IN THE MATTER OF AN ARBITRATION PURSUANT TO
Section 148.2(1) of the Revised Regulations to the Insurance (Vehicle) Act
(includes amendments up to the BC Reg. 126/2014)

AND

***Arbitration Act,* RSBC 1996, c. 66**

BETWEEN:

SN

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATOR'S DECISION REGARDING THE ADMISSIBILITY OF THE REPORT OF D. HARVEY WEST, FEC, P.ENG.

Counsel for the Claimant	Anu Khanna
Counsel for the Respondent	Derek James
Date of Decision	May 11, 2020

INTRODUCTION

1. This is an application by the claimant to exclude from evidence the report of Mr. D. Harvey West dated April 13, 2020. The application is opposed by the respondent.

HISTORY

2. This is a claim for compensation for injuries sustained by the claimant, pursuant to the coverage afforded by the ***Revised Regulations to the Insurance (Vehicle) Act***.

3. The accident which underlies this proceeding occurred on June 22, 2011. That accident gave rise to a tort claim. It was settled with an admission of liability, for available policy limits, and an agreement that the claimant could proceed with this proceeding, which was commenced on November 10, 2015. It was set for a seven day hearing which was to proceed on April 20, 2020.

4. On March 19, 2020 I decided, after receiving submissions from the parties, that the hearing should proceed by video conferencing.

5. On April 8, 2020, counsel for the respondent sent an email to me, copied to claimant's counsel which said, inter alia:

> Since the time of your Decision dated March 19, 2020, the parties have been monitoring the development of the pandemic and the use of videoconferencing to handle a complete trial/hearing where social distancing is required. It is fair to say that the pandemic has gotten worse. It is also fair to say that any confidence in videoconferencing to handle a complete trial/hearing where social distancing is required has been destroyed.
>
> As such, the parties have agreed that it is in everyone's interest to reschedule the hearing to as early a date as makes sense with respect to the pandemic but also to the plaintiff's desire to have this matter heard as soon as safely possible…

6. In a conference call later on April 8, 2020, respondent's counsel advised that the basis for his statement as to the destruction of confidence in using video conferencing was an adverse report from a lawyer or lawyers in his firm that had used Zoom for a mediation.

7. It was agreed during the conference call that the matter be heard for eight days, commencing July 6, 2020.

8. On April 9, 2020, the day after the conference call, counsel for the respondent requested Mr. West to provide an opinion as to whether damage on the bumper of the claimant's vehicle was caused by the vehicle driven by the defendant in the underlying proceeding.

9. On April 13, 2020, Mr. West's report, together with his curriculum vitae, was served on counsel for the claimant pursuant to Rule 11-6 of the ***Supreme Court Civil Rules***. No evidence as to the severity of impact had previously been tendered by either party.

10. On April 15, 2020, counsel for the claimant objected to the admissibility of Mr. West's report. On the same day, I directed that those objections be dealt with in writing, and provided a timetable in respect of same. The respondent objected to the claimant's reply as not being proper, but declined an opportunity to make further submissions. Full submissions have therefore been received.

THE POSITION OF THE PARTIES

11. The claimant's objections as to the admissibility of Mr. West's may be summarized as follows. First, he says that the 84 day deadline for the delivery of expert reports had passed on February 24, 2020. This submission rests on, and is related to, the claimant's second argument, which is that a term of the adjournment was that there would be no further reports or surveillance video tendered by the respondent. Finally, the claimant says that Mr. West's report is not probative of any issues in this proceeding.

12. The respondent says, in summary, that first, that the 84 day deadline has not passed because the hearing is now set to commence July 6, 2020. Second, the respondent says that there was no agreement that further evidence would not be tendered. Counsel says:

> The Claimant suggests that "counsel for the Respondent remained silent when counsel for the Claimant agreed to the adjournment but on the basis that there would be no further reports of video surveillance." There is no evidence to support any of these serious allegations. The only evidence on the point is the notes of Mr. Tweedy and the instruction letter to Mr. West dated April 9, 2020. Further, and with respect, the Rule does not require defense counsel to give notice of an intention to retain an expert in addition to notice by service of the report.

13. Finally, the respondent says that resolution of the issue of whether Mr. West's report is probative of the issues of the measurement of the claimant's injuries requires a voir dire It also says that Mr. West does not comment on that issue, in any event.

DECISION

14. In my opinion, it is not necessary to have a voir dire to determine if Mr. West's evidence ought to be admitted. Mr. West's evidence is complete on its face. He simply offers his opinion that a puncture on the bumper of the claimant's car was not caused by the subject motor vehicle accident. He does not opine on how that might be related to the injuries alleged to have been suffered by the claimant.

15. At its best, Mr. West's evidence might offer support for the proposition that the impact to the claimant's vehicle was modest. Even that is uncertain, because the absence of a puncture does not indicate the forces that were present. Regardless, whether the impact was indeed modest is not, on its own, a relevant consideration in this matter. See, for example, ***Duda v. Sekhon***, 2015 BCSC 2393 (CanLII), where the Court stated:

> [62] Counsel for the defendants spent considerable time and effort making the submission that the two accidents did not cause significant motor vehicle damage. However, it has been clearly established in Canadian law that minimal motor vehicle damage is not "the yardstick by which to measure the extent of the injuries suffered by the plaintiff". Mr. Justice Macaulay stated in ***Lubick v. Mei and another***, 2008 BCSC 555 at para. 5:
>
> The Courts have long debunked as myth the suggestion that low impact can be directly correlated with lack of compensable injury. In ***Gordon v. Palmer***, 1993 CanLII 1318 (BCSC), [1993] B.C.J. No. 474 (S.C.), Thackray J., as he then was, made the following comments that are still apposite today:
>
> > I do not subscribe to the view that if there is no motor vehicle damage then there is no injury. This is a philosophy that the Insurance Corporation of British Columbia may follow, but it has no application in court. It is not a

> legal principle of which I am aware and I have never heard it endorsed as a medical principle.
>
> He goes on to point out that the presence and extent of injuries are determined on the evidence, not with "extraneous philosophies that some would impose on the judicial process". In particular, he noted that there was no evidence to substantiate the defence theory in the case before him. Similarly, there is no evidence to substantiate the defence contention that Lubick could not have sustained any injury here because the vehicle impact was slight.

16. I do not consider Mr. West's evidence to be either relevant or necessary for me to determine the issues in this proceeding. See ***R. Mohan*** 1994 CanLII 80 (SCC).

17. I therefore find that Mr. West's report is not admissible.

18. I decline to address the difficult issue of whether there was an agreement between counsel on April 8, 2020 that there would be no further expert evidence, or that counsel for the respondent should have made reference to a possible report from Mr. West at that time.

_____
Mark Tweedy, C. Med.
Arbitrator
May 11, 2020