IN THE MATTER OF AN ARBITRATION
PURSUANT TO S.148.2(1) OF THE REVISED REGULATION 1984
UNDER THE *INSURANCE (VEHICLE) ACT,*
B.C. REG 44/83 AND THE *ARBITRATION ACT*, R.S.B.C. 1996, C.55

BETWEEN:

S.M.G.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

RULING ON APPLICATIONS

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Date/Place of Hearing:	June 2, 2016 Vancouver, BC
ARBITRATOR: Date of Award:	DONALD W. YULE, QC June 15, 2016

INTRODUCTION

1. The Respondent, Insurance Corporation of British Columbia (ICBC) applies for two further independent medical examinations by Dr. Andrew Eisen, neurologist, on July 13, 2016 and by an occupational therapist for a functional capacity evaluation (FCE) on a date to be agreed upon.

2. ICBC has previously had an independent medical examination (IME) by consent by Dr. Larry Goldstein, an oral and maxillofacial surgeon on September 28, 2015. No report with respect to that examination has been served. The Claimant has also consented to attend an IME with Dr. Marc Boyle, an orthopedic surgeon on July 5, 2016.

3. The application is opposed by the Claimant on the basis that ICBC has not demonstrated a proper legal basis for obtaining two further IMEs.

BACKGROUND

4. The Claimant was injured in a motor vehicle accident on 2011 (the Accident). The Arbitration to assess the compensation to which she is entitled under the underinsured motorist provisions of the *Insurance (Vehicle) Act* (the *Act*) is set for hearing commencing October 31, 2016.

5. In her Notice of Civil Claim (NOCC) the Claimant alleges the following injuries:

   (a) injury to the jaw;

   (b) injury to the neck;

   (c) injury to the shoulders;

   (d) injury to the back;

   (e) injury to the ribs;

   (f) injury to the left arm;

   (g) injury to the right hip;

(h) injury to the leg;

(i) headaches;

(j) fatigue; and

(k) insomnia.

6. The Claimant has served three expert medical reports. They are:

1. Report of family physician, Dr. Lee, dated March 8, 2012;

2. Report of Dr. Max Kleinman, a physiatrist, dated November 15, 2013; and

3. Report of Dr. Sam Zaki, a physiatrist, dated July 24, 2015.

7. In addition, the Claimant has produced the clinical records including consultation reports from Dr. John le Nobel, a treating physiatrist, and Dr. Gillian Simonett, another treating physiatrist.

8. At the time of the Accident, the Claimant was employed, full-time, working 37.5 hours per week as a customer service representative at . She was off work until July, 2012, when she followed a gradual return to work, an application for disability benefits having been declined. On return to work she worked 30 hours per week. Since the Accident she has returned to school and is currently a full-time student at Vancouver Island University, finishing her third year. She is also working part-time, 15 hours per week, as a customer service representative at .

SUBMISSION OF ICBC

Application re IME by a Neurologist

9. ICBC submits that the medical evidence indicates a variety of neurological issues including migraine headaches and paresthesia. Dr. Lee in her medical/legal report (MLR) dated March 8, 2012 recorded the following:

(a) a new symptom of left arm numbness reported on December 23, 2011;

(b) twitching of the right arm and mid-back reported on January 17, 2012;

(c) a new symptom of right foot numbness occurring the week prior to a visit on February 3, 2012;

(d) a guarded prognosis because of uncertainty as to the cause of the paresthesia and newest symptoms;

(e) a conclusion that the Claimant had a soft tissue or neurologically based injury for which she may in the future need to see a neurologist; and

(f) a treating chiropractor, Dr. Nelson, reported his working diagnosis was a thoracic sprain/strain with associated muscle spasm and Grade III whiplash and radicular syndrome.

10. Dr. Kleinman's report dated November 15, 2013 contains, inter alia, the following:

(a) Reported numbness bilaterally down the arms and into the feet based on the Claimant's pain diagram;

(b) Reported "migraine" headaches;

(c) Reported shooting pains with numbness and a tight feeling bilaterally into the arms and hands, worse on the right side; and

(d) a "white" or "bloodless" type of feeling in the right foot, once per week, lasting up to one hour.

11. In his report dated July 24, 2015, Dr. Zaki records the following:

(a) A list of dates provided by the Claimant during the month of May, 2012, when her right foot turned pale and was bloodless white as well as a list of symptoms dated July 5, 2012 including ongoing bloodless and numb right foot;

(b) Current report, ie. July, 2015, of episodes where the right big toe would go completely pale and feel extremely cold. The symptom would last for about 10 minutes. The Claimant felt the symptom was precipitated by back pain;

(c) Dr. Zaki indicated the Claimant was a candidate for Botox injections for her chronic headaches for which a referral to a neurologist or a physiatrist would be required; and

(d) Dr. Zaki also recommended change of medication to Neurontin, Lyrica, or even Cymbalta, which are said to address neurologic symptoms.

12. At her Examination for Discovery (XFD) on February 18, 2016, the Claimant gave evidence as follows:

(a) Her feet go white. She has a cold sensation in them but no pain. This occurs approximately once every one to two months. It happened more often previously and at its worst occurred every couple of days for up to 45 minutes. She associated it with irritation of her hip and low back. There was a difference in neurological touch when the foot was numb; and

(b) Her left quad goes numb every couple of days and lasts for a couple of hours.

13. ICBC does not know whether the Claimant has obtained a report from a neurologist that could still be served within the time provided under the Supreme Court *Rules*.

14. ICBC submits that in the face of these not insignificant neurological symptoms, it is not restricted to the opinion only of an orthopedic specialist but is entitled to an assessment by an expert into whose field of expertise such symptoms squarely lie. ICBC relies in particular upon the decision of Mr. Justice Schultes in *Barbosa v Castillo* (2010) BCSC 2012 at paras 21 – 23 in this regard.

Application re IME for a Functional Capacity Evaluation (FCE)

15. At the time of the Accident, the Claimant was working full-time (37.5 hours per week) as a customer service representative at . After a time off work, she

followed a gradual return to work, ultimately working 30 hours per week. She applied on two occasions for disability benefits which were declined.

16. In September, 2014, she reduced her hours to 15 hours per week on account of her physical health. She has subsequently embarked on a four year program and is a full time student, working part-time at . She has therefore never returned to her pre-Accident level of employment. Moreover, on her XFD she gave evidence that she may look at less physically strenuous types of .

17. The NOCC, at para 9, alleges permanent physical disability, and loss of earning capacity, past and future. This evidence and pleading suggests a claim for past income loss due to an inability to work full-time as a customer service representative at as well as a claim for loss of earning capacity, either because the Claimant will be restricted in the type of practice that she is able to do upon graduation or because she is generally unable to work competitively in other occupations involving heavy work, or both.

18. ICBC should not be restricted to whatever comments Dr. Boyle as an orthopedic specialist may be able to make regarding the Claimant's employability. Although an FCE is only a "snap shot in time", it is an objective assessment of what the Claimant is physically able to do on the examination date and will also be able to match the Claimant's demonstrated abilities or lack of them with multiple other potential occupations. It is wrong to force a defendant to choose between for example an orthopedic specialist and a functional capacity evaluation with respect to future employability because an occupational therapist conducting a functional capacity evaluation is not a medical doctor and is not qualified to provide a diagnosis of injury or prognosis for the injury. Case authorities which refuse to permit a functional capacity evaluation as a second exam following an IME by another specialist need to be assessed on their individual facts.

19. In support of its application, the ICBC relies upon the following authorities, namely:

- *Barbosa v Castillo*, 2010 BCSC 212

- *Guglielmucci v Malcowichuk*, 1996 18 BCLR (3d) 68 (CA)
- *Houghland v Eglisson* (02 October 2013) Vancouver, M110321 BCSC
- *Kim v Lin* 2010 BCSC 1386
- *Stainer v Plaza* (2001) 87 BCLR (3d) 182 (CA)
- *Stubbington v Piper* (18 November 2013)
- *Wildemann v Webster* (1990) 50 BCLR (2d) 244 (CA)

SUBMISSION OF THE CLAIMANT

20. Claimant's counsel stated unequivocally that the Claimant will not be relying at the hearing on a neurologist's report or a functional capacity evaluation. With the possible exception of a report from an economist and a cost of care report, the expert reports on which the Claimant relies have been served. With respect to the somewhat conflicting case authorities respecting further IMEs, the Claimant submits that a further IME generally is allowed in two circumstances. The first is where the plaintiff has a specialist's report and the defendant wishes to obtain its own report in the same specialty. The second circumstance is where the existing defence IME reports cannot address an outstanding issue.

Application re IME by a Neurologist

21. The Claimant submits that there is no neurologically based claim that the Respondent has to meet. The Claimant will not be relying on a report from a neurologist. Neither the Claimant's general practitioner, Dr. Lee, nor any of the four physiatrists (Dr. le Nobel, Dr. Simonett, Dr. Kleinman or Dr. Zaki) ever recommended referral to a neurologist. Each of these five doctors did conduct neurological exams and those exams have all been found to be normal. The neurological symptoms are minor and resolving. Dr. Simonett obtained a history from the Claimant on June 14, 2012 that her left arm numbness had resolved. Dr. Kleinman in his November 15, 2013 report described "leg/arm pain – non neurogenic in origin" and added that he did not believe the Claimant's issue arose from a

peripheral nerve entrapment or radiculopathy but rather her symptomology related to chronic soft tissue referral from the neck and upper back.

22. In his July 24, 2015 report Dr. Zaki obtained a history of left arm pain and numbness on a "seldom" basis as well as episodes of coldness and pallor of the right big toe. His diagnosis included a whiplash associated disorder type II of the cervical area with no evidence of radiculopathy or myelopathy as well as mechanical low back pain and right sacroiliac joint pain with no evidence of radiculopathy. He thought the toe pallor could be related to an automonic dysregulation precipitated by pain.

23. On discovery, the Claimant described her main symptoms as migraines and low back pain.

24. With respect to the foot or toe pallor, the Claimant's discovery evidence is that it does not cause pain; she has never taken any medication for it; it has improved; and the condition does not prevent her from carrying out her work duties.

25. The Claimant's evidence on discovery is that the numbness and tightness in the left arm has mostly resolved with time and treatment.

26. The Claimant further submits that as an orthopedic specialist, as part of his physical exam, Dr. Boyle will do a neurological assessment and will be able to comment on the reported neurological symptoms. Moreover, there is no evidence in this case that an assessment must be done by a neurologist because there is something beyond the expertise of an orthopedic specialist to assess. In some of the reported cases, a specialist conducting a first IME has specifically identified areas or issues outside of his/her expertise, which forms part of the basis for seeking a second IME.

Application for FCE

27. The Claimant will not be relying upon an FCE expert report at the hearing. None of the five medical doctors (Dr. Lee, plus four physiatrists) has recommended a FCE. The Claimant is now a full time student and also works part time at . Dr. Boyle can opine on the Claimant's capacity to work in her former position at

, or as a nurse as well as provide an opinion respecting restrictions from other occupations. ICBC has simply not established proper grounds to warrant an FCE as a further IME. The Claimant relies on the following authorities:

- *Chan v Cheng* (3 March 2016), Vancouver Reg (BCSC)
- *Hamilton v Pavlova*, 2010 BCSC 493
- *Henri v Derbyshire*, [1999] BCJ 1750 (SC) 1999 CanLii 5383 (BCSC)
- *Norsworthy v Greene*, 2009 BCSC 173
- *Shaw v Koch*, 2004 BCSC 634
- *Stocker v Osei-Appiah*, 21015 BCSC 2312

THE LAW

28. ICBC agrees that the applications are for second or further IMEs, consistent with the decisions in *Stene v. Echols*, (2015) B.C.S.C. 1063 at para. 20 - 22 and *Stocker v. Osei-Appiah*, (2015) BCSC 2312 at para. 24. On an application for a second or further IME, a "higher standard" is imposed on the applicant (*McKay v. Passmore*, (2005) BCSC 570 at para. 29).

29. There is no real dispute between the parties regarding the general principles applicable to this type of application, although there is disagreement upon their application to the circumstances of this case. Generally applicable principles are usefully summarized by Mr. Justice Bracken in *Hamilton v. Pavlova*, (2010) BCSC 493 commencing at para. 10 as follows:

> *From those authorities, certain principles emerge. The case law is against a background of the Rules of Court, and in particular, the principle that the rules are designed to secure a just determination of every proceeding on the merits and to ensure full disclosure, so the rules should be given a fair and liberal interpretation to meet those objectives: Wildemann v. Webster, [1990] B.C.J. No. 2304 (B.C.C.A.) at pp. 2-3.*

[11] Rule 30(2) is a discretionary rule, and the discretion must be exercised judicially. An independent examination is granted to ensure a "reasonable equality between the parties in the preparation of a case for trial": Wildemann v. Webster at p. 11 from the separate concurring reasons of Chief Justice McEachern.

[12] Reasonable equality does not mean that the defendant should be able to match expert for expert or report for report: McKay v. Passmore, 2005 BCSC 570 at para. 17, and Christopherson v. Krahn, 2002 BCSC 1356 at para. 9.

[13] A second exam will not be allowed for the purpose of attempting to bolster an earlier opinion of another expert. That is, there must be some question or matter that could not have been dealt with at the earlier examination: Trahan v. West Coast Amusements Ltd., 2000 BCSC 691 at para. 48, and Norsworthy v. Greene, 2009 BCSC 173 at para. 18.

[14] There is a higher standard required where the defendant seeks a second or subsequent medical exam of the plaintiff: McKay v. Passmore, supra, at para. 17 and para. 29.

[15] The application must be timely. That is, the proposed examination should be complete and a report available in sufficient time to comply with the rules of admissibility and to allow enough time for the plaintiff to assess and respond if necessary: Vermeulen-Miller v. Sanders, 2007 BCSC 1258 at paras. 47-48, relying in part on Goss v. Harder, 2001 BCSC 1823.

[16] Finally, subsequent independent medical examinations should be reserved for cases where there are some exceptional circumstances: Wildemann v. Webster, supra, at p. 3.

See also *Trahan v. West Coast Amusements Ltd.* (2000) BCSC 691.

30. ICBC relies in particular upon the cases of *Barbosa v. Castillo*, supra, and *Kim v. Lin*, supra. In *Barbosa,* the defendant sought an IME by a neurologist having previously obtained an IME by an orthopaedic surgeon. The plaintiff alleged a shoulder injury that required surgery. As part of his orthopaedic examination, Dr. Loomer conducted a neurological examination of the plaintiff's upper and lower extremities and commented that the plaintiff's problems with numbness and paresthesia in the left hand had improved considerably since the accident and were not a functional problem any longer. At the time of the first IME the plaintiff had not served any expert reports. Prior to the IME the plaintiff was examined for discovery and described numbness and tingling in the underside of his left arm and between the little and ring fingers of his left hand. After the discovery, the plaintiff served *inter alia* an expert report of Dr. Hunt, a neurologist. Dr. Hunt concluded *inter alia* that the plaintiff had suffered multiple specific nerve injuries. A master denied the application for a further examination by a neurologist, Dr. Hashimoto, on the basis that the defendant was aware of the plaintiff's complaint of nerve-type difficulties prior to selecting an IME by an orthopaedic surgeon; Dr. Loomer conducted some neurologic examination; there was no evidence why Dr. Hashimoto needed to examine the plaintiff in person; and the application was characterized as a second exam by a specialist in a complementary field.

31. In allowing the appeal and ordering the further IME by Dr. Hashimoto, the Court drew a distinction between situations in which the defendant seeks to have a further examination by a particular specialist for no other apparent reason than the plaintiff has had one himself and cases in which a report by a medical expert for a plaintiff provides critical evidence that was not within the expertise of the first defence expert and was unknown to the defendant at the time of that first examination. Of particular relevance to the present case are the Court's comments at paras 22 and 23 as follows:

> *No doubt orthopaedic surgeons are required to have an excellent understanding of the nervous system as it impacts upon the practice of their specialty, but at the end of the day, an orthopaedic surgeon is not a neurosurgeon or a neurologist and it is not correct to say that Dr. Loomer had or would have had at trial the knowledge base to respond to Dr.*

Hunt's detailed findings with respect to the injuries of the fibers and nerves of the Plaintiff's spine.

To preclude the Defendant from involving its own neurologist at this stage would be to impose what is essentially a "one shot" rule on Defendants that would be just as unrealistic as allowing them to match Plaintiffs expert for expert. The reality is that Dr. Hunt has uncovered new and significant medical issues that neither Dr. Loomer nor the Defendant could have been expected to foresee.

32. I observe that the *Barbosa* case involves two circumstances that are different from the present case. First, at the time of the first IME in *Barbosa*, the plaintiff had not served any expert reports. Second, when Dr. Hunt's report was served, it raised critical evidence and that evidence was outside the expertise of Dr. Loomer.

33. In *Kim*, the third party obtained two prior IMEs by a neurologist and a psychiatrist. It sought a further IME by Dr. Kendall, an orthopaedic surgeon. On discovery the Claimant alleged multiple injuries to eyes, ears, neck, shoulders, back, hip, leg, knee and ankle, as well as headaches, dizziness, emotional problems including impaired memory and concentration, fatigue and decreased energy levels. She also testified that her back symptoms were gradually deteriorating. At the time of the application for the IME by Dr. Kendall, the plaintiff had not yet delivered any expert medical reports. The Court concluded, however, that the condition of many of the plaintiff's injuries were alleged to have deteriorated over time; the plaintiff purported to be suffering from a wide range of distinct injuries and symptoms; and the plaintiff asserted that her pain was very extreme.

34. In Dr. Tessler's report following his IME, he concluded that the plaintiff had sustained a soft tissue cervical strain injury rather than a neurological injury. He found no evidence of nerve or spinal cord injury and concluded that the headaches were cervicogenic headaches. He did not address the plaintiff's alleged knee and pelvic injuries. The plaintiff opposed the application for a further IME on the basis that existing reports including that from Dr. Tessler had addressed the soft tissue injuries and a further report to canvass similar issues would do no more than bolster earlier reports.

35. The Court ordered the further orthopaedic IME. It was legitimate for the defendant to have had a neurological assessment because the complaints of severe headaches and shoulder and back pain had a legitimate prospect of being neurological in nature. Without having the benefit of the plaintiff's expert reports, the defendant was seeking to determine what underlay the plaintiff's ongoing complaints. In addressing the possible overlap between the specialties of neurology and orthopaedics, the Court stated at paras 26-27 as follows:

> *26. Limiting the Third Party's assessment of the Plaintiff's soft tissue injuries also potentially places the Third Party at a disadvantage at trial. Dr. Tessler, as a neurologist, arguably lacks the qualifications and background to address Ms. Kim's soft tissue injuries as fully or as authoritatively as a physician with orthopaedic expertise would. This raises the prospect the Plaintiff could assert that Dr. Tessler lacks the qualifications to opine, for example, on the prognosis for various soft tissue injuries or, at a minimum, that his opinion should be given less weight than the opinion of a physician with narrower and more directly relevant expertise.*
>
> *27. Such concerns are not abstract. The qualifications and professional focus of competing experts are routinely advanced as the basis or justification for according a particular opinion greater weight. Limiting the Third Party to the report or work of Dr. Tessler is not consonant with seeking to "insure reasonable equality between the parties".*

36. The Court further addressed the overarching consideration of "proportionality" and concluded that the asserted severity of the plaintiff's multiple complaints favored rather than militated against the appropriateness of a further IME.

37. I comment that there are several circumstances in *Kim* that are different from the present case. First, the plaintiff had not served her expert reports, even up to the time of the Chambers Application. Second, the prior examiner, Dr. Tessler, had effectively

concluded that the cause of some of the Claimant's serious complaints was not within his field of expertise. From the defence point of view, this left a "gap" in the causation of some of the plaintiff's serious injuries.

38. The *Kim* case has been followed in two subsequent decisions: *Houghland v. Egilsson* (Vancouver Registry M110321, October 2, 2013) and *Stubbington v. Piper* (Vancouver Registry M120408, November 18, 2013). In *Houghland*, supra, the defendant had a prior neurological examination by Dr. Eisen and sought a further IME by an orthopaedic specialist. The plaintiff alleged a number of neurological injuries (numbness in the face, neck and left arm) as well as other injuries to her chest, groin, back and shoulders. The plaintiff was relying on reports by a physiatrist, a kinesiologist, a complex chronic pain specialist, and her family doctor (ie., but not by either a neurologist or an orthopaedic specialist). Dr. Eisen's opinion was that the plaintiff suffered from a minor whiplash without neurological deficit. The plaintiff opposed the application on the basis that Dr. Eisen had opined on both the neurological condition, namely numbness as well as her soft tissue injuries, and this precluded a further IME by an orthopaedic specialist with respect to the soft tissue injuries. The Master refused to allow a further IME but that decision was overturned on appeal. Gerow, J. cited the *Kim* case and then stated at paras 22 and 23 as follows:

> *22. I agree that limiting the Defendant's ability to have the Plaintiff's soft tissue issues assist by a physician with the appropriate expertise potentially places the Defendant at a disadvantage at trial. Dr. Eisen, as a neurologist, arguably lacks the qualifications and background to assess the Plaintiff's soft tissue injuries in the same manner a physician with orthopaedic expertise would. As a result it is likely the Plaintiff will assert that Dr. Eisen does not have the requisite qualifications to opine on the Plaintiff's soft tissue injuries or that his opinion in that regard should be given little weight and that the experts relied upon by the Plaintiff have more expertise in that area.*

> *23. As stated by the Defendant, the purpose of the independent medical examination by the orthopaedic surgeon is not to either bolster the report of Dr. Eisen or to undermine his opinion. Rather, the Defendant is seeking a further examination of the Plaintiff by an orthopaedic surgeon to address the soft tissue injuries being claimed by the Plaintiff as opposed to the neurological injuries she is claiming she suffered. I agree with the Defendant that an independent medical examination by an orthopaedic surgeon is necessary to ensure reasonable equality between the parties in their preparation for trial.*

39. In *Stubbington*, supra, the defendant had three IMEs including one by a neurologist, Dr. Tessler. The defendant sought a further IME by Dr. Leith, an orthopaedic surgeon. The plaintiff alleged multiple injuries, including injuries to her right shoulder and right hip. The plaintiff had served multiple expert reports including reports from two orthopaedic surgeons. In Dr. Tessler's report, he specifically deferred to an orthopaedic opinion respecting injuries to the right shoulder and right hip and to a psychiatric or psychological opinion respecting the symptoms of depression, anxiety, and post-traumatic stress disorder. The plaintiff opposed the application on the basis that given the multiple expert reports on both sides, the parties were already on a reasonably equal footing. The Court cited the *Kim* and the *Houghland* decisions and granted the application for the further IME.

40. ICBC also cites the decision in *Guglielmucci*, supra. The plaintiff claimed to be totally disabled. Some of the plaintiff's specialists concluded that she suffered from fibromyalgia. The defendant had two prior IMEs by a rheumatologist and an orthopaedic surgeon. Both disagreed with the diagnosis of fibromyalgia. The plaintiff also alleged depression and personality change. The defendant obtained an opinion from Dr. O'Shaugnessy, a psychiatrist, based on a medical records review, that it was probable that she had some form of psychiatric disorder. The defendant sought a further IME by Dr. O'Shaughnessy. There had been no psychological or psychiatric assessment of the plaintiff through the care of the treating physician. The Chambers Judge refused the application for an IME stating as follows:

> *"none of the treating physicians has opened the door in this case to a psychiatric examination nor do any of their reports lead one to a conclusion that a psychiatric assessment is necessary or appropriate, but there is rarely a case of a lengthy serious whiplash, soft tissue injury where there is not some psychological overlay, nor of course rarely is there a case of diagnosed fibromyalgia without a psychological overlay."*

The Court of Appeal allowed the appeal finding that the decision below was clearly wrong. The effect of the decision below would be to limit the defendant to having a medical examination of the plaintiff by a specialist only if the plaintiff's attending physicians had referred the plaintiff to such a specialist. That is not what the authorities stood for. The defendant's physicians asserted that the plaintiff was not suffering from fibromyalgia and sought to show a different explanation for her injuries.

41. The *Guglielmucci* case stands for the proposition that the mere fact that the Claimant does not have a neurologist's report or an FCE report, standing alone, does not disentitle the defendant from obtaining expert reports in those fields in a proper case.

42. In opposing this application, the Claimant relies in particular on the cases discussed below. In *Henri v. Derbyshire*, supra, the plaintiff's own physiatrist had diagnosed a chronic complex regional pain syndrome with significant psychological and emotional overlay. The Claimant in her pleadings apparently did not claim for any psychological injury. The plaintiff had not submitted any reports from psychologists or psychiatrists. The defence had obtained a prior IME from Dr. Hicks, an orthopaedic specialist. The defendant applied for two further IMEs by a psychologist and a physiatrist. Dr. Hicks had concluded that there were no objective physical findings to corroborate ongoing subjective symptoms and that the plaintiff had demonstrated a textbook case of inorganic behavior with exaggerations, inappropriate grimaces and voluntary restriction of motion. The defendant asserted that it was entitled to an examination by a physiatrist because the plaintiff was relying on a physiatrist. The Court declined to order either examination. The plaintiff's mental condition had not been put in issue on the pleadings. Moreover,

Dr. Hicks had fully addressed the plaintiff's physical condition. There was no question or issue that Dr. Hicks did not deal with, or could not have dealt with, in her examination.

43. I observe that the case is one authority for the undoubted proposition that the defendant is not entitled to "match" experts with the plaintiff. The case, however in my view, really turned upon the conclusion that Dr. Hicks' unqualified report addressed all of the plaintiff's complaints.

44. In *Shaw v. Koch*, supra, the defendant sought an IME in the tort action having previously obtained an IME in the same field of specialty. The principal issue was whether the prior IME was conducted for the purposes of a Part 7 claim or for the purposes of the tort claim. The Court concluded that the first IME related to the tort claim and a second opinion on the same matter could not be obtained unless something had occurred since the first examination which was not foreseeable and could not have been addressed by the first examiner.

45. In *Norsworthy v. Greene,* supra, the defendant had obtained a prior IME from Dr. Schweigel, an orthopedic surgeon. The plaintiff had obtained a Functional Capacity Evaluation Report. The report had been offered to the defendant on terms that the defendant declined to accept. The plaintiff's physiatrist's report was similarly offered to and declined by the defendant. The defendant sought an order for its own FCE assessment. The positions of the parties are set out at paras 13 and 14 as follows:

> *13. The Plaintiff takes the position at this hearing that Dr. Schweigel has fully opined on the question of the Plaintiff's capacity and therefore the Defendants are not entitled to another assessment.*
>
> *14. The Defendants take the position that while Dr. Schweigel has offered an opinion on the Plaintiff's ability to return to work following her motor vehicle accidents, there is a major different between providing an opinion on disability versus an examination which explores the Plaintiff's ability to perform certain occupations. Accordingly, the Defendants say they are*

entitled to this examination by their occupational therapist pursuant to subsection (1) of Rule 30.

46. The Court concluded that the application should be characterized as one for a second or further examination and then, compared large extracts from the two reports, commenting that it was obvious that the reports were prepared by two persons with two completely different disciplines and approaches, although there was a noticeable crossover in some of the observations made. The Court refused to order an FCE on the basis that with knowledge that the plaintiff had her own Functional Capacity Evaluation, the defendant chose to have an IME by an orthopaedic surgeon. The differences in the opinions alone did not provide a valid reason to order a further exam.

47. In *Stocker v. Osei-Appiah*, supra, the plaintiff underwent a Functional Capacity Evaluation by his disability insurer as a result of which his employer concluded that it could not offer any position to accommodate the plaintiff's restricted capacity. On discovery, the plaintiff asserted that he could not return to work in any capacity. The defendant obtained IMEs from a psychiatrist and an orthopaedic surgeon. It then sought further IMEs for an FCE and a vocational assessment. The defendant was aware of the disability insurer's Functional Capacity Evaluation Report. The plaintiff had not yet delivered any of its expert reports. The defendant asserted that the FCE would provide objective data for assessing the plaintiff's current physical functionality and his capacity for future employment. The vocational assessment was necessary to obtain vocational options for which the plaintiff might be suited. There was a potentially significant claim for past and future loss of earning capacity and the principle of proportionality militated in favour of the further assessments.

48. The plaintiff opposed the application on the basis that there was no new or unforeseen circumstance and the defendant had requested both its psychiatrist and orthopaedic surgeon to provide opinions on the plaintiff's present level of impairment or disability and its impact on future employment. The *Kim* case and the *Norsworthy* case were both cited to the Court.

49. The Court declined to order a Functional Capacity Evaluation but did order a vocational assessment. With respect to the FCE, the Court noted the similarity to *Norsworthy* where the defendant chose to have an IME by an orthopaedic surgeon at a time when the plaintiff's functional capacity was in issue. Moreover, both the prior IME examiners were asked to assess the plaintiff's suitability for current vocation and other possible vocations. Thus the Court concluded that the defendant had not shown some question or manner that could not be dealt with in the earlier examinations.

50. Finally, in *Chan v. Cheng*, supra, the defendant had prior IMEs from a physiatrist and a psychiatrist. The defence physiatrist provided an opinion that the plaintiff was not prevented from working as a result of the accident. The plaintiff had not disclosed any of her expert reports. The defendant sought a FCE assessment and in support of the application was an Affidavit describing the difference between an assessment for an FCE and an assessment by a physiatrist. The plaintiff had not worked for several years and was obviously advancing a substantial loss of capacity claim. The Master ordered the FCE stating that "the fact that Dr. Apel provides an opinion that the plaintiff is not currently disabled from working does not foreclose, in my view, a Functional Capacity Evaluation."

51. The cases of *Hamilton, Henri, Norsworthy, Shaw, Stocker,* and *Kim* were all cited to the Judge on appeal. The Court concluded that the Master's decision was clearly wrong. The Master's decision would lead to the conclusion that there would always be a Functional Capacity Report ordered where there were only medical opinions in existence which was clearly not the law. Moreover, the Judge on appeal was concerned that the Master had applied the wrong test and had placed the onus on the plaintiff.

DISCUSSION AND ANALYSIS

52. Although the pleadings, in particular paragraph 8 of the NOCC do not make specific allegations of neurologic symptoms, ie., there is no express allegation of numbness, tingling or paresthesia, the medical records and the Claimant's discovery evidence do include reference to neurological symptoms. These include left arm numbness (first reported December 23, 2011 to Dr. Lee), right arm and mid back twitching (first reported

to Dr. Lee on January 17, 2012), foot or toe whiteness and coldness (first reported to Dr. Lee on February 3, 2012), and left quad numbness.

53. Evidence from the Claimant's own medical reports concerning these symptoms is particularly relevant. ICBC's counsel referenced in his submissions the reference in Dr. Lee's medical-legal opinion dated March 8, 2012 to a working diagnosis of "thoracic sprain/strain with associated muscle spasm and Grade III whiplash and radicular syndrome." Particular importance was attributed to the diagnosis of radicular syndrome. I note, however, that this diagnosis was not that of Dr. Lee, but rather was a diagnosis of Dr. Matthew Nelson, a chiropractor, contained in a letter to Dr. Lee, which letter is not in evidence. Further, Dr. Lee herself was undecided about the cause of the paresthesia.

54. Dr. Kleinman in his report dated November 15, 2013, concluded with respect to leg/arm pain, which he characterized as non-neurogenic in origin, as follows:

> *Ms. continues to complain of referred pain into the upper extremities. Her presentation did not follow a specific determinalogical pattern and I do not believe that her issues from this perspective arise from a peripheral nerve entrapment or radiculopathy. Likely, her symptomology is related to chronic soft tissue referred from the neck and upper back (nociceptive) pain in addition to her difficulty with chronic pain symptomology.*

55. He further diagnosed a chronic myofascial sprain/strain to the cervical thoracic and lumbosacral spine.

56. The most recent medical report of Dr. Zaki dated July 24, 2015 includes, *inter alia*:

1. *Seldom (the patient) will get left arm pain and numbness (report page 9);*
2. *Occasionally pain from the lower back radiates into the left leg (page 10);*
3. *The (patient) had episodes where her right big toe would go completely pale and would feel extremely cold. This would last for about 10 minutes.*

There was no redness or purple discoloration following that episode of pallor. The patient feels this is precipitated by back pain;

4. *The patient reports no symptoms of neurological impairment affecting the cranial nerves, upper or lower extremities. She had an area of reduced sensation on the anterior aspect of the left thigh and that lasted for about six months. This reduced sensation has improved but she would get similar episodes intermittently;*

5. *Dr. Zaki's own neurologic examination revealed no deficits (page 12);*

6. *His diagnosis was post-traumatic cervicogenic headaches; whiplash disorder II of the cervical area with no evidence of radiculopathy or myelopathy; mechanical low back pain and right sacroiliac joint pain with no evidence of radiculopathy; and episodes of pallor affecting the left (sic) great toe that could be related to an autonomic dysregulation precipitated by pain.*

57. With respect to the Claimant's foot/toe pallor symptom, the Claimant's own evidence from discovery on February 18, 2016, is that it was then occurring once every one to two months. She had received no medical treatment for it. The condition was improving in frequency and duration over time. It did not affect her work capacity.

58. The Claimant's discovery evidence is that the left quad numbness occurs every couple of days, lasting for a couple of hours, and was first noticed a couple of years previously.

59. The Claimant's discovery evidence also is that from the physical perspective the upper back and the migraines are the injuries that bother her the most.

60. At the time this application was filed, ICBC did not know whether it would be faced with an expert report by a neurologist at the hearing. There is some basis for reasonably believing that might occur, because there is an indication in the medical records and from the Claimant on discovery that she had been booked to see a neurologist in December 2013. Based on statements of the Claimant's counsel at the hearing of this application,

ICBC now knows that the Claimant will not be relying on a report from a neurologist at the hearing.

61. I conclude that on the evidence before me at this time ICBC has not met the higher standard of demonstrating the need for a further IME by a neurologist in order to ensure reasonable equality between the parties in the preparation of the case for hearing.

62. The factors that I take into account in reaching this conclusion are the following:

(a) There was no medical referral to a neurologist by any of the Claimant's general physicians or the four physiatrists who either treated or assessed her;

(b) ICBC will not be facing at the hearing a report from a neurologist on behalf of the Claimant;

(c) ICBC will have the benefit of Dr. Boyle's assessment and opinion, including presumably his neurological assessment appropriate to an orthopaedic examination;

(d) There is no medical evidence indicating that the assessment by an orthopaedic specialist was or is not able to address any particular neurological condition or symptom;

(e) The majority of the neurological symptoms appear to have either resolved or be resolving;

(f) The neurological symptoms are not, on the Claimant's discovery evidence in February 2016, the injuries that bother her the most;

(g) With respect to the foot/toe pallor/coldness symptom, an IME is not warranted where this symptom has not required any treatment, is not disabling, and had been improving with time. Proportionality does not favour a separate neurological exam for this complaint by itself.

63. The two cases primarily relied upon by ICBC are in my view very different in their circumstances from this case. In *Barbosa*, supra, the defendant sought an IME by an neurologist after having had an IME by an orthopedic surgeon. At the time of the orthopedic examination, the plaintiff had reported symptoms of numbness and paresthesia in the left arm and hand, the orthopedic specialist conducted a neurological exam within the context of his own specialty of orthopedics, and concluded that the neurological complaints were no longer a functional problem. At the time of the orthopedic examination, the plaintiff had not served any medical reports. Subsequent to the orthopedic examination, the plaintiff served a report of a neurologist who diagnosed neurological injuries which were found to be "critical evidence" and "new and significant medical issues" that were both not within the expertise of the orthopedic specialist and not known to the defendant at the time of the first examination. The circumstances in the present case are that the Claimant has served her medical reports (except possibly for a report respecting cost of future care and an economist's report); the Claimant does not have a report from a neurologist; the "prior exam" that might address any neurological issues has not yet taken place; and the neurological symptoms are said to be improving and not the injuries that most bother the Claimant.

64. In *Kim*, supra, the defendant sought a further IME by an orthopedic surgeon, having previously had IMEs by both a neurologist and a psychiatrist. The plaintiff alleged multiple injuries, some clearly orthopedic. The plaintiff had not served any medical reports. The prior neurologist was properly retained to address complaints of severe headaches and shoulder and back pain which had a legitimate prospect of being neurological in nature. The neurologist however concluded that the plaintiff had sustained a soft tissue cervical strain injury rather than a neurological injury. The neurologist report did not address knee and pelvic injuries. At paras 26 and 27, the Court commented on the different qualifications and expertise that neurologist and orthopedic specialists bring to the assessment of injuries that may have a neurological or an orthopedic cause or a combination of causes. I agree with those comments. Ms. Kim however alleged that she suffered severely from multiple complaints and many of the injuries were acute in terms of their severity and ongoing difficulty. As noted above, the circumstances of this case are different for the reasons set out in para 62, above.

65. The *Stubbington*, supra, case is also distinguishable. There the defendant sought a further exam by an orthopedic specialist, having had a prior exam by a neurologist. The neurologist's report addressed the neurological injuries but specifically deferred to orthopedic surgery opinion regarding injuries to the right shoulder and right hip. The plaintiff had already served reports from two different orthopedic specialists. The defendant was thus seeking a report to address a major orthopedic injury that was the subject of reports from two orthopedic specialists served by the plaintiff and which had specifically not been addressed in the prior neurologist's report.

66. Similarly, *Houghland*, supra, is distinguishable. There the plaintiff alleged both neurological and soft tissue injuries. The defendant obtained a report from a neurologist that addressed the neurological issues and sought a second IME by orthopedic specialist. The Court adopted the observations in *Kim*, supra, regarding the potential disadvantage of a neurologist assessing soft tissue injuries. The Court concluded that the purpose of the IME by the orthopedic specialist was not to either bolster or undermine the report of the neurologist but rather to address the soft tissue injuries claimed by the plaintiff as opposed to the neurological injuries. The neurologist had previously provided an opinion that the plaintiff suffered a minor whiplash without neurological deficit. These circumstances are again clearly quite different from those prevailing in the present case.

67. The overriding question remains whether the IME by a neurologist is necessary to ensure reasonable equality between the parties in their preparation of the case for hearing. For the reasons set out previously, I conclude that ICBC has not met the required burden on the present evidence in this case, and the application for an IME by Dr. Eisen is dismissed.

68. With respect to the application for a FCE, ICBC submits that a FCE is necessary in order to defend properly the apprehended claim for loss of earning capacity. That claim is apprehended as having two components. The first component arises from the fact that the Claimant has never been able to return on a permanent basis to her pre-Accident, full-time, employment as a customer service representative at . She has in fact launched on a career change at least partly contributed to by the inability to work

comfortably because of disability arising from the Accident. This implies a permanent inability to work at an occupation with the same or similar physical requirements as that of a . The second apprehended component arises from the Claimant's XFD evidence that she may have to specialize or work in an aspect of that is less physically strenuous. This evidence implies that the Claimant will advance a claim for loss of future earning capacity on the basis that she is foreclosed because of disability arising from the Accident from certain more physically demanding types of . A FCE will enable the defendant to "test" such claims to disability as well as identify any possible physical restrictions applicable to other occupations.

69. There are three authorities cited dealing with the request for an FCE as a further exam. The individual factual circumstances in these cases are very important. There are two important differences in the facts between *Norsworthy*, supra, and the present case. The first is that in *Norsworthy*, at the time the Defendant chose an IME by an orthopedic specialist, the defendant was aware that the plaintiff had an FCE. In the present case, ICBC now knows that it will not be facing an FCE from the Claimant. As the Claimant submits, this is a stronger reason for refusing a second exam than was the case in *Norsworthy*. Second, in *Norsworthy* at the time of the application, the report of the orthopedic specialist was in evidence and that report had addressed the issue of the plaintiff's ability to work. In the present case, Dr. Boyle's IME has yet to take place. That fact cuts both ways. On the one hand, ICBC does not have Dr. Boyle's opinion regarding what he can and cannot assess in terms of the Claimant's functional capacity. This factor would support the Claimant's position that no proper evidentiary basis has been advanced for a further exam. On the other hand, there is no report from the orthopedic specialist that fully opines on the Claimant's ability to work which was apparently primarily the basis on which the application in *Norsworthy* was refused.

70. The facts in *Stocker*, supra, are very similar to the facts in the present case in the sense that the Plaintiff had disclosed its FCE and the defendant had an agreed IME by an orthopedic specialist but not yet any report.

71. I place less reliance on the *Chan*, supra, decision because of the identified error of the Master with respect to the burden of proof.

72. I conclude that on the evidence before me at this time, ICBC has not established the necessity for an FCE in order to ensure reasonable equality between the parties in their preparation of the case for hearing. In reaching this conclusion, I take into account the following:

i. The Claimant is now a full-time student and also working part-time in her former job as a

ii. The most recent medical report being relied upon by the Claimant, namely Dr. Zaki's report dated July 24, 2015 concludes that the Claimant "*is not totally or partially disabled from work or schooling. While she has chronic, ongoing pain symptoms in the locations listed above, she continues to be able to function with her chronic pain.*

iii. There will be no FCE relied on by the Claimant;

iv. ICBC will have the benefit of Dr. Boyle's assessment and opinion, who would be expected to be asked to address the Claimant's ability to work as a as or in other occupations; and

v. There is no medical evidence indicating that the assessment by an orthopedic specialist is not able to address the Claimant's work capacity.

73. Accordingly, the application for a FCE is dismissed.

74. The Claimant shall recover her costs of preparation and attendance for this application.

Dated: June 15, 2016

Donald W. Yule, QC