

**IN THE MATTER OF AN ARBITRATION PURSUANT TO S. 148.2
OF THE INSURANCE (VEHICLE) REGULATION,
B.C. Reg. 447/83 and the Arbitration Act [SBC 2020] c. 2**

BETWEEN:

VJ

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

AWARD RE COSTS ASSESSMENT

Counsel for the Claimant,
VJ

Christopher R. Bacon

Counsel for the Respondent,
Insurance Corporation of British Columbia

Joseph Cahan

Date of Hearing:

April 19, 2023

Place of Hearing:

Vancouver, BC

Arbitrator:

Dennis C. Quinlan, K.C.

Date of Award:

April 27, 2023

I. INTRODUCTION

1. This is an assessment of the Claimant's Bill of Costs pursuant to Rule 14-1 (21) of the *Supreme Court Civil Rules* (the "Rules").
2. The Claimant was involved in two motor vehicle accidents that occurred respectively on March 30, 2016 in Surrey B.C. (the "BC Accident") and July 12, 2018 in Colorado, USA (the "Colorado Accident").
3. The third party liability policy limit of \$25,000 USD maintained by the at fault driver in the Colorado Accident, was insufficient to satisfy the tort claim of the Claimant.
4. Following negotiations, the Respondent consented to the Claimant accepting the policy limit of \$25,000 USD and proceeding to arbitration under the *Arbitration Act* [SBC 2020] Chapter 2, for a determination of the amount of underinsured motorist protection compensation (the "UMP Proceeding") that the Claimant was entitled to pursuant to Part 10, Division 2 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83 (the "Regulation").
5. The parties agreed the Rules would govern the UMP Proceeding, including the requirements prescribed in Rule 11-6 for the delivery of expert reports.
6. Seven days prior to commencement of the arbitration hearing, the parties reached a settlement of the Claimant's UMP claim, together with his claim arising from the BC Accident, with costs to be agreed or assessed.
7. The issue for determination relates to the late service of four expert reports and whether the Claimant is entitled to the cost of those reports, preparation time for the arbitration hearing and a late cancellation fee charged by one of the experts.
8. Underlying this issue is the factual matrix that each of the four experts were retained by the Claimant at or inside the 84 day notice period, and two of the four experts in question had different areas of expertise from those experts previously retained.

II. BACKGROUND FACTS

9. The evidence before me includes two affidavits provided on behalf of the Claimant and Respondent respectively, the four expert reports in issue and the pleadings delivered in the UMP Proceeding.
10. The following four expert reports and their related invoices are in issue:
 - a. Report of Dr. Hawkeswood, physiatrist dated February 15, 2023 (“Dr. Hawkeswood Report”);
 - b. Functional Capacity and Cost of Future Care Report of Nicholas Altieri, occupational therapist dated February 17, 2023 (“Altieri Report”);
 - c. Present Value of Future Care Report of Kevin Turnbull, economist dated February 23, 2023 (“Turnbull Report”);
 - d. Normalized 2017 Income Report of Sergiy Pivnenko, economist dated March 29, 2023 (“Pivnenko Second Report”)
11. The UMP Proceeding was initiated by the Claimant’s delivery of a Domestic Commercial Arbitration Notice dated September 14, 2021 (the “Notice”) in respect to the Colorado Accident.
12. The Notice specifically stated as follows:
 - VII. The following modifications have been agreed to by the parties:

The *Supreme Court Civil Rules* will be used in place of the Domestic Arbitration Rules
13. A pre-arbitration telephone conference with counsel was conducted October 28, 2021 wherein the UMP Proceeding was scheduled for a seven day hearing commencing April 11, 2023, with the intention being (later confirmed) that the claims arising from the BC and Colorado Accidents would be heard together within the UMP Proceeding.
14. The use of the Rules to govern the UMP Proceeding was endorsed at the October 28, 2021 telephone conference.
15. On January 3, 2023, the parties participated in a mediation which was unsuccessful in reaching a settlement.

16. By letter dated January 10, 2023, Mr. Altieri was retained to assess the Claimant on January 17, 2023 and conduct a Functional Capacity Evaluation and Future Care Assessment.
17. The deadline for service of expert reports pursuant to Rule 11-6(3) was January 16, 2023.
18. By letter dated January 17, 2023, the Claimant served five reports, being two from Dr. Vaish, family physician dated December 11, 2018 and December 14, 2020, one from Dr. Cameron, neurologist dated November 8, 2020, one from Dr. Kiraly, psychiatrist dated March 9, 2021 and one from Mr. Pivnenko, economist dated April 11, 2022.
19. All of the reports with the exception of Mr. Pivnenko's report, were earlier provided to the Respondent after the October 28, 2021 pre-arbitration telephone conference.
20. No objection is taken by the Respondent to the five reports served in the January 17, 2023 letter.
21. The Respondent did not serve any reports at the service deadline date.
22. By letter dated January 26, 2023, Dr. Hawkeswood was retained to assess the Claimant on February 8, 2023 and provide a medical/legal report focussing on diagnosis, prognosis and what domestic, employment and leisure/sporting activities were restricted.
23. An Arbitration Management Conference (AMC) was scheduled for January 30, 2023 but as neither party had delivered an AMC Brief, the AMC was rescheduled to February 28, 2023.
24. On February 21, 2023, the Claimant served the Dr. Hawkeswood and Altieri Reports.
25. On February 24, 2023, the Claimant served the Turnbull Report.
26. On February 27, 2023, the Respondent delivered its AMC Brief, which stated that objection would be taken *inter alia*, to the Dr. Hawkeswood, Altieri and Turnbull Reports, the basis of which was "to be provided".

27. At the AMC conducted February 28, 2023, an order was made that the parties particularize any objections to the opposing party's expert reports on or before April 4, 2023.
28. On March 28, 2023, the Respondent served a report of the same date from Dr. Khan, psychiatrist, following an assessment conducted March 21, 2023.
29. On March 29, 2023, the Claimant served the Pivnenko Second Report.
30. By letter dated April 4, 2023, counsel for the Respondent indicated that objection would be taken to the Dr. Hawkeswood, Altieri, Turnbull Reports, and the Pivnenko Second Report, on the basis that they were not served in compliance with Rule 11-6(3).
31. Following settlement on April 5, 2023 of the Claimant's tort, Part 7 and UMP claims for the sum of \$381,569.03 "new money" plus costs to be agreed or assessed, the parties sought a hearing within the UMP Proceeding to assess the Claimant's Bill of Costs.

III. LEGAL PRINCIPLES

32. Given the parties in their settlement agreement made it a term that the Claimant was entitled to costs to be determined in accordance with the Rules, it is not necessary for me to consider any issues arising from sections 148.2 (2) and (3) of the Regulation, section 50 of the Arbitration Act, or legal authority considering those sections.
33. In *Turner v. Whittaker*, 2013 BCSC 712, Master MacNaughton as she then was, summarized the applicable principles in respect to the assessment of disbursements (citations omitted):

[5] Counsel were also able to agree on the following legal principles which are applicable on an assessment of disbursements:

1. Rule 14-1(5) requires an assessing officer to determine which disbursements were necessarily or properly incurred in the conduct of a proceeding and to allow a reasonable amount for those disbursements.
2. The consideration of whether a disbursement was necessarily or properly incurred is case-and circumstance-

specific and must take into account proportionality under Rule 1-3.

3. The time for assessing whether a disbursement was necessarily or properly incurred is when the disbursement was incurred, not with the benefit of hindsight.
4. A necessary disbursement is one which is essential to conduct litigation; a proper one is one which is not necessary but is reasonably incurred for the purposes of the proceeding.
5. The role of an assessing officer is not to second guess a competent counsel doing a competent job solely because other counsel might have handled the matter differently.

34. I will refer to certain principles applicable to the service of expert reports and admission of expert evidence at trial. I appreciate I am dealing with an assessment of a bill of costs, but given the issue at hand concerning late service, those principles are in my view relevant to my decision.

35. Rule 11-6 sets out the service requirements for expert reports.

36. *Rule 11-6(3)* provides that unless the court otherwise orders, expert opinion must be served at least 84 days before trial or the party seeking to rely on the report must obtain leave to admit the non-compliant report:

(3) Unless the court otherwise orders, at least 84 days before the scheduled trial date, an expert's report, other than the report of an expert appointed by the court under Rule 11-5, must be served on every party of record along with written notice that the report is being served under this rule....

37. The rationale for the 84 day limit was described in ***Peace River Greenhouses Ltd. v. Taylor (District)***, 2016 BCSC 1448 at para. 25:

[25] The 84 day limit was established to prevent “trial by ambush” and to allow a party receiving an expert report sufficient time to evaluate the strength of the expert report and the potential need for response.

38. A party seeking to serve a primary report under Rule 11-6(3) must undertake sufficient planning in a timely manner so as to ensure the 84 day deadline can be met: **Balingoay v. Dhindsa**, 2018 BCSC 2307 at para. 17.
39. Rule 11-7 deals with expert opinion evidence at trial.
40. Rule 11-7(1) mandates that such evidence must not be tendered at trial unless that evidence has been served in accordance with Rule 11-6 or the court otherwise orders.
41. Rule 11-7(6) provides that the court may admit reports that do not comply with the Rules if facts that could not have been discovered with due diligence come to light, the non-compliance is unlikely to cause prejudice by reason of an inability to prepare for cross-examination, or by reason of an opportunity to tender evidence in response, or the interests of justice require the admission of the evidence: **Johal v. Fazl**, 2021 BCSC 1368 at para. 6.
42. Justice Veenstra in **Hoang v. Dean**, 2021 BCSC 537 at para. 34 stated the following in respect to whether the interests of justice ought to allow admission:

[34] The court has jurisdiction to reduce the time for service of expert reports pursuant to Rule 11-6(3), in which the words “unless the court otherwise orders” qualify the 84 day deadline. In exercising that jurisdiction, the court should have regard to the principles applied under Rule 11-7(6) when a late-delivered report is tendered at trial: **Usmon v Masi**, 2020 BCSC 958 at para. 6. In **Usmon**, Justice Riley commented that:

[7] Of particular note is Rule 11-7(6)(c), which gives the court at trial the residual discretion to admit a report despite non-compliance with the service requirements where the “interests of justice require it”. In **Maras v. Seemore Entertainment Ltd.**, 2014 BCSC 1109, Mr. Justice Abrioux, as he then was, explained that the “interests of justice” are not properly invoked “to simply excuse or ignore” the requirements of the *Rules*. Rather, there must be compelling reasons justifying the “extraordinary step” of abrogating the service requirements. In my view, the same analysis is appropriate in considering whether the court should exercise its discretion to abridge the 84-

day service requirement in advance of the trial under Rule 11-6(3).

[Emphasis added]

IV. POSITION OF THE PARTIES

(a) Claimant

43. While acknowledging that all of the reports in question were served late contrary to Rule 11-6(3), the Claimant has three main positions in support of his submission that he ought to be allowed the cost of the reports and related invoices.

44. First he submits the four expert reports were necessary in order to properly advance his case. He asserts his case was complicated by a number of facts including a prior bankruptcy which impacted his career as a long haul truck driver, a prior serious accident in 2015 which lead to a WCB claim and an inability to work, and unusual truck repair expenses in 2016 and 2017.

45. Second Mr. Bacon offers the following explanation for the late service of the reports of Dr. Hawkeswood and Mr. Altieri:

10. In the event the Claimant's psychiatric expert opinion was attacked, I believed it necessary to prove the extent to which the Claimant's back pain affected his ability to work as a truck driver.
11. As a result, I decided to commission reports from a physiatrist, Dr. Hawkeswood, and Nick Altieri, a functional capacity evaluator, and directed my office to have the reports in hand before the mediation scheduled for January 3, 2023.
12. I cannot find a note of it, but I believe both experts were scheduled to see the Claimant before December 7, 2022. However he was not canvassed for his availability until the fall of 2022 and he advised me he would be with family in Romania for a couple of months, and unable to attend.
13. As a result the examination by Nick Altieri was scheduled for January 17th, 2023 and the examination by Dr. Hawkeswood was scheduled for February 8th, 2023.

46. Subsequently during the course of the arbitration hearing Mr. Bacon advised by email as follows:

Gentlemen,

I have confirmed that no actual appointment was set up with Hawkeswood or Altieri. I am ready to proceed.

47. Third, it is submitted the Respondent was not prejudiced by the late delivery of the reports because it had the opportunity to arrange an assessment with Dr. Khan, physiatrist and obtain an expert report which the Claimant consented to late service.

48. The Claimant noted the Respondent never sought an adjournment of the arbitration hearing nor did it give notice of any objection for late service of the reports until April 4, 2023

(b) Respondent

49. The Respondent submits that the Claimant does not meet the onus on him to establish that the reports were necessary and proper such that he should be entitled to recover the associated disbursements. It submits that in accordance with legal authority such as *Dhillon v. Bowering*, 2013 BCSC 1178, there must be consequences for the Claimant's failure to adhere to the Rules, and in particular Rule 11-6(3).

50. As confirmed by Mr. Bacon's email sent during the hearing, no appointments were arranged in time to allow service of the reports in compliance with the 84 day notice period. Further the evidence in respect to the Dr. Hawkeswood and Altieri Reports was uncertain as to why they were served late, and in the case of the Pivnenko Second Report, there was no evidence.

51. Mr. Cahan, states that upon receiving the five reports served in the letter of January 17, 2023, he anticipated there would be no further reports, and based upon the reports received in compliance with the 84 day notice period, he did not feel responsive reports were required. Mr. Cahan submits there was both specific and presumed prejudice arising from the late service of the four reports.

52. Finally the Respondent submits that the actions of the Claimant amount to an ambush. It was only after the unsuccessful mediation of January 3, 2023 that steps were taken to retain Mr. Altieri and Dr. Hawkeswood. While Mr. Altieri

was retained six days before the last day for service under Rule 11-6(3), Dr. Hawkeswood was not retained until ten days after that last day for service.

V. DECISION

53. The issue before me is whether the Respondent is responsible for the disbursement costs of four expert reports, notwithstanding their late service. It is accepted late service does not prevent such a result, so long as it can be said the disbursement was necessarily or properly incurred: ***Thorogood v. Roberts***, 2014 BCSC 2213 at para. 62.

54. I am guided in part by the following statement of Justice Devlin in ***Harry v Kalutharage***, 2019 BCSC 403 at para. 24:

[24].....The Rules requirements set out just and structured procedures that ensure fairness to all parties to a matter, accordingly, breaches of the expert report requirements under the Rules requires compelling reasons to justify the court's exercise of discretion to admit the report.

55. I would add to that last sentence "...and compelling reasons to justify the court's exercise of discretion to allow the cost as a disbursement".

56. I will now consider each of the four experts and their respective disbursements in the order that they were retained.

(a) Nicholas Altieri, Occupational Therapist

57. Mr. Altieri rendered two invoices dated February 24, 2023 and March 31, 2023 in the respective amounts of \$7,901.25 and \$210.00. The larger invoice was in respect to the assessment and preparation of his report.

58. The reason given for the need to retain Mr. Altieri was to link the Claimant's back pain to his inability to work as a truck driver. With that objective he was asked to conduct a Functional Capacity Evaluation and Cost of Future Care Assessment.

59. Having read closely the Altieri Report, I have no difficulty in concluding that his opinion evidence was necessarily incurred to advance the case of the Claimant.

60. Suffice to say, Mr. Altieri reviewed the medical evidence provided to him which included two reports from the Claimant's family physician Dr. Vaish, took an extensive history from the Claimant, conducted a number of functional tests directed towards work capacity and endurance, and then based on the results, provided his opinion as to the Claimant's ability to work in various occupations including as a truck driver, and recommendations for future care.

61. The only argument advanced by the Respondent to disallow the two disbursement accounts is that the report was served late. It is true the explanation for the late retainer of Mr. Altieri, and ultimately late service of his report, was vague and weakened by subsequent clarification.

62. However I have little doubt that had an application been brought at the arbitration hearing pursuant to Rule 11-7(6), I would have ruled the Altieri Report admissible. He was retained prior to the deadline for service of expert reports (albeit only 6 days), his evidence was necessary to advance the Claimant's case and there was little if any prejudice to the Respondent by the late service.

63. For those reasons, I would allow the two disbursement accounts of Mr. Altieri.

(b) Dr. Hawkeswood, Psychiatrist

64. Dr. Hawkeswood rendered three invoices dated February 8, 2023, March 30, 2023, and April 6, 2023 in the respective amounts of \$6,798.75, \$1,086.75 and \$3,780.00.

65. The first invoice was for the assessment and preparation of his February 15, 2023 report, the second for review of further records and the third for a late cancellation fee.

66. I see the retainer of Dr. Hawkeswood quite differently from that of Mr. Altieri.

67. First Dr. Hawkeswood was not retained until after the time for service of expert reports had already come and gone. In this regard, the statement of Justice Matthews in **Johal v. Fazil**, 2021 BCSC 1368 at para. 9 is pertinent:

[9] Rule 11-6(4) is not a license for a party to fail to serve a report under Rule 11-6(3) because they want to wait and see the other party's reports before deciding what expert evidence

they will rely on. Parties who delay to serve their evidence under Rule 11-6(3) do so at their own peril if the evidence is not truly responsive in nature: *Timar v. Barson*, 2015 BCSC 340 at paras. 19 and 21, citing *Crane v. Lee*, 2011 BCSC 898.

[Emphasis added]

68. While the statement was made within the context of a response report, it is equally applicable to the situation involving Dr. Hawkeswood. In fact I am of the view that such peril is heightened when the expert is retained after the service deadline has already passed.

69. Second, the explanation for the late retainer of Dr. Hawkeswood suffers from the same frailties as I addressed with Mr. Altieri. Mr. Cahan described the situation as amounting to an ambush. While I do not agree with Mr. Cahan's characterization, the retainer of Dr. Hawkeswood does have the appearance of an afterthought.

70. Third having read the Dr. Hawkeswood Report, I have significant doubt as to whether it can be said his retainer was necessarily or properly incurred at the time of the retainer, given all of the circumstances. I have earlier referenced the peril of proceeding to retain an expert when the time for service has already expired.

71. The stated reason for retaining Dr. Hawkeswood was the same as for Mr. Altieri, that is, "to prove the extent to which the Claimant's back pain affected his ability to work as a truck driver".

72. Mr. Altieri prior to the involvement of Dr. Hawkeswood, was retained to address this issue. His report reveals he did so in significant detail.

73. It is true Mr. Altieri made it clear he was not offering an opinion as to causation. However the family physician Dr. Vaish who provided two reports, did address the link between back pain resulting from the BC and Colorado Accidents, and the Claimant's ability to work as a truck driver. While I was not provided with the reports of Dr. Vaish, I was able to gain a sense of his evidence from the other experts who summarized the opinions of Dr. Vaish.

74. The Claimant advanced the argument that there was no prejudice to the Respondent because it was able to retain a physiatrist to assess the Claimant and obtain a report to counter that of Dr. Hawkeswood.

75. Even if that were so (and the Respondent asserts otherwise), it is but one factor to be considered in exercising my discretion as to whether the invoices rendered by Dr. Hawkeswood are disbursements that the Claimant is entitled to recover from the Respondent as being necessarily or properly incurred in the conduct of the proceeding.

76. At a minimum the Respondent was put into a position it would not have been in, had the Rules been followed with respect to the service of the Dr. Hawkeswood Report.

77. The Claimant also submitted in conjunction with the lack of prejudice argument that the Respondent never indicated it was objecting to the expert reports for late service until April 4, 2023 or required an adjournment of the arbitration hearing. The Claimant says this failure eliminates any argument the Respondent might make as to prejudice. I do not agree with this submission.

78. First the Claimant served the Altieri and Dr. Hawkeswood Reports on February 21, 2023, followed by the Turnbull Report on February 24, 2023. The Claimant would have known these reports were being served nearly five weeks past the service deadline.

79. The Respondent in its AMC Brief delivered February 27, 2023 then gave notice it was objecting to the Claimant's reports, although no reasons were given at that time.

80. However given the late service it should have come as no surprise to the Claimant that objection was being taken.

81. At the AMC of February 28, 2023, an order was made that the parties particularize any objections to the other party's reports on or before April 4, 2023. The Respondent by letter dated April 4, 2023 gave notice in accordance with the AMC order that the reports were objected to on the basis that they were not served in compliance with Rule 11-6(3).

82. As commented on by Registrar Sainty in *Dhillon* at para 45, it is the Claimant who has the burden of proving the necessity and propriety of the disbursements occurred, and those elements cannot be founded on any apparent or alleged failure on the part of the Respondent (see also *Wark v Kang*, 2018 BCSC 1733 at para. 36 and *Johal* at para. 24)

83. For the reasons set out above together with the reasoning in *Dhillon* at paras. 37 to 46, and 73, I disallow the disbursement account of Dr. Hawkeswood dated February 8, 2023 on the basis that it was not reasonable or proper to commission the report at a point when the 84 day notice period prescribed by Rule 11-3(6) had already passed. It follows that the subsequent two invoices of Dr. Hawkeswood are also disallowed.

(c) Kevin Turnbull, Economist

84. Mr. Turnbull rendered an invoice in the amount of \$1,725.15 and dated February 27, 2023.

85. Mr. Turnbull provided a report dated February 23, 2023, which provided calculations to assist in the estimation of future care costs, based upon the recommendations made by Mr. Altieri.

86. Given that I have already allowed the disbursements associated with Mr. Altieri, I similarly allow the disbursement of Mr. Turnbull which was simply costing the recommendations of Mr. Altieri.

(d) Sergiy Pivnenko, Economist

87. Mr. Pivnenko rendered an invoice in the amount of \$2,559.38 and dated March 29, 2023.

88. Mr. Pivnenko was retained to normalize the Claimant's income to remove extraordinary expenses incurred as a result of capital expenses for a rebuilt engine and transmission. He prepared a report dated March 29, 2023, which was served the same day.

89. No letter of instruction to Mr. Pivnenko was produced or referenced, and there was no evidence as when he was retained or why his report was late served thirteen days prior to commencement of the arbitration hearing.

90. The Pivnenko Second Report indicates the only documents reviewed for the purpose of the report were an email dated September 15, 2022 and the Claimant's income tax returns for the years 2016 to 2020.

91. Recognizing my role is not to second guess counsel doing a competent job in selecting the necessary expert evidence, and having read the report, I accept that the evidence was necessary to advance the case of the Claimant.

92. In the circumstances of the very late service with no explanation, combined with my accepting that the report assisted in advancing the Claimant's case, I allow 50% of the disbursement cost to the Claimant.

93. I make the following award:

1. The disbursement invoices for Nicholas Altieri in the amounts of \$7901.25 and \$210.00 are allowed in full;
2. The three disbursement invoices for Dr. Hawkeswood are disallowed;
3. The disbursement invoice for Kevin Turnbull in the amount of \$1725.15 is allowed in full;
4. The disbursement invoice for Sergiy Pivnenko in the amount of 2559.38 is allowed to the extent of 50%.

94. It appears there has been divided success in this assessment such that each party should bear their own costs. However if there are issues I am not aware of and counsel wish to make submissions, arrangements can be made to set up a telephone call to discuss how to proceed.

Dated: April 27, 2023

Dennis Quinlan

Arbitrator – Dennis C. Quinlan, K.C.

