**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:

TJ

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

RULING ON RESPONDENT RULE 7-6 APPLICATION

Counsel for the Claimant, TJ	George Rainforth, A/S Ann Backhouse
Counsel for the Respondent, Insurance Corporation of British Columbia	Jaron Fergusson
Date of Hearing:	February 7, 2023
Place of Hearing:	Vancouver, BC
Arbitrator:	Dennis C. Quinlan, K.C.
Date of Award:	February 15, 2023

I. INTRODUCTION

1. The Respondent seeks orders that the Claimant attend medical assessments with Dr. McDowell, neurologist and Dr. Quee-Newell, vocational consultant on February 24, 2023 and March 6, 2023 respectively.

2. On June 9, 2013, the Claimant was involved in a rear end motor vehicle accident in Bellingham, Washington (the "Accident").

3. The Claimant alleges that as a result of the Accident, he sustained soft tissue-type injuries, including ongoing headaches. He seeks damages for pain and suffering, loss of income earning capacity, loss of housekeeping capacity and future care.

4. This application is made within an underinsured motorist protection arbitration, commenced pursuant to section 148.2 of the ***Insurance (Vehicle) Regulation*** B.C. Reg.447/83 and the **Arbitration Act** [SCBC 2020] Chapter 2 (the "UMP Arbitration")

5. By agreement the Supreme Court Civil Rules govern the UMP Arbitration mutatis mutandis, and this application is brought pursuant to Rule 7-6.

6. The arbitration hearing is scheduled for five days commencing June 26, 2023 and the 84 day deadline for service of expert reports is April 3, 2023.

II. BACKGROUND

7. The UMP Arbitration was commenced by the Claimant delivering a Notice of Arbitration dated October 11, 2018 (the "Notice") to the Respondent and Vancouver International Arbitration Centre ("VanIAC").

8. On January 12, 2022, VanIAC confirmed the appointment of an arbitrator.

9. The Claimant delivered a statement of claim dated March 3, 2022 alleging, inter alia:

> 7. As a result of the Accident, the Claimant sustained personal injury, particulars of which, without limitation, include:
>
>   a. Injury to neck;
>   b. Whiplash;
>   c. Injury to shoulders bilaterally;
>   d. Chronic tension headaches;
>   e. Whiplash Associated Disorder;
>   f. Loss of personal mobility and generalized decreased range of motion and general loss and restriction of limb movement, and range of motion;
>   g. Soft tissue injuries; and
>   h. Such further and other injuries as the Claimant may advise
>
> all of which injuries, loss, and damage have caused , and will continue to cause, the Claimant pain, suffering, and loss of enjoyment of life.
>
> 8. As a result of the Accident, and injuries sustained in the Accident, the Claimant has sustained, or will sustain, the following loss and damage:
>
>   a. General damages for matters of pecuniary loss, particulars of which, without limitation include:
>
>   i. Loss of earning, past and prospective:
>   ii. Loss of opportunity to earn income;
>   iii. Loss of income earning capacity;
>   iv. Costs of future care; and
>   v. Loss, or impairment, of ability to perform household tasks, past and prospective.
>
>   b.General damages for matters of non-pecuniary loss, particulars of which, without limitation, include:
>
>   i. Pain, suffering, and loss of amenities of life; and,
>   ii. Loss of enjoyment of life.

10. The Respondent delivered a statement of defence dated March 9, 2022 wherein it was alleged, inter alia:

> 6. The respondent denies that the claimant suffered any or continues to suffer the injuries, losses, damage, or expenses as alleged in the statement of claim.
>
> . . . .
>
> 9. Any alleged injury, loss, damage or expense was not caused by the collision particularized in paragraph 3 of the statement of claim, but is attributable to previous and/or subsequent accidents, injuries or conditions involving or affecting the claimant of congenital defects and/or pre-existing injuries or conditions and the respondent says further that the alleged condition did not aggravate any pre-existing injury or condition.

11. The Claimant was examined for discovery on October 18, 2022.

12. On December 5, 2022, the Respondent notified the Claimant that independent medical examinations (IMEs) had been scheduled with Dr. Kendall, orthopaedic surgeon on January 10, 2023, Dr. McDowell, neurologist on February 24, 2023 and Dr. Quee-Newell, vocational consultant on March 6, 2023.

13. The Claimant responded on December 16, 2022 by stating he was agreeable to only one physical assessment, being either the orthopaedic assessment or the neurological assessment, but not both. The Claimant also indicated he was not agreeable to a vocational assessment because no evidence had been produced showing it was necessary.

14. On January 3, 2023, the Respondent stated it would proceed with the orthopaedic IME and bring an application for the neurological and vocational IMEs.

15. Due to scheduling difficulties, the orthopaedic IME did not proceed on January 10, 2023 but is in the process of being rescheduled with Dr. Horlick, another orthopaedic surgeon.

III. POSITION OF THE PARTIES

16. The Respondent submits that causation in respect to the Claimant's injuries was put in issue by paragraphs 6 and 9 of its statement of defence. While acknowledging those pleadings are largely pro forma, the Respondent says evidentiary support for the pleading is found in both the Claimant's own description of his headaches at the October 18, 2022 examination for discovery, and discrete references in clinical records to 2001 and 2006 lumbar disc herniations.

17. The Respondent asserts that the causation issue has both an orthopaedic and neurological component requiring investigation by medical doctors having those respective areas of expertise.

18. As to the vocational assessment, the Respondent refers to the Claimant's statement of claim wherein damages are sought for "….loss of earnings, past and prospective, loss of opportunity to earn income, [and] loss of income earning capacity…." Each allegation is described as being "…without limitation…"

19. Given the potential magnitude of the earning capacity claim based upon a possible $20,000 loss per year for the remainder of the Claimant's working life, the Respondent argues it requires a vocational expert who can opine as to whether the Claimant could have qualified for the positions of correctional officer and/or policy analyst which he testified he aspired to prior to the Accident, whether such positions were available, how much they would have paid and whether accommodations were available.

20. The Respondent summarizes by saying that to refuse the assessments would preclude its ability to be on an equal footing with the Claimant in the conduct of the arbitration hearing.

21. The Claimant in opposing the orders sought, relies upon the principles of proportionality set forth in Rule 1-3.

22. He says the injuries alleged are primarily soft tissue and not so complex as to warrant three IMEs in order to place the parties on an equal footing. Further he says the amount involved in the claim is relatively "modest" given he has continued to work full time.

23. The Claimant notes he has not retained and does not intend on retaining an orthopaedic surgeon, neurologist or vocational consultant.

24. To the extent there may be issues of causation, the Claimant submits it is premature to compel him to attend an assessment by a neurologist because the Respondent has adduced no evidence suggesting there is any question which cannot be answered by the orthopaedic surgeon alone.

25. The Claimant asserts that in fact both Dr. Horlick and Dr. McDowell have the necessary qualifications to address the questions at hand, such that if both assessments are permitted, there is a high risk of duplication and overlap between the respective opinions.

26. As to the vocational assessment, the Claimant submits any vocational issues, in the circumstances of this claim, can be addressed by the orthopaedic surgeon. An assessment by a vocational consultant is not necessary to ensure reasonable equality between the parties.

IV. DISCUSSION AND ANALYSIS

27. The guiding principles in respect to a 7-6 application for a further medical assessment are set out in ***Tran v. Abbot***, 2018 BCCA 365.

28. Justice Savage speaking for the Court reviewed the underlying rationale of the Rule:

> [17] Rule 7-6 is a rule of discovery. It is designed to balance the plaintiff's advantage in obtaining expert opinions, by providing the defendant with access to the plaintiff for such prior to trial.
>
> [18] The rule is consistent with the "modern philosophy" that procedural rules should work to promote settlement before trial, and to ensure the speedy and inexpensive determination of each dispute on its merits

29. The Court in rejecting an earlier line of authority that "exceptional circumstances" were a requirement for a second IME, cited the earlier decision of ***Gergely v. Ellingson***, [1978] B.C.J. No. 562 at para. 6 (C.A.), for the principle that as the intention of the Rule was to give litigants the right to know each other's case in advance, it should not be given a "restricted interpretation".

30. Justice Savage then stated:

> [32] In my view, it is well-established that the purpose of an IME is to put the parties on an equal footing with respect to the medical evidence, and Rule 7-6 specifically contemplates more than one IME: ***Wright v. Sun Life Assurance Company of Canada***, 2014 BCCA 309 at para. 31
>
> [33] Multiple examinations may be appropriate and necessary where a variety of injuries are alleged, or the etiology of illness is not straightforward. In exercising its discretion on an application pursuant to Rule 7-6, the court must consider the effect of refusing the order sought on the conduct of the trial.

31. The starting point for a Rule 7-6 application is the pleadings.

32. The opening words of Rule 7-6 provide that the court may order a person submit to an examination "….if the physical or mental condition of a person is in issue…"

33. The question of whether a person's physical or mental condition is in issue, is determined from an examination of the pleadings: ***Astels v. The Canada Life Assurance Co.***, 2006 BCCA 110 at para. 4.

34. Further the request to have a person assessed by an expert or other qualified person, must be grounded in the pleadings and supported by evidence: ***White v. Fan***, 2019 BCSC 785 at para 17.

35. Having reviewed the statement of claim, together with the Claimant's examination for discovery evidence and various clinical records made available to me, I agree with the characterization of Mr. Rainforth on behalf of the Claimant, that the injuries alleged are primarily soft tissue, and on the spectrum of injuries seen in personal injury cases, seemingly straight forward.

36. Such characterization is not however the end of the matter.

37. ***Tran*** at para. 39 stated that that the need to ensure reasonable equality between the parties will include consideration of whether the Respondent should be allowed "….to advance [its] hypothesis as to the etiology of the plaintiff's complaints".

38. While such hypothesis must have a real basis, "medical" evidence is not an independent requirement: ***White v Fan***, at para. 17.

39. Mr. Fergusson on behalf of the Respondent urged me to accept that the etiology of the Claimant's complaints had two neurological aspects (as opposed to only orthopaedic), namely (1) whether there was a neurological explanation for

the headaches which was unrelated to the Accident, and (2) the significance of two herniated lumbar discs in 2001 and 2006 as reported in clinical notes.

40. I note in passing that the clinical notes indicated the herniated discs were treated successfully with massage and physiotherapy.

41. In my view, the evidence as to there being two neurological aspects was sparse. Assertions alone by counsel are not sufficient to provide an evidentiary basis, and as I discussed with Mr. Fergusson during submissions, neither he nor I were qualified, without relevant evidence, to suggest conclusions in that regard.

42. Having said that, I was impressed that Mr. Rainforth was prepared to state that the relevance and importance of the above noted evidence could not be dismissed outright, as in his words, “we do not know at this point”. It is within this context that the Claimant argues it is <u>premature</u> to make a determination as to whether there are issues requiring an investigation by a medical doctor with specific expertise in neurology.

43. I note that as compared to other decisions, no expert reports have yet been exchanged (see ***Fox v. Merricks***, 2020 BCSC 1178 at para. 13), no letters of instruction were produced (see ***Walsh v. Riley***, 2023 BCSC 135 at para. 27), and no affidavit evidence offered as to the need for further investigation by a medical practitioner with a different area of expertise, in this case neurology (see ***Parent v. Krystal***, 2021 BCSC 988 at para. 17).

44. While lack of such evidence on its own is not determinative, its absence does make my task more difficult as was commented on by Master Muir in ***Grey-Verboonen v. Mandurah***, 2019 BCSC 1697 at para. 17.

45. Given what was described in **Walsh v. Riley** at para. 56 as an “evidentiary vacuum”, I have considered whether it is appropriate to simply dismiss the application to have the Claimant assessed by a neurologist in addition to an orthopaedic surgeon.

46. I recognize that the Respondent's choice of experts is not governed by the choice made by the Claimant: **Edgar v. Moore,** 2005 BCSC 1877 at para. 12. Further the Respondent is not bound to accept the Claimant's theory that the source of his ongoing complaints is not neurological: **White v. Fan** at para. 16.

47. In the result I am guided by the principles set forth in **Tran**, particularly at paragraphs 32 and 33. Given the importance of ensuring an equal footing between the parties in order that the issues in dispute can be determined on their merits and with the best evidence, and bearing in mind the submissions of the Claimant, I have concluded that the appropriate order to make at this juncture, is to dismiss the application that the Claimant attend an assessment by Dr. McDowell on February 24, 2023, but give the Respondent leave to renew its application once it is in receipt and has served the report of Dr. Horlick.

48. In making this order, I would add that nothing stated in this ruling should be taken as an indication as to how I might decide any subsequent application, should one be brought. The considerations may well be different at that time.

49. As to the vocational assessment, I have no difficulty in making that order.

50. Prima facie, the Claimant's statement of claim has put into issue the claim for loss of earning capacity, which on its own wording is "without limitation" in describing the earning capacity claim.

51. The Respondent is entitled to address this claim by an expert of its choosing with the appropriate qualifications, and to investigate questions such as those set forth in paragraph 19 herein. The fact that the Claimant states the earning capacity claim is modest given he continues to work full time (albeit in a different job from what he earlier envisaged), is not in my view, a sufficient basis upon which to refuse the request for a vocational assessment.

52. It follows I am satisfied the questions which I am told will be addressed by Dr. Quee Newell, will not involve significant overlap with any opinions to be given by a physical expert such as Dr. Horlick. To the extent there might be overlap and redundancy, the arbitrator is in the best position to deal with such issue: ***Larsen v. Karmi***, 2019 BCSC 1477 at paras 23, 24.

53. In my view a vocational assessment will ensure reasonable equality between the parties in their conduct of the case.

V. CONCLUSION

54. For the reasons set out above, I dismiss the application to have the Claimant attend an assessment with Dr. McDowell on February 24, 2023, with leave to the Respondent to reapply following receipt and service of Dr. Horlick's expert report.

55. I further order that the Claimant attend the vocational assessment with Dr. Quee-Newell on March 6, 2023.

56. Given there has been divided success, I order that each party bear their own costs of this application.

DATED: February 15, 2023.

Dennis Quinlan

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Arbitrator - Dennis C. Quinlan, K.C.