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:

J.W.W.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

RULING ON APPLICATION

COUNSEL FOR THE CLAIMANT	ARSEN KREKOVIC Hoogbruin & Company Barristers and Solicitors 650, 1188 West Georgia Street Vancouver, BC V6E 4A2
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Date/Place of Hearing:	July 18, 2016 Vancouver, BC
ARBITRATOR: Date of Award:	DONALD W. YULE, QC July 22, 2016

INTRODUCTION

1. The Respondent, Insurance Corporation of British Columbia (ICBC) applies for an independent medical examination (IME) by Dr. Robin Rickards, an orthopedic surgeon, on July 27, 2016 in Vancouver. The application is opposed by the Claimant on the basis that ICBC has not demonstrated a proper legal basis for obtaining this further IME.

2. ICBC's application is under Supreme Court *Rule* 7-6.

BACKGROUND

3. The Claimant was injured in a motor vehicle accident on October 13, 2011 (the Accident). The Arbitration to assess the compensation to which he is entitled under the underinsured motorist provisions of the *Insurance (Vehicle) Act* (the *Act*) is set for hearing commencing October 31, 2016.

4. In his Notice of Civil Claim (NOCC) the Claimant alleges the following injuries:

   i. injury to the neck;

   ii. injury to the shoulders;

   iii. injury to the back;

   iv. headaches

   v. fatigue; and

   vi. insomnia.

5. The Claimant has attended three IMEs at the request of ICBC, namely:

   i. Samantha Gallagher – vocational assessment on November 5, 2015;

   ii. Dr. Kulwant Riar – psychiatric assessment on April 4, 2016; and

   iii. Tim Winter – functional capacity evaluation (FCE) on June 28, 2016.

6. In addition, the Claimant has attended two prior IMEs for the purpose of assessing his entitlement to Part 7 ('no fault') benefits, namely:

   i. Chris Winkelaar, FCE - December 10, 2014; and
   ii. Dr. Bruce Yoneda, physical examination by an orthopedic surgeon – April 26, 2016.

7. Claimant's counsel has served the following expert reports:

   i. July 17, 2012, medical/legal report of Dr. Fergus Kennedy (family physician);

   ii. October 22, 2012, medical/legal report of Dr. Fergus Kennedy;

   iii. December 29, 2014, FCE of Chris Winkelaar (occupational therapist);

   iv. May 19, 2015, medical/legal report of Dr. Roy O'Shaughnessy, (psychiatrist);

   v. April 22, 2016, report of Associated Economic Consultants Ltd.; and

   vi. May 24, 2016, medical/legal report of Dr. Fergus Kennedy.

8. At the date of the application hearing, ICBC had not served any reports respecting its prior tort IMEs and defence counsel had only just received two of the reports. The reports obtained by ICBC with respect to the prior Part 7 IMEs were delivered to Claimant's counsel who has served one of them (Mr. Winkelaar's FCE report).

9. At the time of the accident, the Claimant worked as for in Vancouver where he had been employed on a full time basis since 2009. He attempted a return to work following the accident but was reportedly unable to manage the continuous sitting demands of the job. He was laid off and has remained unemployed up to the present date. He has received total temporary disability benefits under Part 7 from ICBC totaling $70,950.15 (as of April 11, 2016) and an additional $18,852.04 under Part 7 medical costs (as of the same date).

IME WITH DR. YONEDA

10. By email dated April 11, 2016, Suzanne Deering (Ms. Deering), the ICBC Claims Examiner responsible for the Claimant's Part 7 claim wrote Claimant's counsel advising of an appointment made with Dr. Yoneda for an IME in connection with the Part 7 claim. She stated, in part, as follows:

> *In reviewing (your client's) case, I have determined that it would assist me to have your client attend a medical expert to provide me with an opinion regarding the ongoing requests for entitlement under the coverage. My letter of instruction to the doctor will request that he restricts the examination and opinion to issues specific to Part 7 Coverage, that being diagnosis, causation, treatment, and disability.*
>
> *The opinion contained in the report will assist me in determining entitlement for your client in the future. As this is a Part 7 report, it is not a privileged document, a copy will be provided to your office and I would encourage you to share it with your client and the family doctor.*

Ms. Deering advises that the doctor would be provided with the various clinical records "which have been generated for the Part 7 Coverage" and that attendance at the exam was a requirement of continued funding.

11. Claimant's counsel responded by email dated April 12, 2016 agreeing to the IME but insisting that ICBC not share the report with anyone "outside of the Part 7 "universe"" and stating specifically that "it is not to be used in the tort claim".

12. Ms. Deering responded the same day confirming her practice of not disclosing Part 7 documents to defence counsel in the tort action and stating, in part:

> *Your concern seems to be that I will be turning this report over to the tort counsel so that it can be served as an expert report in the tort litigation. This report is restricted to Part 7 issues only and would not cover the scope needed for a tort claim. The timing of this examination is specific to the Part 7 file and in particular the ongoing request of entitlement. It is my practice that the retaining and instructions of experts in the Tort action be managed by the handling counsel.*

And should a tort expert be needed, the selection, timing and the scope of any (sic) this activity be based specifically on the evidence and claims alleged in the tort action.

13. Claimant's counsel responded, also the same day, confirming that the Claimant would attend the IME with Dr. Yoneda; confirming that in seeking the report, ICBC was acting in its capacity as the first party insurer of the Claimant; and conceding that the examiner could not control what use might be made of the report once it was produced to Claimant's counsel and listed on a List of Documents.

14. Because of their importance to one of the issues in dispute, Ms. Deering's letter of instruction to Dr. Yoneda dated April 12, 2016 and Dr. Yoneda's IME report dated April 26, 2016 are annexed to this Ruling as Exhibit "A".

15. The significant components of the instruction letter are as follows:

    i. The IME is expressly stated to be pursuant to s.99 of the *Insurance (Vehicle) Regulation*;
    ii. The IME is specifically stated to be related to a contractual agreement for accident benefits and not tort litigation, and the doctor is requested not to include in his report the paragraph outlining the duty to the Court (a request with which Dr. Yoneda did not comply);
    iii. The examiner was essentially asking for medical assistance in determining what is reasonably and properly payable under the accident benefits coverage;
    iv. The doctor was requested to "restrict" all opinions contained in your letter to diagnosis, causation, disability, and treatments;
    v. The doctor was asked to identify all physical injuries claimed and address causation, address medical history, provide recommendations for reasonable and

necessary medical treatment, and discuss any associated total disability from employment; and

vi. Medical records from the Claimant's Part 7 coverage file (only) were enclosed. The doctor was also asked to provide the reasons for his opinion, a description of the factual assumptions on which the opinion was based, a history from the Claimant, a description of research, and a list of every document relied upon.

16. The significant components of Dr. Yoneda's are as follows:

   i. The report includes the certification of the duty to the Court required by Supreme Court *Rule* 11-2;

   ii. The report is 2 pages and 5 lines in length;

   iii. The first page is taken up with the doctor's qualification, certification of duty to the Court and part of the history from the Claimant;

   iv. The doctor refers to a 1cm thick documentation provided to him but only specifically identifies a vocational rehab discharge report dated December 30, 2015 and a FCE dated December 29, 2014;

   v. The examination portion of the report consists of 15 lines;

   vi. The diagnosis is "soft tissue injuries, neck, and upper back";

   vii. The discussion of causation is "mva on November 13, 2011";

   viii. The prognosis is "Poor – as good/bad as he is going to get. Has been through complete spectrum of appropriate conservative therapy";

   ix. There is a recommendation for monthly kinesiology supervision, and daily self-directed exercises. The comment respecting disability is "assess for permanent disability pension on the basis of his FCE from 2014 – which I do not think I would have changed significantly".

17. Dr. Yoneda's report was provided to Claimant's counsel who has provided a copy to ICBC's counsel.

DR. RICKARD'S IME

18. By letter dated May 4, 2016 ICBC's counsel advised that IME appointments had been arranged with Dr. Rickards for June 14, 2016 and with Tim Winter, a registered occupational therapist for June 28, 2016. Claimant's counsel responded, agreeing to the further exam with Mr. Winter but objecting to the exam by Dr. Rickards on the basis of the number and type of IMEs already attended. ICBC's defence counsel was at the time unaware of the Part 7 IME arranged by Ms. Deering in April, 2016. An intended application for an order for an IME by Dr. Rickards was postponed by agreement of counsel until Dr. Yoneda's report was available. Dr. Yoneda's report was sent from

Claimant's counsel to ICBC's counsel on July 11, 2016. There was disagreement regarding its impact on entitlement to a further IME by Dr. Rickards. The present application followed.

DR. KENNEDY'S MEDICAL/LEGAL REPORT

19. A summary of the Claimant's condition contained in the most recent medical/legal report of his family physician, Dr. Kennedy, dated May 24, 2016 at page 7 is as follows:

> *In summary, this 34 year old man has had chronic pain and stiffness since he suffered soft-tissue injuries affecting his neck and lumbar spinal areas after the motor vehicle accident referred to above. He has lost his job as a visual effects artist because he was unable to perform his required duties as a direct result of these injuries. He remains unemployed to the present day. In my opinion, he is capable of doing other work but should not return to his previous career. He should avoid working long hours and should avoid postural strain on his neck and lower back.*
>
> *He has also had significant mental health issues, with a probable diagnosis of adjustment disorder. He has tried hard to improve his physical fitness, and is committed to regular aerobic exercise and weight loss. He has a very supportive physiotherapist, and continues to get benefit from his physiotherapy treatment.*
>
> *His prognosis is unclear. I think he will continue to have pain and stiffness in his affected areas of his body in the long term, but there may be some further improvement in this regard over time. He no longer requires prescription medication for his and this is obviously a good thing. He should continue to be physically active, and should avoid weight gain in the future. With regard to his mental health, the best assistance for this would be for him to find a new career, re-establishing daily routines and regular remuneration.*

SUBMISSION OF ICBC

20. ICBC submits that the purpose of IMEs is to put the parties on an equal footing with respect to the medical or expert evidence. Multiple examinations are appropriate where multiple complaints are raised. In this case, although ICBC has had three prior tort IMEs, none is by a medical doctor qualified to provide opinions on physical injuries. Neither Ms. Gallagher, who provided the vocational assessment, nor Mr. Winter, who provided the FCE are medical doctors. Dr. Riar is a psychiatrist, but a psychiatrist is not qualified to provide opinions regarding diagnosis, treatment, or prognosis of physical injuries. The claim being advanced on behalf of the Claimant is for chronic pain affecting his neck and lumbar spine that has resulted in the loss of his prior employment and his being unemployed for a number of years. If ICBC is not allowed to obtain the examination by an orthopedic specialist, it will be seriously disadvantaged at trial as it will have no expert

evidence on the nature, cause, diagnosis, prognosis, and future duration of the Claimant's physical injuries.

21. With respect to the impact of Dr. Yoneda's IME, ICBC submits that it is a "pure" Part 7 report, arising out of a contractual obligation for entitlement to 'no fault' benefits and not the tort litigation. As such, it is not a prior IME for the purposes of Supreme Court *Rule* 7-6(1); the request for the exam by Dr. Rickards is the first medical exam with respect to physical injuries. The instructions to Dr. Yoneda and the communications between Ms. Deering and Claimant's counsel make it clear that the IME was being obtained pursuant to Part 7 of the Regulations. Although Ms. Deering is the ICBC examiner responsible both for the Claimant's Part 7 claim and his tort claim, defence counsel in the tort action had no involvement in or knowledge of the IME arranged with Dr. Yoneda. Second, Dr. Yoneda's report is very limited and provides no explanation of his conclusions. It has technical deficiencies as an expert report in that it does not contain a description of the factual assumptions on which the opinions are based nor does it contain a list of all documents relied upon. It simply does not closely resemble a report following an independent medical examination under *Rule* 7-6. ICBC relies particularly on the cases of *Roberge v Canada Life Assurance Company* (2002) 45 CCLI (3rd) 295 and *Teichroab v Poyner* (2008 BCSC 1130).

22. The claim being advanced is a very serious one. ICBC in this proceeding is entitled to have an independent medical exam by a practitioner of its choice, to address the Claimant's physical injuries.

SUBMISSION OF THE CLAIMANT

23. The Claimant opposes the further IME by Dr. Rickards on three grounds. First, ICBC has had three prior tort IMEs. There is no new claim or development that could not have been addressed at the earlier examinations. The nature of the claim advanced and its potential seriousness have been known from the outset. ICBC has elected to have examinations by a psychiatrist and an occupational therapist doing a FCE and should have to live with that choice. In addition, this application is not timely, coming on the eve of the deadline for the service of expert reports and will prejudice the Claimant by having to travel to Vancouver for the exam and potentially having to obtain a reply expert report.

24. Second, relying on the cases of *Koulechov v Crossman (2015 BCSC 393)* and *Thandi v Higuchi* (2015 BCSC 2366), the Claimant says there is no evidence that a further exam by an orthopedic specialist is required. In the cases cited, prior expert reports had not yet been served, as is the case here, and the Court concluded that without seeing the contents of the prior reports, it could not determine whether a further exam was necessary.

25. The third basis upon which the Claimant says a further IME by Dr. Rickards should not be ordered relates to the IME conducted by Dr. Yoneda. That IME undermines ICBC's argument regarding inequality which is based on an erroneous assumption of fact. Dr. Yoneda was selected by ICBC and his report is available for use in the tort action. Thus

ICBC has a current orthopedic assessment; ICBC's real complaint is that it does not like Dr. Yoneda's opinion.

26. Dr. Yoneda's report should be treated as a first orthopedic report under Rule 7-6, in which event, there would be no entitlement to a second orthopedic assessment when Dr. Yoneda's report is current and there is no new development or circumstance that could not have been assessed by him.

27. With respect to the content of the report, brevity does not disqualify the report from being a genuine IME. Although brief, it does answer the critical questions of identification of physical injuries, and diagnosis, causation, disability and treatment. The Claimant will waive any technical deficiencies in the report such as the omission of any research conducted and the omission of a listing of all documents relied upon. The Claimant relies upon the statement in *Teichroab v Poyner* (2008 BCSC 1130) to the effect that:

> *The more closely an examination performed under a contractual obligation for the purposes of a claim for Part VII resembles an independent medical exam under Rule 30(1), the more relevant it will be to the exercise of the discretion conferred by the Rule, and the less likely it may be that an order under that Rule will be made.*

28. The Claimant submits that Dr. Yoneda's report appears to be "thorough and complete" and it should be treated as a first orthopedic assessment under Rule 7-6. The *Roberge v Canada Life Assurance Company* (2002 BCSC 1500) case is distinguishable on two grounds. First, the prior IME in *Roberge* was conducted before any litigation was contemplated. Second, the prior IME was four years old at the time of the application for a further exam. This datedness of the prior IME was relied on by Master Muir in *Briscoe v SSQ Life Insurance Company* (2013 BCJ No. 2454) in distinguishing *Roberge*. Finally, the Claimant notes that he does not have and will not be relying upon his own orthopedic assessment.

29. In the alternative, if a further IME is ordered, the Claimant submits that it should take the form of an addendum to Dr. Yoneda's report or an additional assessment by Dr. Yoneda. In this regard, the Claimant relies upon *Antoniali v Massey* (2007 BCSC 1458).

DISCUSSION AND ANALYSIS

Three Prior Tort IMEs

30. There is no real dispute between the parties regarding the general principals applicable to this type of application. The generally applicable principals 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.

31. In this case, ICBC has not previously had any IME by a medical doctor with reference to the Claimant's physical injuries. Although both parties have reports from psychiatrists, and only one of them is in evidence on this application, it appears that a substantial if not primary component of the Claimant's claim arises from disabling physical pain that has rendered him unemployed for a period of years. The report of Associated Economic Consultants Ltd. (Exhibit 'G' to the Affidavit of Michelle Moore) (the AEC Report) calculates a net past loss of earning up to May 2, 2016 at $118,700. (This figure appears

not to take into account the Part 7 income loss benefits paid by ICBC). The same AEC Report provides various sample calculations of the potential loss of future earning capacity claim. I fully appreciate that these sample calculations are not anyone's opinion of what the Claimant's loss of earning capacity actually is and the sample calculations are subject to other factors and contingencies that remain to be determined at the arbitration hearing. Nonetheless, a number of the sample calculations produce a present value of the loss of future earning capacity at in excess of $1.0 million. I reference the AEC Report solely for the purpose of indicating the potential magnitude of the claim with which ICBC is faced which is a factor that may be taken into account in considering the requirement generally for "proportionality" mandated by the Supreme Court *Rules*. By obtaining a psychiatric assessment in April, 2016, and a functional capacity evaluation in June 2016, I do not think that ICBC has elected to forego a physical examination by a medical doctor. Although it does not follow that a defendant is always entitled to have as IMEs, both a functional capacity evaluation and an orthopedic assessment *Chan v Cheng* (Vancouver Registry M110770, March 3, 2016 at para 24), I conclude that in this case, where ICBC has had no prior physical exam by a medical doctor, it is entitled to have such an examination and the absence of such an examination would result in severe inequality of the medical evidence at the hearing. The fact that the Claimant does not have his own orthopedic assessment does not alter this outcome. The Claimant has medical reports from Dr. Kennedy. ICBC is entitled to select the examiner of its choice, and is not restricted to an IME by another general practitioner simply because that is the expert on the other side.

32. Finally, the IME is being scheduled such that a report may be served within the time limited by the *Rules* and I do not find that the Claimant has been prejudiced by the timing of the IME.

No Evidence Supporting the Need for a Further IME

33. The Claimant relies upon the *Koulechov*, supra and *Thandi*, supra, decisions. Both in my view are distinguishable. In both cases, the report from the first examination had not been disclosed. In both cases however the exams were by a neurosurgeon (first exam) and an orthopedic surgeon in *Koulechov* and an orthopedic surgeon (first exam) and a neurologist in *Thandi*. The issue of concern for the Court was that the first examination might be able adequately to address the plaintiff's injuries because of the potential overlap in their respective specialties. In the present case, I agree with the submission of ICBC that it is self-evident that none of the previous tort IME examiners is able to provide a medical opinion with respect to the Claimant's physical injuries. Accordingly, it is not necessary for example for there to be a report from Dr. Riar on this application stating that he defers to his medical colleagues with respect to the Claimant's physical injuries. Similarly, it is not necessary to have evidence from Ms. Gallagher or Mr. Winter that they cannot provide medical opinions. I do not accept this submission of the Claimant.

IME by Dr. Yoneda

34. The final question is whether the IME by Dr. Yoneda is a "Part 7" exam or a first orthopedic IME under *Rule* 7-6, and in any event whether its existence should result in the exercise of discretion against ordering any further orthopedic assessment.

35. In the case law, there are a number of decisions in which a prior IME said to have been conducted for Part 7 purposes was either found to be or treated as an exam under the Supreme Court *Rules*. For example, in *Shaw v Koch* (2004 BCSC 634) at the time of the first IME the claimant was unrepresented; there was no Part 7 claim outstanding; the instructing letter sought findings on many areas that had nothing to do with Part 7 benefits and although defence counsel had no input into the choice of the first examining doctor, the Court found that the tort defendant was represented by the ICBC adjuster "who was concerned about the assessment of the plaintiff's tort claim and not any claims for benefits". Thus, the Court refused to order a further IME.

36. In *Antoniali*, supra, at the time of the first IME, there was no outstanding claim for Part 7 benefits; the claimant had never advanced a claim for loss of wages; and the ICBC adjuster was found to have asked for a complete medical examination that pertained not only to Part 7 benefits but also to the plaintiff's tort claim. The instructing letter to the doctor referred simply to the fact that the plaintiff had "made a claim with ICBC for injuries resulting from a motor vehicle accident" which was found not to be construed in any way as limiting the claim to Part 7. Although the tort defendants were not involved in the selection of the first examining doctor, the Court concluded that their interests were represented by the adjuster and further found that the exam should properly be considered a medical examination under the Supreme Court *Rules*.

37. In *Walch v Zamko* (2008 BCSC 433) a Part 7 adjuster arranged for an assessment of the plaintiff by a team of three medical examiners. The instructing letter made no reference to the exam being under Part 7 and requested comment on matters that would not generally be the subject of a Part 7 inquiry, "such as: whether the claimant had suffered any permanent disability, the likely duration of any partial disability, recommendations for future treatment or if surgery may be required and the time off work required for this purpose" as well as inquiries about the use of seatbelts and headrests. At the time of the initial IME, no tort action had been commenced and the letter to the Claimant's counsel said that the examinations were "for the purposes of potential issuing of Writs". The resulting reports were comprehensive. The Court concluded that the "Part 7" examinations constituted first examinations under the *Rules*.

38. In *Imeri v Janczukowski* (2010 BCSC 1383) the first IME was stated to be under Part 7. The adjuster arranging the IME was the adjuster for both the Part 7 and tort claims. At the time of the IME, some benefits had been paid, but there was no Part 7 claim outstanding. The instruction letter to the examining doctor was not disclosed. The resulting report contained opinions irrelevant to a Part 7 claim but relevant to a tort claim, such as use of seatbelt and headrest, considerations of impact low velocity and physical damage to the vehicles involved. The Court concluded that the prior IME was a first exam under the Supreme Court *Rules* as well as for the Part 7 claim. The claimant

consented to a second IME but on the basis that it was to be conducted by the first examining doctor, which the Court ordered.

39. In my view, the foregoing cases are demonstrably distinguishable from the facts in the present case. The IME with Dr. Yoneda was a genuine Part 7 assessment. The Claimant had an ongoing claim for total disability benefits and likely medical and rehabilitation expense. He had been receiving TTD benefits for an extended period of time following his unsuccessful return to his pre-accident employment. The email to Claimant's counsel (April 11, 2016) references the continuing funding of Part 7 coverage and the intended instruction to the doctor to restrict the examination and opinions to issues specific to Part 7 coverage. Claimant's counsel sought assurance that the IME report would not be shared with defence counsel in the tort action and that in seeking the report "ICBC is acting in its capacity as insurer of the Plaintiff under his Part 7 policy (first party insurance".

40. The instructing letter to Dr. Yoneda stated that the exam was pursuant to s.99 of the *Insurance (Vehicle) Regulation* and that it related to a contractual agreement for accident benefits and not tort litigation. To that end, the adjuster requested that Dr. Yoneda restrict his opinions to diagnosis, causation, disability, and treatments.

41. I note that in some of the prior cases, requests for opinions or the provision of opinions on matters such as diagnosis, prognosis, disability and treatment have been found to be indicia of a tort report and beyond the scope of a Part 7 examination. While those conclusions may be correct in the circumstance where there is no outstanding unpaid Part 7 benefit claim, they are not correct in my view in the present case where the Claimant has been continuing to receive TTD benefits and medical and rehab expense for an extended period of time. I think the Part 7 examiner is entitled to an opinion on more than just whether the Claimant is totally disabled on the day of the examination and whether the Claimant needs the type of treatment he or she is receiving as at the date of the examination. For ongoing claims handling expectations as well as reserve purposes I think all of the questions sought by the examiner in her instructing letter were legitimate questions for the purposes of a Part 7 assessment in this case.

42. I was advised at the time of the hearing that Ms. Deering was the examiner responsible for both the Claimant's Part 7 and tort claims. That fact alone in this case does not alter my view that Dr. Yoneda's assessment was for Part 7 purposes alone. As the email communications between Ms. Deering and Claimant's counsel made clear, Ms Deering's practice was to leave the subject matter of tort IMEs in the hands of defence counsel and defence counsel in this instance had no involvement in or even an awareness of the IME with Dr. Yoneda.

43. Moreover, Dr. Yoneda's report does not go outside the boundaries of the instructing letter.

44. Accordingly, I find that the IME by Dr. Yoneda was genuinely for Part 7 purposes alone.

Other Caselaw

45. In *Vorasarn v Manning* (1997) 30 BCLR (3d) 63(CA) ICBC obtained a neuropsychological exam pursuant to Part 7. There were separate Part 7 and tort examiners. The examiner and plaintiff's counsel agreed that the report would not go to defence counsel who had no input into the first examination. Defence counsel in the tort action subsequently received a copy of the first report, apparently from plaintiff's counsel. ICBC sought an IME in the tort proceeding by a different neuropsychologist. A master ordered the examination. That decision was set aside on appeal by a Chambers judge. Leave to appeal to the Court of Appeal was granted. By the time the appeal was heard in the Court of Appeal, the underlying action had been settled during the course of trial. On the appeal, the plaintiff was unrepresented and although the issue was moot, the Court heard the appeal on the basis of its precedential effect on other cases. The Court of Appeal restored the decision of the master who had ordered the examination. The Chambers judge was wrong in characterizing the rehabilitation department's representatives as representatives of the defendant's insurers. Although the rehabilitation department representatives were employees of the defendant's insurers, they were not representatives of the defendants. The Chambers judge fell into error as a result of an apparent misunderstanding of the role of first party no fault and third party liability representatives at ICBC. The Court did state that:

> *The Court may take into consideration prior, no fault examinations in exercising its general discretion under Rule 30. The issue accordingly becomes whether the master properly exercised his discretion in the circumstances.*

46. *Vorasarn*, supra, appears to stand for the proposition that a proper "Part 7" exam is not a "first exam" under the *Rules* but nevertheless may be taken into consideration by the Court in exercising its discretion to order a "first exam" under the *Rules*.

47. In *Roberge*, supra, the plaintiff sued his disability insurer for payment of long term disability benefits. Prior to the commencement of the action, the insurer had obtained an IME as a contractual right. As a result of the IME, disability benefits were discontinued and an action commenced. The insurer sought an IME under the *Rules*. Master Groves identified the issue as whether the application was request for a first or second medical examination. He observed at para 3:

> *The distinction is quite important. Simply put, when the person in litigation makes a claim for personal injury, the defendant is, without oversimplifying the matter, almost always entitled to a medical examination of the plaintiff. A much higher standard is imposed when the defendant seeks a second medical exam of the plaintiff.*

48. Master Groves ordered the further IME, which decision was upheld on appeal by Bauman, J. (as he then was). At the time of the first examination, the parties were not involved in litigation, nor was there any suggestion that litigation was contemplated. The insurer was simply exercising its right to request that a person claiming benefits attend a

medical examination. At the time of the application for a further exam, the circumstances were different. Litigation had been commenced. Defence counsel had had no input in the prior medical exam and to find that the Defendant had exhausted or lost its *prima face* right under the *Rules* to a medical examination on the basis of a pre-litigation exam was unduly restrictive.

49. As noted by Claimant's counsel there are some factual differences between the circumstances in *Roberge* and the present case. In particular, at the time of the first examination in *Roberge* there was no litigation existing and by the time of the application for a further IME, some three years had lapsed since the first exam, although this is not a reason identified in the appeal for upholding the Master's decision.

50. In *Robertson v Grist* (2006 BCSC 1245) an ICBC adjuster acting in a dual capacity obtained an IME from a physiatrist. ICBC subsequently sought a further IME by an orthopedic specialist. ICBC conceded that if the prior exam was a first exam under the *Rules*, it was not entitled to a second exam. The instruction letter to the physiatrist was not confined to Part 7 issues. (It asked questions about seatbelt and headrest use.) A Master ordered a second IME but that order was set aside on appeal. The instructing letter stated that the examination was for the purpose of Part 7 benefits but there was no agreement within ICBC not to use the examination for both Part 7 and tort purposes. The judge on appeal held that the IME that had taken place was a first exam under the *Rules*. She determined that whether the "Part 7" exam constituted a first independent medical exam depended upon the scope of the examination. In this instance, there was no restriction on the scope of the examination and the request letter covered matters that would solely be relevant to a tort action. At the time of the first IME, the tort action had not yet been commenced.

51. With respect to the *Vorasarn*, supra, the Court said as follows:

> *Ultimately, the Master concluded that Vorasarn stood for the proposition that a Part 7 examination is not to be considered as a pre-existing medical examination for purposes of an application in the tort claim, although that was not a hard and fast rule. In my view, this is clearly wrong. The more logical interpretation of Vorasarn is that an independent medical examination under Part 7 is normally considered a pre-existing independent medical examination except in such circumstances where the adjuster handling the tort claim on behalf of the insured defendant was not consulted nor had any involvement in the selection of the Part 7 doctor so that it could not be said that the Part 7 doctor was the nominee or representative of the insured defendant. This interpretation is supported by the ruling in Telosky wherein the Part 7 benefits examination can be used in a tort action under contemplation at the time of the examination. This also fits with the statement in Vorasarn that the Court may take into consideration that there has been a prior no-fault examination in exercising its discretion under Rule 30. In the situation of this case where the instructions or report go beyond the scope of a rehabilitation report,*

this discretion should be exercised as though it is a request for a second examination".

52. In *Teichroab*, supra, the plaintiff was injured in a motor vehicle accident and a few months later was injured in a fall from a veranda. ICBC obtained a Part 7 exam by a physiatrist and subsequently sought an IME by a neurologist. A Master found that the prior exam was not a first exam under the *Rules* and ordered the further IME. This decision was upheld on appeal. After noting that the authorities are difficult to reconcile, and commenting on the *Vorasarn* decision, the Court said at para 24:

> *In my view, the wording of the Rule and the weight of authority supports the conclusion that the "further examination" contemplated by Rule 30(2) means an examination in addition to one ordered under Rule 30(1). To the extent that is so, there can be no question but that the examination ordered by the Master was a first examination for purposes of the Rule. The examination carried out by Dr. Laidlaw was not ordered under Rule 30(1). Thus, it cannot be that the examination ordered by the Master was a "further" examination which fell to be decided under Rule 30(2). That is not to say that the examination by Dr. Laidlaw is irrelevant to the issue. It, and the circumstances under which it was obtained, are matters that can be properly considered in determining whether to exercise the discretion conferred by Rule 30(1). It may be that this is a distinction which will make little difference to the analysis in most cases because the same factors which are to guide the exercise of discretion under Rule 30(2) will inform a decision to be made under Rule 30(1) when there has been an earlier assessment. Approaching the matter in this way serves to focus the inquiry on the exercise of the discretion with a view to the purpose of the Rule and obviates the need to guess as to whether, and if so when, a first assessment not ordered under the Rule may have evolved into such an assessment. Generally, the more closely an examination performed under a contractual obligation or for purposes of a claim under Part VII benefits resembles an independent medical examination under Rule 30(1), the more relevant it will be to the exercise of the discretion conferred by the Rule, and the less likely it may be that an order under the Rule will be made. ....To the extent an assessment prepared under a contract of insurance or in relation to a claim for Part VII benefits puts a defendant on an equal footing, the need for an assessment under Rule 30(1) will be mitigated.*

53. On the facts of the case, the Judge on appeal found that the Master did not err in treating the application as an application for a first IME under Rule 30(1) but also noted that, had the Defendant sought an assessment by another physiatrist, rather than by a neurologist, it may well have been properly refused.

54. The foregoing analysis in *Teichroab* was followed in *Lloyd v Munday* (2015 BCSC 1371) by Mr. Justice Schultes at para 26. He viewed one benefit of the approach being to encourage a focus:

On the substance of the Part 7 report and the extent to which it is sufficient to advance the interests of the Defendant in the litigation, rather than on engaging on a technical classification of it.

55. On the facts in *Lloyd,* ICBC obtained series of reports from a specialist in occupational medicine for the purposes of Part 7 and subsequently sought IMEs under the Rules by a physiatrist, orthopedic specialist and a psychiatrist. The prior reports were both technically and in substance suitable to be introduced at trial. The question for consideration was whether and to what extent the substance of the reports, despite their ostensible purpose of assessing Ms. Lloyd's eligibility for Part 7 benefits, made it unnecessary for the defendant to achieve reasonable equality in the litigation through further IMEs they seek. The Court declined to order the further IMEs on the basis that it seemed to involve attempting to improve on existing opinions rather than on addressing an unfair gap or omission in the expert evidence.

56. Adopting the approach in the *Teichroab* and *Lloyd* cases, I find that Dr. Yoneda's report is not a first report under Rule 7-6. It was clearly identified and agreed between the parties on the basis of negotiation to be a report that ICBC was obtaining solely under Regulation s.99, and was not to be used for tort purposes, in the sense of being provided by Ms. Deering to the tort defence counsel.

57. Because of the three prior tort IMEs, the further IME by Dr. Rickards is technically a second examination, but I have previously concluded that the prior tort IMEs do not preclude an IME by Dr. Rickards, which is to be regarded as a first exam by a medical doctor regarding the Claimant's physical injuries.

58. The questions then are how closely Dr. Yoneda's report resembles an IME for tort purposes under *Rule* 7-6 and the extent to which it makes it unnecessary for ICBC to obtain further IMEs in order to achieve reasonable equality with respect to the medical evidence in the tort proceeding. These are the factors to be considered in the exercise of discretion to order an IME under *Rule* 7-6.

59. Turning finally to Dr. Yoneda's report, I respectfully disagree with the characterization of it by Claimant's counsel as "thorough and complete". Quite apart from the technical deficiencies of failing to list documents relied upon and the factual assumptions, the report is wholly deficient when compared to the typical medical/legal report obtained under the *Rules* for tort purposes. With respect to the critical questions of diagnosis, causation, and prognosis, the report is essentially conclusionary, but devoid of any explanation or justification for the conclusions reached. The abbreviated response to the questions asked may well be because of Ms. Deering's constraint upon the nature of the report, which in my view confirms my conclusion that although the report was responsive to the questions arising in the Part 7 claim, it was not responsive to the way in which similar questions would be answered in the typical tort IME under the *Rules*. It is significant that Dr. Yoneda did not go outside the boundaries of the questions asked, which questions I have concluded were all appropriate in the context of an ongoing and substantial Part 7 claim.

60. I am very much aware that this application by ICBC may appear to be an attempt to obtain a different opinion in the same specialty field without any intervening event or changed condition, which is clearly prohibited by the authorities (*Hamilton v Pavlova*, supra, at para 13 and other cases cited there).

61. Nevertheless, I approach the question from the starting point that this is a first examination under *Rule* 7-6 by a medical doctor respecting the Claimant's physical injuries and therefore prima face ICBC is entitled to have an examination by an examiner of its choice. That entitlement may be displaced, or the discretion exercised against allowing such a first exam, where the prior 'no fault' exam adequately provides equality to the Defendant with respect to the medical evidence. Quite apart from the questions set out in the instruction letter to Dr. Rickards (Exhibit 'N') to the Affidavit of Michelle Moore, sworn July 14, 2016) that were not asked of Dr. Yoneda, his report would have to be wholly recast in order to resemble a typical tort IME report under the *Rules*. Simply put, it is not a tort IME under the guise of Part 7 IME.

62. The risk that ICBC may now obtain a report that provides a different conclusion from that of Dr. Yoneda is ameliorated to some extent by the fact that a Part 7 medical examination is available for use in a tort action (*Telosky v Ash* 2006 BCSC 913 at para 25; *Robertson*, supra, at para 13).

63. I would distinguish Jackson v Miller (1999 BCJ No. 2751) on the basis that the prior Part 7 reports there were found to appear "fairly thorough and complete" without any indication why they were unacceptable, except for the results. In the present case, Dr.Yoneda's report is far from "thorough and complete"; it is exceptionally brief, and conclusionary in nature without explanation or reasoning for the conclusions.

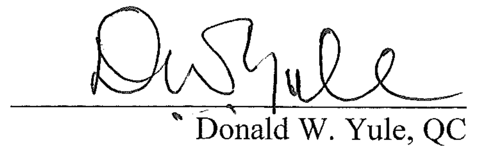
Who Should Perform the IME?

64. The Claimant submits that if ICBC is entitled to a further IME, it should be by Dr. Yoneda. The Claimant relies upon the order made to this effect in *Antoniali*, supra.

65. I decline to exercise my discretion by requiring the further IME to be conducted by Dr. Yoneda. The starting point is that this is a first exam under the Rules by a medical doctor with respect to the Claimant's physical injuries and ICBC is entitled to have the examination by an expert of its choice. Second, defence counsel correctly observed that Dr. Yoneda did not follow the express, capitalized, request in the instructing letter to him not to include the paragraph outlining his duty to the Court. He also appears not to have provided reasons for his opinions as requested. These matters must be balanced against the potential invasiveness of a potential examination by a doctor who is a stranger to the Claimant. In the circumstances of this case, I would not allow that consideration to restrict ICBC from having the further examination conducted by an examiner of its choice.

66. The application for an IME of the Claimant by Dr. Rickards is granted.

67. ICBC is entitled to its costs of the application in the cause.



Dated: July 22, 2016

Donald W. Yule, QC