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 ADMISSIBILITY OF CERTAIN EXPERT REPORTS

Counsel for the Claimant	Anu Khanna
Counsel for the Respondent	Derek James
Date of Decision	April 22, 2020

INTRODUCTION

1.This is a claim for compensation for injuries sustained by the claimant, pursuant to coverage afforded by the ***Revised Regulations to the Insurance Vehicle Act.*** It is set for an eight day hearing, which is to commence on July 6, 2020.

NATURE OF THE APPLICATION

2. The claimant applies to exclude from evidence, in their entirety, two reports of Mr. Clae Willis, a vocational therapist, dated October 21, 2019, and December 12, 2019. Alternatively, the claimant submits that certain portions of those reports be redacted, and not admitted into evidence.

3. The claimant also applies to exclude from evidence portions of the report of Dr. John Oliver, an orthopaedic surgeon, dated December 18, 2019.

4. The respondent opposes the claimant's applications.

5. I have not dealt with arguments surrounding the admissibility of the report of Dr. Strauss. Those arguments were mentioned by the respondent, but not addressed by the claimant. If the parties wish me to deal with that matter, they can advise me.

THE LAW

6. The general legal principles governing the admissibility of expert reports are well known. A useful summary is that provided by the Supreme Court of Canada in ***R. v. Mohan***, 1994 CanLII 80 (SCC) at page 20, where the Court stated:

> Admission of expert evidence depends on the application of the following criteria:
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> (a) relevance;
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> (b) necessity in assisting the trier of fact;
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> (c) the absence of any exclusionary rule;
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> (d) a properly qualified expert.

7. In ***R. v. Sekhon***, 2014 SCC 15 (CanLII), the Supreme Court of Canada stated, at paragraph 46:

> Given the concerns about the impact expert evidence can have on a trial — including the possibility that experts may usurp the role of the trier of fact — trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence. While these concerns are perhaps more pronounced in jury trials, all trial judges — including those in judge-alone trials — have an ongoing duty to ensure that expert evidence remains within its proper scope. It is not enough to simply consider the *Mohan* criteria at the outset of the expert's testimony and make an initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries of expert evidence. As noted by Doherty J.A. in *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 62:
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> > The admissibility inquiry is not conducted in a vacuum. Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence. In doing so, the trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert's opinion may be proffered so as to minimize any potential harm to the trial process. A cautious delineation of the scope

> of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential. The case law demonstrates that overreaching by expert witnesses is probably the most common fault leading to reversals on appeal . . . . [Emphasis added; citations omitted.]

8. An expert report must be written in such a manner that it is possible for the trier of fact to determine the factual assumptions the expert relies upon, and for the opposing party to properly prepare and conduct a cross examination of the expert, and secure a responsive expert opinion. See ***Mazur v. Lucas***, 2010 BCCA 473 (CanLII).

9. The relevant Supreme Court Civil Rules are 11-6-Expert Reports, and 11-7-Expert Opinion Evidence at Trial.

THE CLAIMANT'S SUBMISSIONS

10. The claimant's submissions regarding the reports of Mr. Willis, and Dr. Oliver, in turn, are as set out below. I have set them out with particularity because the resolution of each objection turns on the specific comments made by Mr. Willis and Dr. Oliver.

(a) The claimants submissions regarding the reports of Mr. Willis

(i) Opining outside the area of his expertise

11. The claimant says that the following statements of Mr. Willis in his report of October 21, 2019 are outside the scope of his expertise and are therefore inadmissible:

> (a) "However, more than 8 years post-incident SN should have reached Maximum Medical Recovery (MMR) in terms of musculoskeletal recovery…";
>
> (b) "Despite some of the medical opinions within the chart that support an ongoing vocational impairment, as well as SN's self-concept of being incapable of competitive employment within his chosen filed [sic]; the vocational assessment results indicate that he is capable of sitting, capable of complete testing, has retained his academic ability, is capable of arriving on time, capable of self transportation, is able to maintain good interpersonal communication.";
>
> (c) "I opine that with the appropriate treatment protocols and a willingness to mitigate his losses, SN could be returned to competitive employment.";
>
> (d) "As noted, a period of Graduated Return to Work is suggested after the provision of appropriate care, Mr. SN will have full access to the competitive work environment." [sic];
>
> (e) "From a vocational rehabilitation perspective and given the Functional Capacity Evaluation results, the opinions expressed, as well as the vocational testing results

rendered and interview information from SN, he will require a period of successful pro-active treatment.";

(f) "I opine that with the provision of pro-active treatment, and a willingness to mitigate the situation, SN could return to competitive employment.";

12. The claimant says that the following statement of Mr. Willis in his report of December 12, 2019 is outside the scope of his expertise and is inadmissible:

"I continue to opine that with the provision of appropriate pro-active treatment, and a willingness to mitigate the situation, SN could return to competitive employment."

(ii) Improperly setting out facts and assumptions

13. The claimant says that Mr. Willis did not properly set out the facts and assumptions that his opinion is based on, as required by Rule 11-6 (1) (f) (i). The claimant says that the "Facts and Assumptions" section of the October 21, 2019 report is in fact "selective excerpts" from a variety of treating medical professionals.

(iii) Arguments in the guise of opinions

14. The claimant says that some of Mr. Willis' opinions are argument in the guise of opinion, and are therefore inadmissible, as follows:

(a) Mr. Willis noting that SN refused to sign a release that would have allowed Mr. Willis to contact previous employers or treatment providers;

(b) Mr. Willis opined on the expertise of one of the claimant's experts, Mr. Paukulak;

(c) Mr. Willis minimised SN's "post accident injuries", and attempted to bolster his opinion by picking "brief, random and isolated comments from the medical records;

(d) Mr. Willis provided an "argument/legal opinion" about the job market.

(iv) Opining on credibility

15. The claimant says that Mr. Willis improperly opined on the claimant's credibility, and says that those statements are inadmissible, as follows:

a) "It is unclear what is maintaining SN in a self-defined vocationally disabled state.";

b) “I opine that with the provision of appropriate pro-active treatment, and a willingness to mitigate the situation**,** SN could return to competitive employment.”; and

c) “SN’s concept of self-disability appears entrenched.”

16. The claimant says that “Mr. Willis’ report is “so flawed it should be excluded in its entirety”. Alternatively, the claimant says that the offending portions of Mr. Willis’ report should be redacted.

(b) The claimant’s submissions regarding the report of Dr. Oliver

16. Dr. Oliver provided a report in response to various reports provided by the claimant, and in response to the October 21, 2019 report of Mr. Willis. Dr. Oliver said:

> “With regard to the report of Mr. Clay Willis, October 21, 2019, I agree with Mr. Willis and the statement that ‘*with the appropriate treatment protocols and willingness to mitigate his losses, SN could be returned to competitive employment”.*
>
> I am in agreement with #9 in the conclusion of Mr. Willis. Namely, with the provision of appropriate proactive treatment, SN could return to competitive employment.”

17. As previously noted, the claimant objects to those opinions being proffered by Mr. Willis, and says that their adoption by Dr. Oliver does not make them admissible. The claimant further says that Rule 11-6 (4) does not permit a party to respond to a report from that same party.

THE RESPONDENT’S SUBMISSIONS

18. The respondent’s submissions regarding the reports of Mr. Willis and Dr. Oliver are, in turn, set out below. I have set them out with particularity because the resolution of each turns on the specific comments made by Mr. Willis and Dr. Oliver.

(a) The respondent’s reply to the claimant’s submissions regarding the reports of Mr. Willis

(i) The application is premature

19. The respondent says that the argument that Mr. Willis is opining outside his area of expertise is “premature”, and that there has to be a voir dire, with examination and cross

examination of Mr. Willis on his qualifications. The respondent relies upon ***Cao v. Chen***, 2019 BCSC 844 (CanLII) as authority for that proposition.

(ii) Opining outside of his area of expertise

20. The respondent says that there is "ample evidence to show that Mr. Willis is qualified to provide the opinions" objected to by the claimant. The respondent's specific responses to the claimants objections are as follows:

(a) Objection

"However, more than 8 years post-incident SN should have reached Maximum Medical Recovery (MMR) in terms of musculoskeletal recovery…".

Response

The respondent says that this is not an opinion, but a factual assumption.

(b) Objection

The claimant says that in the following statement, Mr. Willis purports to disagree with medical opinions: "Despite some of the medical opinions within the chart that support an ongoing vocational impairment, as well as SN's self-concept of being incapable of competitive employment within his chosen filed [sic]; the vocational assessment results indicate that he is capable of sitting, capable of complete testing, has retained his academic ability, is capable of arriving on time, capable of self transportation, is able to maintain good interpersonal communication.";

Response

The respondent says this is an opinion on vocational impairment which Mr. Willis is qualified to provide, and that he is not disagreeing with medical opinions.

(c) Objection

"I opine that with the appropriate treatment protocols and a willingness to mitigate his losses, SN could be returned to competitive employment."

Response

The respondent says that Mr. Willis is opining on a return to work, which is within his area of expertise. It further says that to the extent that this is a medical opinion, it is buttressed by the opinion of Dr. Oliver.

(d) Objection

"As noted, a period of Graduated Return to Work is suggested after the provision of appropriate care, SN will have full access to the competitive work environment." [sic];

Response

The respondent says that this opinion must be read in the context of the preceding paragraphs, which discuss employment statistics, and the statistical chances of having full access to competitive employment.

(e) Objection

"From a vocational rehabilitation perspective and given the Functional Capacity Evaluation results, the opinions expressed, as well as the vocational testing results rendered and interview information from SN, he will require a period of successful pro-active treatment.";

Response

The respondent says this is not a medical opinion, but rather, what is necessary to get the claimant to "Competitive Employability".

(f) Objection

"I opine that with the provision of pro-active treatment, and a willingness to mitigate the situation, SN could return to competitive employment.";

Response

The respondent once again says that this is not a medical opinion, but rather an opinion as to the claimant's ability to return to competitive employment. It further says that to the extent that this is a medical opinion, it is buttressed by the opinion of Dr. Oliver.

21. The claimant objected to the following passage in Mr. Willis' report of December 12, 2019:

"I continue to opine that with the provision of appropriate pro-active treatment, and a willingness to mitigate the situation, SN could return to competitive employment."

The respondent's response is that this is not a medical opinion, but rather an opinion as to the claimant's ability to return to competitive employment. It further says that to the extent that this is a medical opinion, it is buttressed by the opinion of Dr. Oliver.

(iii) Improperly setting out facts and assumptions

22. The respondent says that Mr. Willis' factual assumptions are in the factual assumptions section, and that his opinions in the opinion section of his report. It further says that the extent to which Mr. Willis may have wrongly relied on various facts is a matter for cross examination at the hearing.

(iv) Argument in the guise of opinion

23. The respondent's specific responses to the claimants objections are set out below.

(a) Objection

Mr. Willis noting that SN refused to sign a release that would have allowed Mr. Willis to contact previous employers or treatment providers;

Response

The respondent says that there is nothing inappropriate about Mr. Willis' "search for the facts of the case".

(b) Objection

Mr. Willis opined on the expertise of one of the claimant's experts, Mr. Paukulak;

Response

The respondent says that this is "advocacy for the opinion", which is permitted. See, for example, ***Bolton v. Vancouver***, 2002 BCSC 537 (CanLII).

(c) Objection

Mr. Willis minimised SN's "post accident injuries", and attempted to bolster his opinion by picking "brief, random and isolated comments from the medical records.

Response

The respondent says that this argument is “without merit”, and that, in essence, the records say what the records say.

(d) Objection

Mr. Willis provided an “argument/legal opinion” about the job market.

The respondent says that there is no issue that Mr. Willis is able to opine on the job market, but that a finding of whether there is a loss of earning capacity is up to the arbitrator.

(v) Opining on credibility

24. The respondent says that none of the objections amount to Mr. Willis opining about the credibility of the claimant. Further, that Mr. Willis should have “leeway” to comment on matters related to credibility. The respondent’s specific responses to the objections raised by the claimant are as follows:

a) Objection

“It is unclear what is maintaining SN in a self-defined vocationally disabled state.”;

Response

The respondent says that there is no medical evidence supporting “the fact that the Claimant is not working at all that is not based solely on the Claimant’s self report”.

b) Objection

“I opine that with the provision of appropriate pro-active treatment, and a willingness to mitigate the situation**,** SN could return to competitive employment.”

Response

The respondent says that the “willingness to mitigate the situation” comment must be “put into context”, that being that various experts have opined that the claimant can work. It says “what else could one call the Claimant’s refusal to even try to go back to work”, and says, in any event, that this is “a matter for cross-examination”.

c) Objection

> "SN's concept of self-disability appears entrenched."
>
> Response
>
> The respondent repeats the same arguments noted above. It also says "this is a matter for cross-examination, and not a fine tooth comb analysis before an explanation is provided by the author".

(b) The respondent's submissions regarding the report of Dr. Oliver

25. The respondent first says that it is appropriate for Dr. Oliver to comment on Mr. Willis' report, notwithstanding that both reports were served by it. It relies upon Rule 11-6(4), which governs responding reports, and ***Cambie Surgeries Corporation v. British Columbia (Attorney General)***, 2018 BCSC 748 (CanLII).

ANALYSIS AND RULINGS

(a) Whether the application to exclude portions of Mr. Willis' reports on the basis that they are outside the scope of his expertise is premature

26. As noted, the respondent says that the claimant's arguments that certain opinions expressed by Mr. Willis are premature, and should only take place after an examination and cross examination on qualifications has taken place. It relies upon ***Cao v. Chen***, supra.

27. I do not agree that ***Cao v. Chen***, supra, stands for the proposition that such an application must proceed in the manner proposed, although it certainly did in that case. In ***Cambie Surgeries Corporation v. British Columbia (Attorney General)***, 2017 BCSC 445 (CanLII), the court only proceeded with examination and cross examination on qualifications after it became apparent that there were questions regarding same. There is no similar issue in this case. Here the objections as to matters being outside Mr. Willis' scope of expertise center on his agreed upon lack of expertise as a medical practitioner, despite his substantial expertise as a vocational therapist.

28. In my view, the application is not premature.

(b) Whether certain of Mr. Willis' opinions are outside the scope of his expertise

29. I will deal with each objection in turn. Unless otherwise noted, all references are to the October 21, 2019 report.

30. “However, more than 8 years post-incident SN should have reached Maximum Medical Recovery (MMR) in terms of musculoskeletal recovery…”.

31. On its face, Mr. Willis is expressing a medical opinion, which is outside the scope of his expertise. The statement is therefore inadmissible

32. “Despite some of the medical opinions within the chart that support an ongoing vocational impairment, as well as SN’s self-concept of being incapable of competitive employment within his chosen filed [sic]; the vocational assessment results indicate that he is capable of sitting, capable of complete testing, has retained his academic ability, is capable of arriving on time, capable of self transportation, is able to maintain good interpersonal communication.”

33. I do not agree that Mr. Willis “purports to disagree with medical opinions”. Rather, he is simply acknowledging that there are medical opinions contrary to his opinion. The statement is admissible.

34. “I opine that with the appropriate treatment protocols and a willingness to mitigate his losses, SN could be returned to competitive employment.”

35. In my view, Mr. Willis is here expressing a medical opinion, as well as a legal opinion. It is not of “necessity” that I hear him on those matters. Rather, those are issues that I will have to decide after hearing all of the evidence. See ***R. v. Mohan***, supra. The statement is therefore inadmissible.

36. “As noted, a period of Graduated Return to Work is suggested after the provision of appropriate care, SN will have full access to the competitive work environment.” [sic]

37. Although Mr. Willis is not opining on what “appropriate care” might be, in my view he does reach a conclusion as to what state of recovery the claimant might achieve. In my opinion, this is outside the scope of his expertise, and the statement is inadmissible

38.“From a vocational rehabilitation perspective and given the Functional Capacity Evaluation results, the opinions expressed, as well as the vocational testing results rendered and interview information from SN, he will require a period of successful pro-active treatment.”

39. Mr. Willis is not opining on what “successful pro-active treatment” might be. In my view, Mr. Willis is qualified to express the view that such treatment is necessary, and that it be successful. The statement is therefore admissible.

40. “I opine that with the provision of pro-active treatment, and a willingness to mitigate the situation, SN could return to competitive employment.”

41. This statement assumes that pro-active treatment will be successful. Whether that is so is outside the scope of Mr. Willis' expertise, and is therefore inadmissible.

42. A similar statement was made in the December 12, 2019 report. Mr. Willis stated: "I continue to opine that with the provision of appropriate pro-active treatment, and a willingness to mitigate the situation, SN could return to competitive employment."

43. For the same reasons expressed in paragraph 40, I find that this statement is inadmissible.

(c) Whether Mr. Willis adequately sets out his facts and assumptions

44. I agree with the respondent's submission that the issue is whether it is possible to determine the facts and assumptions upon which Mr. Willis bases his opinions. See ***Mazur v.*** Lucas, supra. The claimant's principal objection is that Mr. Willis was selective in what portions of what reports he relied upon. This is something which will no doubt be explored on cross-examination, and upon which submissions as to the weight to be given to Mr. Willis' opinions will be made and based upon. It is not something which I am prepared to rule upon at this time.

(d) Whether Mr. Willis has advanced arguments in the guise opinions

45. I will deal with each objection in turn.

46. Mr. Willis noted that SN refused to sign a release that would have allowed Mr. Willis to contact previous employers or treatment providers.

47. I agree with the claimant's submissions that Mr. Willis' efforts to conduct his own investigation was inappropriate. I do not agree with the respondent's submission that there was "nothing inappropriate about Mr. Willis' search for the facts of the case". If Mr. Willis did not have the facts necessary to express the opinions he was asked to express he should have so advised counsel, who then could have taken what steps he thought necessary. I therefore hold the statement to be inadmissible.

48. Mr. Willis opined on the expertise of one of the claimant's experts, Mr. Paukulak.

49. The respondent characterises this as "advocacy for the opinion". I do not agree. While Mr. Willis may properly opine on his differences with Mr. Paukalak, and how those arise, it is not his function to comment on Mr. Paukalak's expertise. I therefore find that statement to be inadmissible.

50. Mr. Willis minimised SN's "post accident injuries", and attempted to bolster his opinion by picking "brief, random and isolated comments from the medical records".

51. I do not agree that this is argument in the guise of opinion. Claimant's counsel will be able to challenge both the opinion reached, and the facts which underly it, in cross-examination. I hold that the statement is admissible.

52. Mr. Willis provided an "argument/legal opinion" about the job market. The specific statement which was impugned was "SN does not have to have 100 jobs, or even 50, he needs only one at a time."

53. I agree that this statement is argument in the guise of opinion, and is not admissible

(e) Whether Mr. Willis has opined on the claimant's credibility

54. I will deal with each objection in turn.

55."It is unclear what is maintaining SN in a self-defined vocationally disabled state."

56. Whether the claimant is in fact "vocationally disabled" is one of the central issues in this arbitration. It is not necessary for me to hear what is in essence Mr. Willis' commentary about the claimant's state of mind to reach a conclusion about that issue. See ***R. v. Mohan***, supra.

57. "I opine that with the provision of appropriate pro-active treatment, and a willingness to mitigate the situation**,** SN could return to competitive employment."

58. I have ruled this statement to be inadmissible on another basis. See paragraph 41 of this Decision.

59. "SN's concept of self-disability appears entrenched."

60. Once again, whether the claimant is in fact disabled is one of the central issues before me. It is not necessary for me to hear Mr. Willis' opinion regarding the claimant's state of mind in order to decide that issue. See ***R. v. Mohan***, supra.

(e) Whether Mr. Willis' reports should be excluded in their entirety

61. While I have ruled that a number of the statements made by Mr. Willis in his reports are inadmissible, I do not agree that his reports are so flawed that they need be excluded in their entirety. They can either be redacted or revised, as counsel determines.

(f) The admissibility of Dr. Oliver's opinions regarding Mr. Willis' opinions

62. I agree with the claimant's submissions in reply that Rule 11-6 (4) does not permit a party to respond to its own reports. I was not referred to a decision where that occurred.

63. If I am wrong about the application of Rule 11-6, the opinions expressed by Mr. Wills that Dr. Oliver agreed with have both been ruled inadmissible. In my view, it is not appropriate for Dr. Oliver's opinions as to inadmissible opinions to be themselves admissible.

Mark Tweedy

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Mark Tweedy, Arbitrator
April 22, 2020