IN THE MATTER OF AN ARBITRATION
PURSUANT TO S.148.2(1) OF THE *INSURANCE (VEHICLE) REGULATION*,
B.C. REG 447/83 AND THE *ARBITRATION ACT*, R.S.B.C. 1996, C.55

BETWEEN:

S.B.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA
(PURSUANT TO DIVISION 2 OF PART 10 OF
THE INSURANCE (VEHICLE) ACT REGULATIONS,
UNDERINSURED MOTORIST PROTECTION)

RESPONDENT

RULING ON APPLICATION
RE: FURTHER INDEPENDENT MEDICAL EXAM

COUNSEL FOR THE CLAIMANT	JAMES T. MCBRIDE Hammerberg Lawyers LLP Barristers and Solicitors 1220, 1200 West 73rd Avenue Vancouver, BC V6P 6G5
COUNSEL FOR THE RESPONDENT	JASROOP S. GREWAL Pacific Law Group Barristers and Solicitors 203, 815 Hornby Street Vancouver, BC, V6Z 2E6
Date/Place of Hearing:	March 23, 2016 Vancouver, BC
ARBITRATOR: Date of Award:	DONALD W. YULE, QC April 7, 2016

INTRODUCTION

1. This is an application by the Respondent, Insurance Corporation of British Columbia (ICBC) for various orders relating to document production and for an order that the Claimant, (the Claimant), attend for a further independent medical assessment by a neuropsychologist, Dr. Darcy Cox, on March 29, 2016 and April 4, 2016. These arbitration proceedings concern the Underinsured Motorist Protection (UMP) claim of the Claimant arising out of a motor vehicle accident that occurred on September 2, 2011 on Interstate 5 in Seattle, Washington, USA (the Accident). The hearing is set for July 5 – 20, 2016.

2. The application was heard on March 23, 2016 following which I advised the parties that the application for a further independent medical examination was dismissed with reasons to follow. These are the Reasons.

DOCUMENT PRODUCTION

3. All of the issues with respect to document production have been resolved one way or the other between counsel prior to the hearing. I set out the disposition of each of the items by reference to their paragraph numbers in the Notice of Application.

    1. The Order will go by consent;
    2. The application is adjourned;
    3. The Order will go by consent. Worksafe BC, having been served with the application, have advised they do not object to the order;
    4. The application is withdrawn;
    5. The Order will go by consent. The Application having been served upon Village Medical Clinic and Dr. Myers of that Clinic has advised that he does not object to the order;
    6. The application is adjourned;
    7. The Order will go by consent. The Ministry of Health, having been served with the application have advised that they do not object to the Order, provided there is no change from the application sought;
    8. The application is adjourned;
    9. 10. These applications are adjourned; and
    11. 12. 13. The Orders will go by consent.

APPLICATION FOR AN IME WITH DR. COX

Background Information

4. The Arbitration proceedings were formally commenced by an "Arbitration Notice" issued by the Claimant, dated May 21, 2015. In her Statement of Claim, also dated May 21, 2015, the Claimant sets out in para 12 her alleged personal injuries as follows:

a. Complex Regional Pain Syndrome (CRPS);
b. Musculo-ligamentous injury to the cervical region of the spine, with pain distribution into the shoulder musculature;
c. Musculo-ligamentous injury to the thoracic region of the spine;
d. Musculo-ligamentous injury to the lumbar region of the spine;
e. Sleep disorder; and
f. Psychological symptomology.

5. The Claimant also claims in para 13 for, *inter alia*, loss of earnings past and future, and cost of care, past and future. At the time of the Accident, the Claimant was working as a receptionist/accounts payable clerk with . She ceased working in October, 2013 allegedly due to ongoing symptoms resulting from the Accident.

6. The Claimant has served the following medical/legal reports upon counsel for ICBC:

a) Dr. Patrick Chin (Orthopaedic surgeon)
Date March 9, 2012
Served: October 6, 2014

b) Dr. Shao-Hua Lu (Psychiatrist)
Date: March 11, 2014
Served: October 6, 2014

c) Dr. William McDonald (Chronic Pain Management)
Date: June 1, 2015
Served: September 4, 2015

d) Linda Waithmam (Occupational Therapist)
Date: July 23, 2015
Served: September 4, 2015

e) Dr. Dean Powers (Vocational Therapist)
Date: August 31, 2015
Served: September 4, 2015

f) Dr. Jonathan Hawkeswood (Physical medicine/rehabilitation)
Date: July 28, 2015
Served: September 9, 2015

7. The Claimant has attended the following independent medical exams (IME) scheduled by ICBC by consent:

a) Dr. Kemble, neurologist, March 11, 2015;
b) Alison McLean, occupational therapist, May 14, 2015;
c) Dr. Smith, psychiatrist, May 26, 2015;
d) Dr. Paramonoff, physiatrist, July 7, 2015; and
e) Dr. Newell, vocational therapist, September 30, 2015.

8. Counsel for ICBC has not served, as yet, any medical/legal reports. It appears that counsel for ICBC has not yet received final reports from all or most of its experts pending the additional information requested from the Claimant (Truong Affidavit, sworn March 22, 2016 Exhibit "F", p47).

9. The Claimant was examined for discovery on September 23, 2015 (the XFD).

SUBMISSION OF ICBC

10. ICBC submits that the Claimant's cognitive functioning will be an issue at the hearing to assess damages. The purpose of the further IME with Dr. Cox is to permit neuropsychological testing. It is common ground that the Claimant has not previously undergone neuropsychological testing. Given the Claimant's age, pre-Accident employment, and her ceasing to work as of October, 2013, ICBC foresees the potential of a large demand for loss of future earning capacity.

11. ICBC identifies two circumstances that support the relevance of and necessity for a neuropsychological assessment. The first circumstance is the comment in an initial opinion report of a registered psychologist, Dr. Tara Learn, dated February 27, 2014, at pps 2 and 3 where she states:

Page 2:

> *With respect to her cognitive functioning after her motor vehicle accident, reported that her memory changed slowly after her motor vehicle accident. Her memory has been "awful" since the motor vehicle accident. Specifically, she stated that her memory has been "bad" for the past 3 months. Approximately 6 months after her motor vehicle accident, she began to note that she was unable to concentrate or focus at work. ....In September, 2013, she reduced her hours of work due to pain and inability to concentrate. reported that she stopped working in October, 2013, because she was in too much pain to work.*

At page 3:

> *also reported that her memory is "awful" and that she is no longer able to focus on anything. As I am not an expert in her physical or cognitive functioning, I would defer to the respective specialists to comment further on her physical and cognitive difficulties and diagnosis.*

12. The second circumstance relied on by ICBC is the Claimant's evidence concerning difficulties with concentration and focusing given on her XFD.

13. The following are selected excerpts from the Transcript:

A 197 *I have a super hard time concentrating, so focusing on anything is really difficult.*

A 199 *I can probably read one article but not read the whole newspaper.*

A 200	*I could probably read a couple (of articles) maybe and that's it.*
A 201	*I flip through magazines and read parts of newspapers but not on a regular basis.*
A 235	*I have a difficult time focusing on anything.*
A 237	*I just can't concentrate on what's – what the path – what I need to do. I have a difficult time.*
A 239, 241	*I have a difficult time filling out paper work.*
A 251	*I knew what the answers were and I knew what they were asking, but I was having a hard time focusing and concentrating enough to get through it.*
A 265	*I cannot make a lengthy email reply.*

14. ICBC says that the requested IME goes to the issue of cognitive fatigue which has not previously been objectively tested. The test results would be expected to indicate the nature and extent of any cognitive disability together with treatment recommendations to ameliorate or resolve any demonstrated disability. The testing may also indicate whether the difficulties with cognitive functioning are as severe as the Claimant subjectively perceives them to be.

15. With respect to the legal principles involved in this type of application, ICBC relies upon the objective of independent medical examinations to achieve equality as between the parties and avoid trial by ambush (*Stainer v Plaza* 2001 87 BCLR (3rd) 182 (CA)). An applicant must demonstrate that it is not just seeking to bolster existing opinions and that the further exam relates to something that could not have been addressed by prior assessors. ICBC relies upon *Hamilton v Pavlova* (2010) BCSC 493 which sets out the considerations to be addressed on this type of application as well as *Gulamani v Chandra* (2008 BCSC 1601), a factually unusual case where a Plaintiff who had previously attended five IMEs was ordered to attend an additional five IMEs. Four of the five prior IME's in the present case took place prior to the Claimant's XFD; hence her evidence regarding her cognitive functioning could not have been addressed. A neuropsychological assessment cannot be regarded as bolstering prior assessments because there has been no prior formal testing of the Claimant's cognitive functioning.

SUBMISSION OF THE CLAIMANT

16. The Claimant submits that she was required as a term of the settlement of her tort action to agree to use the *Supreme Court Rules* in this arbitration. These *Rules* incorporate time deadlines for the service of expert reports. The Accident will have occurred five years ago this September. The Claimant will be extremely prejudiced by the late service of an expert report. In this case, the Claimant submits that the lack of timeliness and resulting prejudice "trumps" the relevance of any assessment.

17. The authorities establish that it is counsel's obligation to identify issues, engage appropriate experts and to do so in a manner that reports may be served within the time constraints of the *Rules*. In this case, the Claimant has been forthright in providing her medical expert reports. Complex regional pain syndrome and psychological symptoms were pled from the outset. Ms. Learn's report, dated February 27, 2014, which identifies

symptoms relating to cognitive functioning was served in October, 2014. The Claimant was examined for discovery in September, 2015, and gave her evidence respecting cognitive symptoms. All the Claimant's expert reports except that of an occupational therapist were served prior to the XFD of the Claimant. The Claimant's vocational assessment report, served just prior to the XFD also addresses to some degree cognitive issues, although that report is not in evidence.

18. The Claimant has previously agreed to five independent medical assessments including ones by a neurologist, a psychiatrist, and a vocational assessor. The Claimant does not challenge the possible relevance of a neuropsychological assessment and suggests that had the request been made in September, 2015, immediately following the Claimant's XFD, she may well have consented to it. However, for the exam to take place within two weeks of the service deadline, and require an extension of the service deadline, particularly where the Claimant has not previously had her own neuropsychological assessment and does not have a neuropsychologist familiar with the claim on retention, the Claimant will be severely prejudiced as an adjournment of the arbitration hearing would likely be required in order for the Claimant to obtain a responsive report. There has been no "changed circumstance" since the previous IMEs, and in particular there has been nothing new since the Claimant's XFD.

19. The Claimant relies upon the decisions in *Hamilton v Pavolova*, supra; *Benner v City of Vancouver* (2007 BCSC 1998); *Turnbull v Yarmohammadi* (2012 BCSC 287); *Wright v Brauer* (2010 BCSC 1282); *Scott v Ridgway* (2011 BCSC 1552); *Agesen v ICBC* (2010 BCSC 428) and *Hoflin v Rea* (2010 BCSC 1950).

REPLY SUBMISSION OF ICBC

20. With respect to timeliness, ICBC points out that the initial attempt to arrange the neuropsychological assessment with Dr. Cox commenced with a letter dated February 19, 2016 seeking consent to examinations on March 7 and March 21, 2016. For reasons that are not explained in the evidence, that request was apparently not received by Claimant's counsel resulting in a follow up email dated February 25, 2016. At that time, the Claimant was scheduled to be admitted to St. Paul's Hospital on or about March 7, 2016 for approximately two weeks for treatment. By email dated February 26, 2016, ICBC's counsel requested consent for attendance at new appointments with Dr. Cox scheduled for March 29 and April 4, 2016 as well as an extension of time for the service of her report to April 22, 2016. By email dated March 1, 2016, the Claimant advised through her counsel that she would not consent to attend a further IME (Harris Affidavit, sworn March 9, 2016 Exhibits "X" and "Y".

21. The significance is that the first attempt to arrange the IME with Dr. Cox was for dates that would have permitted service of her report outside the 84 day period and in accordance with the *Rules*. There is no explanation for the delay from September, 2015 until February, 2016 in seeking the further IME.

22. With respect to the issue of prejudice, ICBC is prepared to allow the Claimant whatever time she needs for service of any contrary expert report, regardless of the time limits in the *Rules*.

DISCUSSION AND ANALYSIS

23. The legal principles to be applied on an application for a further independent medical exam are conveniently summarized by Mr. Justice Bracken in *Hamilton v Pavlova*, supra, at paras 10 – 16 as follows:

> *[10] Rule 30(1) provides discretion to the court to order an independent medical examination, and under Rule 30(2), more than one examination may be ordered. Counsel, in their helpful submissions, have thoroughly canvassed the relative authorities on this point. 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 (CanLII) at para. 17, and Christopherson v. Krahn, 2002 BCSC 1356 (CanLII) 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 (CanLII) at para. 48, and Norsworthy v. Greene, 2009 BCSC 173 (CanLII) 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 (CanLII) at paras. 47-48, relying in part on Goss v. Harder, 2001 BCSC 1823 (CanLII).*

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

24. In *Benner v City of Vancouver*, supra, in dismissing an application for an IME approximately 3 weeks before trial, Mr. Justice Smith cited the decision of Master *Groves in Mackichan v June* (2004 BCSC 1441) at para 11 where he stated:

> *It is not simply a question of putting the parties on a level playing field at this stage, it is a question of really balancing the prejudice which will result to the Defendants in not having a report and the prejudice that will result to the Plaintiff in having a report prepared late which would no doubt I accept cause an adjournment of the trial.*

25. Justice Smith also cited the decision of Master Patterson in *White v Gait* (2003 BCSC 2023) at para 22 where he said:

> *Whether or not the Defendant's motion can be construed as being an effort to obtain this truly responsive evidence, it comes at a time now in the 30 days prior to trial which leaves the Plaintiff in the position of having personally to attend these two examinations and deal with that in a time when he should attend to preparation of his own case and deal with presentation of his own material as opposed to responding to the Defendant's choice of time and place.*

26. In *Agesen v ICBC*, supra, Madam Justice Morrison at para 45 said:

> *In my view, it would be prejudicial to the Plaintiff at this date to order an IME four weeks before a ten day jury trial. That the Plaintiff has serious injuries is not a surprise to the defence. That his claim is substantial should certainly not have been a surprise. Any advantage to the defence at this point in time would be outweighed by prejudice to the Plaintiff, not only because of his problems in dealing with examinations, depositions and preparation for trial, but also because of the very real possibility that a late medical opinion could well result in Plaintiff's counsel having to seek an adjournment of this trial, in order to meet unexpected or opinion evidence that may be prejudicial to the Plaintiff. In this case, the balancing of prejudice must be in favor of the Plaintiff, given the chronology of events.*

27. The facts in *Agesen*, supra, were that the plaintiff had been injured in two separate motor vehicle accidents and separate actions respecting the accidents were being defended by separate counsel. The application defendant had not had any physical IME at all and they had no expert report addressing the consequences of the second accident alone. The application was first heard by a Master on March 23, 2010 and the appeal was heard March 31, 2010. A 10 day jury trial was set to commence April 26, 2010. The plaintiff

had been off work from the date of the first accident in May, 2005. The application was denied.

28. In this case, the allegations of complex regional pain syndrome and psychological symptomology have been pled from the outset. This raises the potential at least of a symptom of cognitive difficulties.

29. Dr. Learn's report dated February 27, 2014 and served October, 2014 documents the Claimant's report of cognitive difficulties. Although not specifically mentioned by counsel, Ms. Waithman's report on work capacity and cost of future care, dated July 23, 2015, and served September 4, 2015, also refers to the Claimant's subjective complaint on pages 3 and 18 of fatigue impacting her concentration and focus. A fuller description of these symptoms was elicited from the Claimant on her XFD. I accept that it was reasonable in the face of a July, 2016, hearing date to examine the Claimant for discovery in September, 2015 and I accept the explanation that, notwithstanding the indications in Dr. Learn's report of cognitive difficulties, it was not until the XFD (September, 2015) that the Claimant's evidence respecting this symptom was "fleshed out" so as to potentially warrant a further IME at that time by a neuropsychologist. The difficulty however is that either no decision was made to seek a further IME or no step was taken to seek one for the five months between September, 2015 and February, 2016, for which there is no explanation. Then, as a result of events that were not anticipated (the February 19, 2016 letter not being received and the initial exam dates conflicting with treatment scheduled at the time) but not events that were unforeseeable (it is foreseeable that a claimant may not always be available for any date selected for an IME), the examination dates available had to be changed such that any resulting report necessitated an extension of the time for service.

30. In exercising my discretion not to order the Claimant to attend a sixth IME, I take into account the following factors:

    a) Complex regional pain syndrome and psychological symptomology were pled from the outset;

    b) There has been early disclosure of all of the expert reports on which the Claimant intends to rely;

    c) Subjective complaints of cognitive difficulties were identified and known to ICBC in October, 2014, when Dr. Learn's report was served, and prior to any of the defence IMEs;

    d) There have been five prior IMEs by a neurologist, occupational therapist, psychiatrist, physiatrist and vocational therapist;

    e) There has been no "new issue" or new development since the prior IMEs. At best, it may be said that the extent of the Claimant's symptom of cognitive difficulty was "fleshed out" on her XFD;

f) There is no explanation for the delay in seeking the further IME between September, 2015 and February, 2016;

g) I accept that equality between the parties on the medical evidence does not mean that a party is precluded from retaining a particular specialist just because the opposing party does not rely on an expert with the same specialty. Nevertheless it is not an insignificant factor that in this case ICBC is not faced with a neuropsychological assessment on behalf of the Claimant, let alone one served only shortly before the 84 day deadline under the Rules. Hence the risk of "ambush" in this case is slight. Both parties will have similar experts addressing the cognitive functioning issue as they each have a psychiatrist, physiatrist, and vocational assessment. In addition, ICBC has an expert neurologist;

h) I am satisfied that late service of a neuropsychological report at this stage carries a real possibility of the Claimant requiring an adjournment of the hearing to assess her compensation arising from an accident that will have occurred five years ago this September.

31. For the foregoing reasons, the application for a further IME by Dr. Cox is dismissed.

32. With respect to costs, I consider the outcome of the applications to be mixed. It appears that an application had to be brought to compel a response to some longstanding requests for documents or authorizations with respect to which ICBC was largely successful as a result of an agreement reached the day before the applications were to be heard. On the other hand, the Claimant has been successful with respect to the application for a further IME. I consider that the parties ought to bear their own costs of the applications.

Dated: April 7, 2016

Donald W. Yule, QC