reliance upon information provided by Mr. Blasko and based on his review and knowledge of the Applicant's medical file, including the opinion given by Mr. Boutilier. This information was before the Senior Deputy Commissioner by way of a Briefing Memorandum prepared by Mr. Henry de Souza, Director General of Clinical Services.

[54] There was no medical evidence before the Senior Deputy Commissioner that the Applicant's condition cannot be adequately treated, or will further deteriorate, through the use of a modified institutional shoe. The decision made is consistent with the expert opinion of Mr. Boutilier, whose opinion, the evidence indicates, was given after consultation and assessment of the Applicant's needs.

[55] The Senior Deputy Commissioner further found that the Applicant's request for slippers had not yet been raised at the lowest possible level by way of Offender Complaint. Therefore, this part of the Applicant's grievance was rejected.

[56] The Applicant argues that the decision of the Senior Deputy Commissioner contains a reviewable error in relation to his requirement for slippers. The decision reads as follows on this issue:

> **Issue #2: Slippers**
>
> You request that Health Services provide you with slippers. However, your file information indicates that this issue was not raised in your complaint submission.
>
> CD 081, paragraph 1 states:

> To support the resolution of offender complaints and grievances promptly and fairly at the lowest possible level in a manner that is consistent with the law.
>
> Given that you have not raised the issue referred to above, at the lowest possible level in accordance with the above-noted policy, this part of your grievance is rejected.

[57] The Applicant says that although he did not raise the slippers issue at the first level of grievance, it was part of his medical record and he was interviewed by Mr. Knell, who clarified his complaint and stipulated that he needed both shoes and slippers. The Applicant says there was no need to bring this matter up in the grievance procedure because it had already been decided.

[58] In any event, the Applicant says that *Lewis v Canada (Correctional Service)*, 2011 FC 1233, paragraphs 1 and 30 make it clear that each level of grievance is a *de novo* appeal so that he cannot be restricted to the allegations in his first level of grievance.

[59] The paragraphs from *Lewis* which are relevant to this judgment are:

> 30 Furthermore, it is important to note that every appeal under the CSC grievance procedure is conducted de novo and cannot be strictly limited to the allegations as raised in the first level grievance. In *Tyrrell v Canada (Attorney General)*, 2008 FC 42 at paras 37-38, Justice Snider stated:
>
> > Grievance procedures under the Corrections and Conditional Release Act, S.C. 1992, c. 20 are governed by the Corrections and Conditional Release Regulations, S.O.R./92-620, ss. 74-82). The procedure was described by Justice Rothstein in the case of *Giesbrecht v. Canada*, [1998] F.C.J. No. 621 at para. 10 (T.D.) (QL):

> Grievances are to be handled expeditiously and time limits are provided in the Commissioner's Directives...Through the grievance procedure an inmate may appeal a decision on the merits and an appeal tribunal may substitute its decision for that of the tribunal appealed from (see also *Wild v. Canada*, [2006] F.C.J. No. 999, 2006 FC 777 at para. 9).

> In other words, at each higher level of the grievance procedure, the decision maker may substitute its decision for that rendered by the decision maker below. Therefore, although technically an "appeal", the nature of the grievance process allows each subsequent decision maker to approach a grievance as a de novo review and to hear new evidence (see, for example, *Besse v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 1790 at para. 5 (C.A.) (QL)).

> 31 Thus, in the circumstances, I agree with the applicant that it is contrary to the rationale and the objective of the offender grievance procedure as set out in section 90 of the CCRA and sections 74 to 82 of the CCRR to ask the applicant to restart from square one, should he wish to raise any of the above-mentioned issues against the contested AD. Furthermore, the respondents have not alleged that they suffered any prejudice and there is no evidence of prejudice on their side, while there is definitively a prejudice suffered by the applicant.

> 32 I therefore conclude that the CSC also failed to comply with paragraph 37 of CD 081, which provides that the decision maker will ensure that the griever is provided with complete responses "to all issues raised" in his or her grievance. The impugned decision is thus unreasonable.

Thus, I agree with the Applicant on this point. In *Lewis*, the complaints that were not initially raised were closely related to the complaints that were raised. In paragraph 28, Justice Martineau says that the complaint was of a "continuous nature…the third level grievance is not entirely a new one." In this case, the slipper issue involves the Applicant's foot problems, so in that way it is closely related

to his medical issue and his need for modified footwear. Mr. Knell clarified the Applicant's complaint and stipulated that he needed both shoes and slippers. It would be perverse and unkind not to deal with shoes and slippers at the same time.

[60] Based on *Lewis*, I agree with the Applicant that the Decision of the Senior Deputy Commissioner is unreasonable in regards to the slippers issue. She refused to consider the Applicant's complaint because it was not raised at the lowest possible grievance level, when this is clearly not what is required by the statutory structure of the grievance procedure.

[61] In *Lewis*, a $350 cost award was ordered. However, in that case the Applicant's entire application was allowed. In *Johnson v Canada (Attorney General)*, 2011 FCA 76 [*Johnson*], a case that had to do with compensation for the destruction of property, the Federal Court of Appeal provided the following guidance at paragraph 38:

> Costs
>
> The $200 costs award made by the judge in relation to the application for judicial review of the above-noted decision is set aside. Although Mr. Johnson was only partially successful on his appeal, his out-of-pocket expenses with respect to the preparation and duplication of the appeal book and memorandum of fact and law as well as service of the documents would not have been diminished had he appealed only in relation to the application in which he ultimately succeeded.

[62] In the present case, although the Applicant has been only partially successful, I think he should have the full amount of his disbursements. The history of this matter reveals that the Applicant's needs for modified footwear have not been addressed in a reasonable and timely manner. In addition, the refusal of the Senior Deputy Commissioner to deal with the slippers

issue has perpetuated these problems and forced the Applicant to confront yet further delays. The Applicant's footwear needs require prompt attention.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed in part. Within 30 days of the date of this judgment the Senior Deputy Commissioner will consider and determine the Applicant's complaint about the ongoing failure to provide him with the slippers he requires to meet his medical needs.

2. The Respondent will pay the Applicant the costs of all of his disbursements for this application.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-905-12
STYLE OF CAUSE:	**DAVID WILLIAM SHORTREED** - and - **WARKWORTH INSTITUTION (CHIEF OF HEALTH SERVICES)**
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 25, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	March 25, 2013

APPEARANCES:

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Andrew Law	**RESPONDENT**

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