BCICAC File No. DCA 1506 – UMP

IN THE MATTER OF AN ARBITRATION PURUSANT TO R148.2(1)
OF THE REVISED REGULATION (1984) TO THE *INSURANCE (MOTOR VEHICLE) ACT*
BC REG 447/83
AND *THE COMMERCIAL ARBITRATION ACT* RSBC 1996, c55

BETWEEN:

CLAIMANT

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

DECISION ON APPLICATION
OF ARBITRATOR, DONALD W. YULE, QC

Counsel for the Claimant:	W. Mark Belanger
Counsel for the Respondents:	Vincent R.K. Orchard, QC
Date of Hearing:	November 28, 2013
Date of Judgment:	December 20, 2013

INTRODUCTION

In this Arbitration the Claimant, [redacted] ("Claimant") seeks underinsured motorist protection compensation pursuant to s.148.2 of the *Revised Regulation* (1984) *to the Insurance (Motor Vehicle) Act*, BC Reg 447/83 (the "Regulation"). The Arbitration hearing is scheduled for April 14 – 22, 2014. The Respondent, ICBC ("ICBC") has arranged for two independent medical examinations of the Claimant to be conducted on its behalf by a neurologist on December 4, 2013 and by psychiatrist on December 24, 2013. The Claimant has declined to consent to these examinations. ICBC brings this application seeking an order to compel the Claimant to attend, or alternatively an order appointing the two proposed medical examiners as joint experts under s.27(4) of *British Columbia International Commercial Arbitration Centre Domestic Commercial Arbitration Rules of Procedure* (the "BCICAC Rules"). The Claimant opposes the application on the basis that the arbitrator has no jurisdiction under the BCICAC Rules to order an independent medical examination.

I have previously advised the parties that the primary application is granted, with reasons to follow. These are those reasons.

THE STATUTORY REGIME

Under the ICBC Regulation an insured person is entitled to recover compensation from ICBC in the case of injury or death where the injury or death is caused by an underinsured motorist. Any dispute between the insured and ICBC must be submitted to Arbitration under the Commercial Arbitration Act (ICBC Regulation s.148.2(1)). The *Commercial Arbitration Act* (now named the *Arbitration Act*) (the "*Act*") provides in s.2(1)(b) that it applies "to an arbitration under an enactment that refers to the *Act* except insofar as the *Act* is inconsistent with the enactment regulating the arbitration, or with any rules or procedure authorized or recognized by that enactment". Section 22(1) of the *Act* provides that "unless the parties to an arbitration otherwise agree", the BCICAC Rules for the conduct of domestic commercial arbitrations apply to that arbitration. The BCICA Rules, as amended June 1, 1998, are the current Domestic Commercial Arbitration Rules of Procedure. The Claimant and ICBC have not agreed to any modification of the BCICAC Rules.

THE ARBITRATION ACT

Section 6(2)(c) of the *Act* provides that in an arbitration, the arbitrator may determine, subject to the rules of natural justice, how evidence is to be admitted.

In addition to making the BCICAC Rules applicable, s.22 also provides in subsections (2) and (3) that if the BCICAC Rules are inconsistent with or contrary to the provision in an enactment governing the arbitration, the provision of that enactment prevails, and if the BCICAC Rules are inconsistent with or contrary to the *Act*, then the *Act* prevails.

Section 23 provides that an arbitrator must adjudicate the matter "by reference to law" unless the parties agree that the matter may be decided on equitable grounds, grounds of conscience or some other basis.

THE BCICAC RULES

The BCICAC Rules do not explicitly provide for the independent medical examination of a claimant.

Rule 19 provides 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.*"

Rule 23 provides that the arbitration tribunal may order parties to produce documents.

Rule 26(2) provides that each party shall prove the facts on which it relies.

Rule 27(4) permits the arbitration tribunal itself to appoint experts to report on specific issues.

Rule 29 sets out general powers of the arbitration tribunal. Rule 29(1) commences as follows:

> "*(1) Without limiting the generality of Rule 19 or any other Rule which confers jurisdiction or powers on the arbitration tribunal, and unless the parties agree at any time otherwise, the tribunal may:*".

There follows a list of 11 specific orders that may be made by the arbitration tribunal. The orders include adjourning the proceedings (a); ordering inspection of documents (d); extending or abridging time periods (f); ordering security for costs (h); ordering any party to be examined on oath or affirmation (j).

PRIOR ARBITRATION DECISIONS

In a decision in *Newell v ICBC* dated September 11, 1990, Arbitrator J.J. Camp, QC, concluded that the then BCICAC Rules did not provide the jurisdiction to order independent medical examinations. In that case, ICBC wished to have examinations of the claimant conducted by a neurologist, an orthopedic doctor, a psychologist, a rheumatologist, and a psychiatrist. ICBC relied upon s.23 of the *Commercial Arbitration Act* ("an arbitrator shall adjudicate the matter ... by reference to law") and judicial authority requiring an arbitrator to act fairly and afford a party a fair opportunity of answering the case. In addition ICBC relied upon the law that had developed under the Supreme Court Rules. Arbitrator Camp "searched in vain" for any express or implied reference in the relevant statutes or the Rules to permit the exercise of the discretion requested by ICBC. He commented gratuitously that the Commercial Arbitration Rules were "ill-suited for personal injury arbitration". He reached his decision "with considerable misgiving" since it seemed to him that the Rules should be broadened to permit an arbitrator to make the kinds of orders sought by ICBC in appropriate circumstances (at the time, the Rules did

not provide for an Examination for Discovery either. ICBC sought an order that it be entitled to examine Mr. Newell for discovery but that application was also dismissed).

ICBC sought a "rehearing" of the above decision which was granted by Arbitrator Camp and resulted in confirmation of his earlier decision in a further award dated November 1, 1990. ICBC relied on 3 grounds in seeking to reverse the previous decision. The first ground was a reference to a case not known to counsel and evidently discovered through the Arbitrator's own research. It was a decision of Arbitrator Paul D.K. Fraser, QC, dated September 19, 1990 in *Krogh v ICBC*. The decision is in fact a memorandum of a pre-hearing meeting with counsel. At that meeting, counsel for ICBC requested that the arbitrator appoint a medical examiner under then Rule 29 (now Rule 27(4)). The arbitrator declined to "take such a pro-active role at this stage of the proceedings". The application appears to be premised on the mutual assumption that the Rules did not provide for independent medical examinations. From the memorandum however that does not appear to have been an issue argued before Arbitrator Fraser.

In granting the re-hearing, Arbitrator Camp presumably overcame any prejudice that may have arisen through his reliance on an arbitration award not argued by or known by counsel.

The second ground relied upon by ICBC was the unfairness in forcing it to proceed to a hearing to assess UMP compensation without the benefit of either independent medical examinations or an Examination for Discovery. Whilst describing himself as "sympathetic" with ICBC's position, Arbitrator Camp nevertheless was unable to find any implied empowering mandate to make the orders sought.

ICBC also relied upon some factual inaccuracies which, when corrected, did not change the outcome. Arbitrator Camp reiterated his willingness to appoint his own medical expert under Rule 29 if at the hearing it was plain to him that there was a need for it.

Arbitrator Camp revisited the issue in *Tepei v ICBC* (Arbitration Award, January 19, 2010). ICBC again sought to have the claimant examined by an orthopedic specialist, a functional capacity specialist and a vocational specialist. The arbitration was governed by the BCICAC Rules as amended June 1, 1998. The Tepei claim for damages for personal injuries had proceeded to trial in an action in Washington State. ICBC had defended one of the Defendants in that action. The purpose of the arbitration was to determine UMP compensation on the basis that the quantum of damages was required to be determined by the law of British Columbia. In rendering his decision in *Tepei*, Arbitrator Camp referred to an intervening arbitration decision in *Hayward v ICBC* (September 30, 2005) which dealt only with the jurisdiction to order a pre-hearing oral examination of a party. Arbitrator Camp acknowledged the twin obligations under Rule 19 of treating parties fairly and giving them full opportunity to present their case as well as striving to achieve a just, speedy, and economical determination of a proceeding on its merits. The accident that gave rise to Ms. Tepei's injuries had occurred 14 years previously. She had previously been examined by a host of medical practitioners and had been examined under oath on two prior occasions. Although the Arbitration Rules had been changed after the *Newell* decision with respect to oral examinations on oath, they had not been changed with respect to independent medical examinations. Thus, Arbitrator Camp concluded that he could find no express or implied authority to order an independent medical exam. Interestingly, had he found jurisdiction, Arbitrator Camp would not have exercised his discretion to order the requested independent medical examinations. Presumably this was because of the volume of medical and

other information already available to ICBC through the underlying Washington State action. Finally, Arbitrator Camp reiterated his willingness to appoint his own expert if "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".

SUBMISSION OF ICBC

ICBC submits that the decisions in *Newell* and *Tepel* are not binding. In the alternative, they are distinguishable on the basis of the third branch of the *stare decisis* rules established in *Re Hansard Spruce Mills Ltd.* (1954) 4 DLR 590 (BCSC – Wilson J.). This branch provides that a prior decision which was unconsidered, a *nisi prius* judgment given without opportunity to fully consult authority, is not binding. In this case ICBC submits that the *Newell* and *Tepel* decisions were given without reference to other authority describing the scope of the "fairness" required generally in administrative law.

An arbitrator assessing UMP compensation must assess damages according to the law of British Columbia (ICBC Regulation, Section 148.2(6)(b)). In this case the claimant has a history of potentially relevant pre-existing medical conditions, namely Guillain-Barre Syndrome, arthritis and depression. (Report of Dr. [redacted] dated July 22, 2013; Report of [redacted], dated May 16, 2012; Exhibits 'E' and 'B' respectively to the Affidavit of [redacted] sworn November 25, 2013). In order to assess damages properly according to the law of British Columbia, the arbitrator is required to determine the Claimant's "original position" and award damages against the tortfeasor only for the additional injury caused (*Athey v Leonati* (1976) 3 SCR 458). Moreover any award must be "moderate and fair" to both parties (*Andrews v Grand & Toy Alberta Ltd.* (1978) 83 DLR (3rd) 452 (SCC) at page 462). Thus it is submitted that in order for an arbitrator to perform the function of determining a substantively fair assessment of damages for personal injuries as required by the ICBC Regulation, the arbitrator must have the jurisdiction that would permit both parties to obtain information that may be placed in evidence so as to result in a proper decision according to law.

ICBC also submits that the BCICAC Rules are mere "house" rules, and are neither Statute nor Regulation. The reference to the rules of natural justice in s.6(2) of the *Act* imports the rules of natural justice into the entire arbitration proceeding. Section 22(2) of the *Act* provides that, in the case of conflict between the Act and the ICBC Regulation, the ICBC Regulation prevails. In this case, the obligation to assess damages according to the law of British Columbia imports a fairness requirement that would permit independent medical examinations.

ICBC relies upon three authorities. They are *Re University of British Columbia and Association of University and College Employees, Local 1 et al* (1984) BCCAAA No. 45; 15 LAC (3rd) 151 – Arbitrator B.H. McColl, February 24, 1984) (the 'UBC' case); *Telecommunications Workers Union v Telus Communications Inc.* (2010) CLAD No. 256; 198 LAC (4th) 52 – Arbitrator Ib S. Petersen, May 17, 2010 (the 'Telus' case); and *Certas Direct Insurance Company v Gonsalves* (2011) ONSC 3986 (Ontario Divisional Court) (the 'Certas' case). The *UBC* and *Telus* cases involve grievances under collective agreements. In the *UBC Case*, an employee with a history of mental illness and discipline for erratic behavior, was arbitrarily placed on a medical leave of absence by the employer. During the grievance procedure the employer sought an independent medical exam of the grievor by a psychiatrist. The grievor had reports from two psychiatrists

recommending a return to work. The basic statutory mandate for Labour arbitrators was contained in s.92(2) of the *Labour Code*, RSBC 1979, c.212 which provided as follows:

> "*It is the intent and purpose of this Part that its provisions constitute a method and procedure for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.*"

Section 92(3) provided as follows:

> "*An arbitration board shall, in furtherance of the intent and purpose expressed in subsection (2), have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties thereto under the terms of the collective agreement, and the shall apply principles consistent with the industrial relations policy of this Act, and is not bound by a strict legal interpretation of the issue in dispute.*"

The Code also set out in s.98 a list of specific arbitrator powers, but the list did not include the explicit power to order an independent medical examination. In a seminal decision, addressing the issue of the inherent jurisdiction of an arbitrator as author of the proceedings to do that which is necessary to effect a fair hearing of the real issues and thus make a final and conclusive settlement of the dispute, Arbitrator McColl concluded that he had jurisdiction to make the order for an independent medical examination (see para 61). Arbitrator McColl stated at para 45:

> "*It is sufficient, I think, to say that where there is a substantive issue as to whether or not a medical report is reliable in terms of its diagnosis or conclusions, and that issue is bound to be determined by an impartial tribunal, a party adverse in interest is entitled to have the benefit if an independent expert for the purpose of properly presenting its case to the impartial tribunal.*"

In the *Telus Case*, the employer terminated the grievor's employment for excessive absenteeism. The grievor had been diagnosed with chronic depression. The Union grieved the termination on the basis that it was without just cause and contrary to the collective agreement and the *Canada Human Rights Act*. The Union's position was that the grievor suffered from a disability which the employer was required to accommodate. The Union intended to rely upon a psychiatric report. The employer applied for order requiring the grievor to undergo a medical examination by a psychiatrist of the employer's choice. Arbitrator Petersen reviewed the law since the seminal decision in the *UBC Case* and concluded at para 56 that:

> "*...the requirement that all parties to this proceeding, including the Employer, be granted a fair hearing must take precedence over the Grievor's concerns about her privacy. As such, I find that an order that the Grievor be examined by Dr. Hashman is appropriate in the circumstances of this case.*

In the *Certas* case, the claimant sought no fault benefits pursuant to Ontario's Statutory Accident Benefits Schedule. Prior to the arbitration to determine entitlement, the claimant served two new orthopedic opinions. The arbitrator ordered an adjournment of the hearing and ordered the claimant to submit to a further orthopedic examination at the insurer's instance. The claimant appealed the orders and refused to attend the orthopedic assessment. The arbitrator's orders were overturned on appeal and the insurer applied for judicial review of the appeal decision. The

Ontario Divisional Court allowed the further appeal and restored the original decision of the arbitrator. In doing so, the Court said at paras 8-10 as follows:

> "8. *Fundamental to any administrative process, is the requirement that it be fair. At its most basic, procedural fairness requires that a party have an opportunity to be heard and that it be able to respond to the position taken against it.*
>
> 9. *In the circumstances of this case, if this arbitration is allowed to proceed in the absence of a further orthopedic examination by a doctor of the insurer's choosing, the insurer will have no practical ability to respond to the opinions with which it was provided 31 days before the commencement of the arbitration.*
>
> 10. *In our view, the insurer would be denied the right to make a full response and would not be heard as the dictates of procedural fairness require.*"

Further, at para 20, the Court said that the arbitrator had "a wide discretion to ensure a fair hearing. Neither the Dispute Resolution Practice Code (the 'Code') nor Practice Note 9 can interfere with that overarching responsibility".

In the present case, the Claimant was injured in a motor vehicle accident on November 18, 2006 in Arlington, Washington. The tortfeasor/underinsured motorist was insured with an American liability insurer, not ICBC. The Claimant's claim against the tortfeasor/underinsured motorist has been settled with ICBC's consent without a trial. The Claimant has been deposed by counsel for the insurer of the tortfeasor/underinsured motorist approximately 3 years ago. There have been no prior independent medical examinations either by ICBC or by the liability insurer of the tortfeasor/underinsured motorist. Attached and marked as Exhibit 'E' to the Affidavit of filed in support of ICBC's application is a medical/legal report dated July 22, 2013 of Dr. the Claimant's family physician. At page 7 of the report under the heading "Past Medical/Surgical History", there is reference to a history of Guillain-Barre Syndrome affecting the lower extremities. At page 8 of the report, under the heading 'Diagnosis', there is a reference to "major depression and anxiety disorder", but this is followed by the statement that "the association between this diagnosis and his MVA is not clear."

A Functional Capacity Evaluation Report by occupational therapist, dated May 16, 2012, marked Exhibit 'B' to the Affidavit of states at page 4 under the heading of "Past Medical History" the following:

> "*He reported that he was diagnosed with Guillain-Barre Syndrome at age 17 years. This results in weakness in his legs and foot drop (right worse than left) and impacts his balance and coordination. This limited his ability to participate in heavier physical activities and tasks requiring bending and squatting. He had never been to engage in hard physical work and avoided physically demanding tasks around his home as much as possible.*"

A Cost of Future Care Assessment report, also prepared by [redacted] dated January 21, 2013, and marked Exhibit 'C' to the Affidavit of Ms.[redacted] indicates *inter alia* a list of recommended services including, at page 9 under the heading "Home Improvement" items for mowing and edging lawn, seasonal clean-up, exterior/gutter cleaning, interior painting, deck painting and fence painting. A further report of [redacted] Consulting Economist, with Columbia Pacific Consulting dated January 28, 2013 and marked Exhibit "D" to the Affidavit of Ms[redacted] calculates the present value of all the services recommended in Mr[redacted] report at approximately $92,000.

Dr.[redacted] is a neurologist with experience in auto-immune disorders, including Guillain-Barre Syndrome. Dr.[redacted] is a psychiatrist with experience dealing with major depression and anxiety. ICBC submits that the Claimant's pre-accident medical history is clearly relevant and that if it is not permitted to develop evidence of its own through the requested independent medical examinations it will be severely prejudiced and simply will not have received a fair hearing.

SUBMISSIONS OF THE CLAIMANT

The Claimant submits that there is no nexus between "fairness" and jurisdiction. They are mutually exclusive concepts. The matter is to be approached as a question of statutory interpretation. Rule 29 of the BCICAC Rules enumerates a long list of the powers of an arbitrator, and authority to order an independent medical exam is simply not among them. In statutory interpretation, the duty of the Court is to endeavor to ascertain the intention of the legislature by reading and interpreting the words used (*Thomson v Canada (Department of Agriculture*) (1992) 1 SCR 385 (SCC)). If the legislature has explained its own meaning too unequivocally to be mistaken, the Court must adopt that meaning. If the legislative purpose is clear, the Courts can neither disregard it, nor decline to carry it out (*Boulter-Waugh & Co. v Phillips* (1919) 58 SCR 385 (SCC).

In this case it is clear that the BCICAC, as drafters of the BCICAC Rules, did not intend to provide the authority to order an independent medical examination. Such authority has never been included in the several revisions to the BCICAC Rules. Moreover it is noteworthy that subsequent revisions to the original rules have specifically added the power to order a prehearing oral examination of a party under oath, but the revisions have not added the power to order an independent medical examination. The Rules of the Supreme Court of British Columbia is illustrative of how drafters may provide for an independent medical exam. The silence of the BCICAC Rules on the subject cannot be mistaken.

The Claimant distinguishes the Labour arbitration cases by emphasizing that part of s.92(3) of the Labour Code which provides that an arbitrator is not bound by a strict legal interpretation of the issue in dispute. This provision creates an ambiguity permitting greater discretion for an arbitrator.

The Claimant further notes that the general objective in s.19(1) of the BCICAC Rules to treat parties fairly and allow full opportunity to present its case is limited by the introductory words "subject to these Rules". Thus where the specific enumerated powers do not include the power to order an independent medical examination, authority to do so should not be found in the general words in s.19.

Finally, the Claimant submits that the *Newell* and *Tepei* decisions of Arbitrator Camp are correct. In the event ICBC is not entitled to independent medical exams, it is not entirely without alternatives. It may commission expert reports by doctors who have not had the benefit of a personal examination of the claimant and ICBC may rely upon general litigation rules applying to the burden of proof and the weight of the evidence.

DISCUSSION AND ANALYSIS

I have no doubt that ICBC will be severely disadvantaged if it is required to participate in an arbitration hearing to assess the Claimant's damages for personal injury without having the benefit of independent medical examinations of the claimant. From his comments in the initial *Newell* decision (the Rules are ill suited for personal injury arbitration; I make this decision with considerable misgiving) and from his comments in the *Newell* reconsideration (I am sympathetic with the position in which ICBC finds itself) and by his repeated statements in the *Newell* and *Tepei* decisions to appoint his own expert if necessary, it is clear that Arbitrator Camp held the same view of the unfairness to ICBC. The Claimant's suggestion that the field could be made less unlevel by ICBC commissioning expert reports from doctors who did not personally examine the Claimant is addressed in the *Telus* case at paragraph 9 where Arbitrator Petersen said:

> "*If Dr. Hashman is called to testify, the Union is likely to put to him that he "hasn't even seen this woman" hence, the prejudice to the Employer.*"

I would add the next proposition likely to be put to Dr. Hashman, namely that he would have preferred to have examined the Claimant personally and it would have been beneficial in coming to a proper opinion to have done so. It is because the unfairness is so obvious that the Claimant understandably seeks to separate the concepts of fairness and jurisdiction.

Although I do not think that I am technically bound to follow the decisions of Arbitrator Camp in *Newell* and *Tepei*, I hesitate to disagree with those decisions. They have settled the law on this point for almost twenty five years. *Newell* has survived two revisions to the BCICAC Rules. The decisions are from an able and knowledgeable arbitrator. However, I conclude that the current BCICAC Rules do include a discretionary power to order an independent medical examination in appropriate circumstances. My reasoning is as follows:

Even if the doctrine of *stare decisis* applied to arbitral decisions, I think this case falls within the second or third exceptions namely where some binding authority in case law was not considered or where the judgment was a nisi prius judgment given without opportunity to fully consult authority. In this case, the line of applicable authority cited to me but not considered in the prior decisions is the arbitration cases with respect to the scope of an arbitrator's obligation to provide procedural fairness where a claimant's physical or mental condition is relevant to the issue to be arbitrated.

The Claimant's primary objection to inferring the power to order an independent medical examination is that that power is not listed specifically anywhere in the BCICAC Rules, and in particular is not included in any of the 11 itemized general powers set out in Rule 29. However, the enumerated general powers in Rule 29 are specifically described as "without limiting the generality of Rule 19 or any other Rule which confers jurisdiction or powers on the arbitration

tribunal." Thus the absence of a specific power from the list in Rule 29 does not deprive the arbitration tribunal of a power that is required to meet the overarching obligation of the arbitrator under Rule 19 to treat each party fairly and give each party full opportunity to present its case. Although Rule 19 is introduced by the phrase "subject to these Rules", when the introductory words of Rule 29(1) and Rule 19(1) are read together, I do not think that the introductory words of Rule 19(1) and the absence elsewhere in the Rules of the specific power to order an independent medical examination precludes the authority to make such an order where it is necessary to satisfy the fairness and full opportunity obligations of the arbitrator.

The Act may apply to multiple types of disputes and may well have been initially expected to apply primarily to commercial disputes. Section 2 of the Act provides that it applies to an arbitration agreement in a commercial agreement, an arbitration under an enactment that refers to the Act, and to any other arbitration agreement. Because the provisions of the Act may apply to markedly different types of disputes, I think that the twin fairness obligations on an arbitrator in Rule 19 are deliberately general ones that must be interpreted according to the subject matter of the dispute. Where the subject matter of the dispute is the determination of the quantum of damages according to the law of British Columbia for personal injuries, I conclude that the obligations to provide a fair hearing and give full opportunity to a party to present its case may permit an arbitrator to order an independent medical examination if circumstances warrant.

I find the principled approach of arbitrator McColl in the *UBC* case persuasive. In that case, the arbitrator's statutory authority was provided in the Labour Code. The Labour Code provided a long list of specific powers which did not include the power to order an independent medical examination. Arbitrator McColl noted at para 34 the inherent jurisdiction of an arbitrator to ensure a just and fair hearing, absent specific language to negate the authority. Arbitrator McColl relied upon inherent jurisdiction to do what is necessary to effect a fair hearing. In the present case, that obligation is specifically imposed on the arbitrator in Rule 19 of the BCICAC Rules. Arbitrator McColl had before him the example of the explicit provisions in the BC Supreme Court Rules providing for independent medical examinations. He also had before him the argument that the proposed order was unprecedented (para 60).

I do not think that the labour arbitration cases can be distinguished, as the Claimant argues, on the basis that the Labour Code provided in s.92(3) that the arbitrator was not bound "by a strict legal interpretation of the issue in dispute." Neither decision however relied upon that provision in concluding that there was a power to order an independent medical examination. Rather, the decisions were based upon the obligation to ensure a fair hearing. Moreover, the *Certas* case is not a labour arbitration case and is based upon fundamental procedural fairness in any administrative process.

With respect to fairness, I adopt the observation at para 55 of the *Telus* case where Arbitrator Petersen stated:

> *"Generally, the report from an expert, who has examined an individual, will carry more weight than the report from one who has not. In my view, deficiencies in the medical evidence may not, as argued by the Union, be adequately addressed in cross examination. As noted in* Canada Post *and quoted above:*

If one side has access to experts who have examined the grievor and the other side does not, an unfairness manifests itself in an inability to adequately understand the medical evidence as it relates to the individual, an inability to adequately cross examine on critical points and an inability to call contradictory evidence."

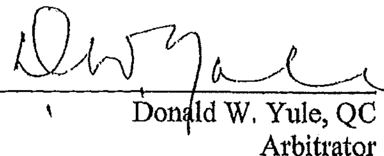
The reliance upon evidentiary rules respecting the burden of proof and the weight of evidence is no substitute for discovering the evidence and being able to adduce it at the hearing.

Accordingly, I accept the authority of the labour arbitration and the *Certas* cases that where the subject matter of the arbitration makes clearly relevant the physical or mental condition of a participant, the opposing party is entitled in appropriate circumstances to an independent medical examination, notwithstanding the absence of an explicit authority in the enabling provisions respecting independent medical examinations. With respect to this arbitration I find such authority is contained in the obligation imposed upon the arbitration tribunal in Rule 19(1) to treat each party fairly and give each party full opportunity to present its case.

The next question is whether on the evidence in this case I ought to exercise my discretion to make the order for independent medical examinations. It does not follow that ICBC will be routinely permitted to have independent medical examinations of a claimant in an UMP arbitration. In UMP cases, there are multiple different factual circumstances respecting the underlying claim against the tortfeasor/underinsured motorist. That tortfeasor may or may not be insured by ICBC. The underlying claim may or may not have gone to trial. Where the tortfeasor is insured by another insurer, with low third party liability limits and the accident is in a foreign jurisdiction and it is settled without even the commencement of an action, ICBC may not have any medical information apart from what is provided by the claimant. On the other hand, where the accident is in British Columbia and ICBC is the insurer of the tortfeasor, and an action is commenced and defended but settled on the eve of the trial, ICBC may have had the benefit of the full rights of examinations for discovery and independent medical exams under the BC Supreme Court Rules. In such a circumstance, fairness and the full opportunity to present its case may well not warrant any further independent medical examinations.

In the present case, ICBC was not the insurer of the tortfeasor/underinsured motorist. It has not obtained any independent medical examinations itself nor has it even had the benefit of any other independent medical examinations obtained by the tortfeasor's liability insurer. It is not disputed that the Claimant's pre-existing medical history is relevant to the assessment of damages. The facts in this case are in my respectful view the clearest instance of when independent medical examinations ought to be ordered and I hereby do so.

In view of the above conclusion, it is not necessary for me to address ICBC's alternative submission respecting the appointment of joint experts under Rule 27(4) of the BCICAC Rules. Accordingly, I order that the Claimant attend the independent medical examinations as set out in para 1 of the Application.



Donald W. Yule, QC
Arbitrator