IN THE MATTER OF AN ARBITRATION
PURSUANT TO SECTION 148.2(1) OF THE REVISED REGULATIONS
TO THE *INSURANCE (MOTOR VEHICLE) ACT*
BC REG. 447/83

AND

THE COMMERCIAL ARBITRATION ACT,
R.S.B.C. 1996, C. 55

BETWEEN:

[redacted]

CLAIMANTS

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION DETERMINATION ON PRELIMINARY MOTION FOR INDEPENDENT MEDICAL EXAMINATIONS

DATE OF HEARING: **By way of written submission**
PLACE OF HEARING:

J.J. CAMP, Q.C. **Arbitrator**
Camp Fiorante Matthews
400-555 West Georgia Street
Vancouver, BC V6B 1Z6

GREGORY L. SAMUELS **Counsel for the Claimants**
Cross Border Law
Suite 204 – 1730 West 2nd Avenue
Vancouver, BC V6J 1H6

AVON M. MERSEY **Counsel for the Respondent**
MARTHA VON NIESSEN
Fasken Martineau LLP
Barristers & Solicitors
Suite 2900-550 Burrard Street
Vancouver, BC V6C 0A3

ISSUE TO BE ARBITRATED

1. The Respondent, the Insurance Corporation of British Columbia ("ICBC") brings a motion to have one of the claimants, [redacted], attend an independent medical examination by an orthopedic specialist, a functional capacity specialist and a vocational specialist. ICBC also seeks a direction that it be permitted to introduce into evidence and use the independent medical expert report of orthopedic surgeon Dr. Aitken, dated August 29, 2003.

2. It is common ground that this arbitration is governed by the *Commercial Arbitration Act*, R.S.B.C., 1996, c. 55 (the "Act") and the Domestic Commercial Arbitration Rules of Procedure (as amended June 1, 1998) (the "Rules").

3. Rule 19, Conduct of the Arbitration, reads as follows:

> **"19. Conduct of the Arbitration**
>
> (1) Subject to these Rules, the arbitration tribunal may conduct the arbitration in the manner it considers appropriate but each party shall be treated fairly and shall be given full opportunity to present its case.
>
> (2) The arbitration tribunal shall strive to achieve a just, speedy and economical determination of the proceeding on its merits."

FACTS

4. The facts pertaining to this arbitration are more fully set out in my earlier ruling on August 28, 2009. At this juncture, I set out a shortened version of the facts germane to this motion.

5. The single vehicle accident that is the subject of this arbitration occurred on October 27, 1996 near Chehalis, Washington. The British Columbia vehicle involved in the accident was being driven by [redacted]. He had six family members with him. One of the tires on the vehicle rapidly deflated causing Mr. [redacted] to lose control of the vehicle. It rolled over several times causing injuries to the claimants.

6. At the time of the accident, Mr. [redacted] was a resident of British Columbia and was insured under a third party liability policy of insurance with a limit of $200,000 issued by ICBC.

7. At the time of the accident, each claimant was a resident of British Columbia and a member of the same household as Mr. [redacted] and as such each had first party coverage pursuant to Part 10, s. 148.1 of the Regulations to the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231.

8. On October 26, 1999, the claimants filed a Complaint for Damages For Negligence and Product Liability in the Superior Court of Washington for Lewis County against the defendants, the Uniroyal Goodrich Tire Company, Uniroyal Goodrich Tire Company Inc., Michelin North America and [redacted] (the "Complaint"). The claim against the defendant [redacted] was for negligent maintenance and operation of his motor vehicle. The claim against the remaining defendants was for defective design or defective manufacture of the tires on the vehicle.

9. The Complaint alleged the customary array of heads of damage.

10. On November 14, 1999, counsel for the claimants served a copy of the Complaint on ICBC and notified ICBC that the damages suffered by the claimants were likely to exceed the $200,000 third party liability insurance.

11. The trial before a jury commenced in March, 2004, and lasted approximately 45 days. It dealt with issues of both liability and damages. On April 23, 2004, the jury delivered a verdict, dismissing the product liability case. The jury also found that, although the defendant [redacted] was not negligent in his operation of the vehicle, he was negligent in failing to maintain the tire in proper working order and in this regard his negligence was the proximate cause of the plaintiffs' injuries. The jury awarded damages of approximately $9.1 Million (U.S.) to the plaintiffs as follows:

- [redacted]: US $ 1,497,266
- [redacted]: US $ 1,129,271
- [redacted]: US $ 1,553,921
- [redacted]: US $ 3,605,832
- [redacted]: US $ 1,179,991
- [redacted]: US $ 136,798

12. In my earlier determination of August 28, 2009, I held that s. 148.2(6) of the Regulations to the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231 was properly interpreted to mean that issues of legal entitlement shall be determined by Washington law in this case and that the issues pertaining to the quantum of damages shall be determined by the law of British Columbia.

13. The first arbitration to be conducted will be for the claimant [redacted] and it is in relation to her claim that the respondent seeks the relief in the motion before me. I have been advised that this claimant was deposed in the Washington state litigation on the damages issues pertaining to her and that both parties have the transcript of this deposition. I have been further advised that this claimant underwent a form of examination for discovery in December 2009, in British Columbia, pertaining to the damages issues and that both parties have this transcript.

14. The injuries allegedly suffered by this claimant include head injury, right clavicle fracture, thoracic spine and interior wedge fractures, spinous process fractures, right lung contusion, scalp lacerations, and various other abrasions and contusions. A Statement of Claim has been filed on behalf of this claimant and in addition to clinical and hospital records, the evidence of eight experts will be relied upon including an orthopedic surgeon, Dr. Tarazi, vocational rehabilitation specialists, Dr. Gordon Wallace and Cloie Petgrave, and a functional capacity specialist, Paul Pakulak. The reports of all of the expert witnesses including of these three specialists are dated in 2003.

15. This claimant underwent an independent medical examination at the behest of one of the defendants in the Washington State action by Dr. Aitken, an orthopedic surgeon in British Columbia. He examined the claimant on April 24, 2003 and generated a lengthy report (14 pages) on August 29, 2003. To my knowledge, this report was not introduced at the Washington State trial but has been in the possession of and reviewed by both parties to this arbitration.

ANALYSIS

A. Should ICBC be able to introduce and use the report of Dr. Aitken?

16. I wish to deal first with the motion that ICBC be able to introduce and use independent medical reports generated by the defendants in the Washington state litigation. The only report identified in the written submissions by the parties was the report of Dr. Aitken, dated August 29, 2003. Hence, I am confining my ruling to that report.

17. I first note that this claimant underwent an independent medical evaluation by Dr. Tazari, an orthopedic surgeon apparently chosen by plaintiff's counsel, on August 30, 2003, and a report was generated by Dr. Tazari on that same day. Dr. Aitken, in his August 29, 2003 report, reviewed, at some length, the report of Dr. Tazari.

18. Both of these reports were put in front of me and I have carefully reviewed them. There can be no doubt that both of these reports are relevant and germane to the issues that I need to decide in arbitrating the damage award to this claimant. These reports are not without their differences, but I have no difficulty in concluding that they should both be reviewed by me in conjunction with submissions by able counsel. I highlight the fact that the use of the report by Dr. Aitken by ICBC should not introduce any further element of delay in concluding this particular arbitration.

19. Therefore, I conclude that ICBC should be able to introduce and use the report of Dr. Aitken.

B. Should ICBC be permitted to obtain independent medical examinations and reports?

20. ICBC moves to have this claimant undergo further independent medical examinations, an expression I use rather loosely since the motion refers to an independent functional capacity evaluation and a vocational assessment evaluation, in addition to an orthopedic evaluation.

21. I first must address the threshold issue of whether I have jurisdiction to order the independent medical examinations. Counsel for the claimant says I do not possess such jurisdiction and referred me to an earlier interlocutory decision I made in an arbitration, *Newell v. ICBC*, dated September 11, 1990, and a reconsideration of my decision dated November 1, 1990.

22. The facts in the *Newell* case bare some similarity to the facts in the underlying case. There the accident also happened in Washington state and depositions and medical reports were generated for that litigation. The claimant in that case also underwent an independent medical legal examination at the request of counsel for the defendant. Similarly, the authors of the various medical and vocational reports were deposed by Washington State defense counsel. Similar to this case, all medical legal reports in the possession of Mr. Newell were provided to the British Columbia counsel for ICBC. In the *Newell* case, ICBC argued, as they do in this case, that there were medical legal issues that needed to be addressed and that the medical legal reports generated up to that date were stale. In the *Newell* decision, I said that I searched in vain for statutory authority or any case authority to support my jurisdiction to order either a form of examination for discovery or order independent medical examinations. The predecessor Rule to Rule 19, quoted above, was put before me in the *Newell* arbitration. Nevertheless, I concluded at page 5 of my original *Newell* decision:

> "In all the circumstances, and particularly given the lack of any express or implied provisions which would permit an arbitrator under the Rules with which I am governed to make the orders requested, I decline to do so. I make this decision with considerable misgivings since it seems to me the Rules should be broadened to permit an arbitrator to make the kinds of order sought by the claimant in this case in appropriate circumstances."

In my decision reconsidering my original decision, I said at page 5:

> "Dealing with the unfairness argument, it is my view that there must exist at least an implied empowering mandate for an arbitrator to order that one of the parties undergo a form of examination for discovery or independent medical examination at the instance of the other party, before making such an order. None exists in my opinion."

23. The Rules that governed at the time of the *Newell* decision were amended in 1995 and again in 1998. Arbitrator Don Yule, Q.C. referred to my *Newell* decisions and the various changes to the Rules in a carefully reasoned arbitration decision, *Hayward v. ICBC*, handed down September 30, 2005. At page 5, Mr. Yule agreed that at the time of the *Newell* decision, there was no explicit power for an arbitrator to order a pre-hearing examination of a party nor was that subject matter included in the general powers of the arbitrator. He then went on to reference the fact that the 1995 rule changes specifically provided for pre-hearing oral examination for discovery under oath, either by agreement of the parties or by order of the arbitration tribunal. He found it significant that the arbitration tribunal was not required to be guided by the principle (now Rule 19(1)) which focuses on the fair treatment of each party and the granting of a full opportunity to present the party's case. Rather, he noted that the 1995 rule change required the arbitration tribunal to be guided by the goal of a just, speedy and inexpensive determination of the proceedings on its merits (now Rule 19(2)). See page 8 and 9 of *Hayward.* He then referenced the amendments to the 1998 Rules and found at page 13 that these amendments gave the arbitration tribunal the authority to order the pre-hearing examination upon oath of a party in the nature of an examination for discovery. At page 14, he said:

> "By requiring an order of the arbitration tribunal for any pre-hearing oral examination on oath of a party, in the absence of the mutual consent of the parties, it seems to me the 1998 Rules are nevertheless reflecting some of the characteristics that distinguish arbitration from civil litigation. Under the 1998 rules the discretion to be exercised under Section 29(1)(j) is to be guided by the twin consideration for the conduct of the arbitration set out in Section 19, namely the requirements that each party be treated fairly and given full opportunity to present its case and that there be a just, speedy and economical determination of the proceeding on its merits. I am also mindful that UMP arbitrations may proceed in the absence of any underlying trial judgment."

He went on to say:

> "Accordingly, in some circumstances it would be quite unfair to the respondent insurer to force it into an oral hearing without ever having had an opportunity to examine the claimant on oath regarding issues that are relevant to the arbitration proceeding. On the other hand, by requiring an order from the arbitration tribunal, the 1998 Rules provide a measure of protection to a party against time-consuming, expensive, irrelevant or marginally relevant examinations."

I agree with Mr. Yule's analysis and his over arching comments pertaining to the arbitration process.

24. The *Hayward* arbitration decision only addressed the right to order a pre-hearing oral examination of a party under oath, a matter that was expressly dealt with by amendments to the 1995 and the 1998 Rules.

25. I have reviewed the Rules that govern this arbitration as amended in 1995 and 1998 and I again find no express or implied authority in an arbitrator to order that the claimant undergo an independent medical examination or evaluation. This lack of jurisdiction is underscored by the fact that the 1995 and 1998 amendments to the Rules expressly empowered an arbitrator, at his or her discretion, to order a pre-hearing oral examination of a party.

26. I am mindful of the argument by ICBC that I must treat ICBC fairly and I must give ICBC the full opportunity to present its case. I am also mindful of my obligation that I must strive to achieve a just, speedy and economical determination of this proceeding on its merits. See Rule 19.

27. This accident and the injuries to this claimant happened over 14 years ago and without being critical of any counsel, the wheels of justice in this case are grinding very slowly, some might say too slowly. This claimant has been examined by a host of medical practitioners, both treating physicians and independent medical examiners, as well as other medical oriented practitioners. She has been examined under oath on two occasions on the subject of her damages. All of this evidence is at hand. Certainly, it can be argued that there are outstanding uncertainties pertaining to her medical condition and pertaining to her future care and capacity to earn income but that will always be the case.

28. I conclude that I have no jurisdiction to order a form of independent medical examination. I also wish to add that if I did have such jurisdiction and if that jurisdiction was discretionary, in this case and in all of the circumstances pertaining to this case, I would not exercise my discretion in favour of ordering the independent medical examinations as requested by ICBC.

29. I wish to point out to the parties that I am mindful of the Rules that permit me to call a witness on my own motion and, perhaps more importantly, to appoint experts to report on specific issues. If, during the course of this arbitration, it becomes apparent to me that contrary to what I presently generally see as a level playing field, one party is "stealing a march" on the other party, I will exercise my powers to ensure that each party is treated fairly and given a full opportunity to present its case.

COSTS

30. Although I view the motion pertaining to my jurisdiction to order independent medical examinations to be the more important issue, this issue is novel and because of the mixed success by the parties, I order costs in the cause.

CONCLUSION

31. I order that ICBC can enter the independent medical report of Dr. Aitken, dated August 29, 2003, into evidence and use that report in the arbitration of the damages claim of [redacted]. I find that I do not have the jurisdiction to order that [redacted] attend independent medical examination by an orthopedic specialist, a functional capacity specialist, and a vocational specialist as requested by ICBC. I further find that if I did have such jurisdiction and it was discretionary, I would not exercise my discretion at this time and under the present circumstances of this case to order such independent medical examinations.

Dated: Jan. 19, 2010