IN THE MATTER OF AN ARBITRATION PURSUANT TO S. 148.2 OF THE INSURANCE (VEHICLE) REGULATION, B.C. Reg. 447/83 and the Arbitration Act [SBC 2020] c. 2

BETWEEN:

EM

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

RULING ON RESPONDENT RULE 7-6 APPLICATION

Counsel for the Claimant, EM	Tyler F. Dennis
Counsel for the Respondent, Insurance Corporation of British Columbia	Joseph P. Cahan
Notice of Application:	October 11, 2024
1st Affidavit of Theresa Grabowski sworn:	November 24, 2023
2nd Affidavit of Theresa Grabowski sworn:	October 11, 2024
Application Response dated:	October 21, 2024
1st Affidavit of Lan Nguyen sworn:	October 21, 2024
Date of Hearing:	October 22, 2024
Place of Hearing:	Vancouver, BC, by Zoom
Arbitrator:	Dennis C. Quinlan, K.C.
Date of Ruling:	October 23, 2024

NATURE OF APPLICATION

[1] The Respondent applies for an order pursuant to Rule 7-6 (2) of the Supreme Court Civil Rules, that the Claimant attend an independent medical examination ("IME") with Dr. J. Hawkeswood, physical and medical rehabilitation specialist (physiatrist) on Wednesday October 23, 2024.

[2] It recently came to the attention of the parties that the Claimant was out of the country on October 23, 2024. The application proceeded on the basis that if the order sought was granted, a new examination date would be arranged.

[3] This application arises within an underinsured motorist protection (UMP") claim advanced pursuant to section 148.2 of the ***Insurance (Vehicle) Regulation,*** B.C. Reg. 447/83 and ***Arbitration Act*** [SCBC 2020] Chapter 2 (the "UMP Proceeding").

[4] The arbitration hearing is scheduled for seven days commencing January 2, 2025. It has already been adjourned once in November, 2023 at the request of the Respondent due to counsel's unavailability.

[5] The issue in dispute is two fold.

[6] First, is the Respondent entitled to an order that the Claimant submit to a further IME with a physiatrist?

[7] If so, can that IME be with a different practitioner (Dr. Hawkeswood) who has the same area of expertise and speciality as the practitioner who previously examined the Claimant in 2019 (Dr. J. Wong)?

[8] The Respondent asserts that due to disclosure of new documentation coupled with the significant passage of time since the 2019 IME, a further IME is necessary in order to place the parties on an equal footing with respect to the medical evidence.

[9] The Respondent then submits it is necessary to have Dr. Hawkeswood conduct the IME due to concerns expressed by the judiciary in other cases about

the reliability of Dr. J. Wong's opinion evidence. In the Respondent's opinion, it is no longer prudent to continue with Dr. J. Wong as its expert.

[10] In opposing the Respondent's application, the Claimant submits the Respondent has not established a further IME is necessary in accordance with the principles set out in ***Tran v. Abbott***, 2018 BCCA 365, and even if it has, no justifiable reason has been shown for such assessment to be with a physiatrist other than Dr. Wong.

[11] In the words of Claimant's counsel, the Respondent is "….stuck with having a terrible expert with a nonsensical opinion."

BACKGROUND

[12] On November 28, 2016 the Claimant sustained multiple injuries as a result of being struck by a 1999 Toyota motor vehicle while crossing Kingsway as a pedestrian at the intersection with Victoria Drive.

[13] On July 18, 2017 the Claimant filed a Notice of Civil Claim in the Supreme Court of British Columbia alleging negligence against the owner and operator of the Toyota (the "Tort Action").

[14] In the course of prosecuting her Tort Action the plaintiff (being the Claimant herein) served the medical legal report of Dr. Waseem, physiatrist, dated November 8, 2019.

[15] Counsel on behalf of the defendants in the Tort Action served the report of Dr. J. Wong, physiatrist, dated October 11, 2019.

[16] On October 26, 2021, the Claimant settled her Tort Action for the policy limits, with the Respondent's agreement that she could proceed to arbitration in respect to her UMP claim.

[17] By way of Notice to Arbitrate delivered to the Vancouver International Arbitration Center ("VanIAC"), the Claimant was deemed to have commenced her UMP Proceeding on April 7, 2022.

[18] The arbitration hearing was originally scheduled for eight days, commencing November 29, 2023.

[19] An arbitration management conference ("AMC") was held October 19, 2023 at which time the commencement date of November 29, 2023 was confirmed and various procedural directions made.

[20] The Claimant's AMC brief stated she would be relying upon inter alia, the November 8, 2019 report of Dr. Waseem and a supplemental report from Dr. Waseem dated February 12, 2023.

[21] The Respondent's AMC brief indicated it would only be relying upon the October 11, 2019 report from Dr. J. Wong.

[22] On November 24, 2023, the Respondent served a notice of application seeking an adjournment of the November 29, 2023 arbitration hearing due to the unavailability of counsel.

[23] By agreement between the parties, the arbitration hearing was adjourned and rescheduled to January 2, 2025 on a pre-emptory basis as against the Respondent.

[24] In early 2024, the Respondent discovered Dr. J. Wong's objectivity had been the subject of negative judicial comment in a number of British Columbia Supreme Court decisions.

[25] Beginning in late April, 2024 the Respondent sought the Claimant's agreement that she undergo an IME with a different physiatrist from Dr. J. Wong. Three different physiatrists were proposed respectively on April 26, 2024, September 16, 2024 and October 7, 2024.

[26] On each occasion the Claimant opposed the request on the basis that the Respondent had Dr. J. Wong's report of October 11, 2019 opining the Claimant had no ongoing issues at the time of the 2019 assessment, and a further examination was therefore not necessary.

[27] On October 11, 2024, the Respondent delivered the within Notice of Application.

LEGAL TEST FOR FURTHER EXAMINATION

[28] The guiding principles in respect to a Rule 7-6 application for a further assessment are set forth in ***Tran.***

[29] Rule 7-6 is a rule of discovery designed to balance the plaintiff's advantage in obtaining expert opinion, by providing the defendant with access to the plaintiff so as to obtain same prior to trial: ***Tran*** at para. 17.

[30] The rules are designed to secure a just determination of every proceeding on the merits and to encourage full disclosure: ***Wildemann v W*ebster** (1990), B.C.L.R. (2d) 244 (C.A.) The rules should be given a fair and liberal interpretation to meet those objectives: ***Tran*** at para. 30

[31] Justice Savage in ***Tran*** summarized the test as follows:

> [32] In my view, it is well established that the purpose of an IME is to put the parties on an equal footing with respect to the medical evidence, and Rule 7-6 specifically contemplates more than one IME (citation omitted).
>
> [33] Multiple examinations may be appropriate and necessary where a variety of injuries are alleged, or the etiology of illness is not straight forward. In exercising its discretion on an application pursuant to Rule 7-6, the court must consider the effect of refusing the order sought on the conduct of the trial.

DISCUSSION

A. Is the Respondent entitled to an order that the Claimant submit to a further examination by a physiatrist?

[32] In answering the first aspect of the issue before me and putting to one side the question of who the assessor would be, I conclude the Respondent in these circumstances would be entitled to a further IME by a physiatrist in respect to the physical or mental condition of the Claimant at issue in this UMP Proceeding.

[33] The 2019 assessment by Dr. J. Wong was conducted some five years ago in respect to an accident that occurred nearly eight years ago. The affidavit evidence not surprisingly, discloses that since 2019 the medical records identify a number of issues and events not previously known or considered.

[34] Claimant's counsel Mr. Dennis submits that because Dr. J. Wong opined in 2019 that the Claimant had recovered from her accident related injuries with no ongoing physical impairment, a further examination in 2024 was not necessary.

[35] In his words, the Respondent already has its answer and defence, thereby negating any need for a further assessment. Reliance is placed upon ***Gray-Verboonen v. Mandurah***, 2019 BCSC 1697 at para. 19 as support for that proposition.

[36] I do not agree ***Gray-Verbooen*** goes so far. The commentary at para. 19 reflects plaintiff counsel's submissions.

[37] The application for a functional capacity evaluation in ***Gray-Verbooen*** was denied for the reason that there was uncertainty as to the extent of overlap with two other experts whose reports had not yet been produced. In those circumstances the defendants had not met their burden to establish necessity.

[38] I agree the opinions of Dr. J. Wong are stark to the extreme. However I do not agree his opinion that the Claimant had recovered from her injuries leaving no accident-related impairment or physical disability necessarily forecloses a further examination where five years have passed since the original report.

[39] Whether the issues and events described in the post 2019 medical records are in any way related to the accident of November 28, 2016 is not an issue for determination at this point – the fact is they exist and the Respondent is entitled to investigate any such relationship, together with the present medical condition of the Claimant.

[40] As in any case where a party seeks damages for personal injury, it is important the decision maker have available to him or her the "best" evidence at the time of assessment. In my view "best" evidence means that evidence which is "up to date".

[41] The Claimant wisely took steps to achieve that end. The November 8, 2019 opinion of Dr. Waseem was updated in his "supplementary" report of February 12, 2023.

[42] To deny the Respondent in these particular circumstances the opportunity to update its assessment of the Claimant, would in my view be contrary to the well established objective of "…put[ting] the parties on an equal footing with respect to the medical evidence."

B. Can the IME be with a different physiatrist from Dr. J. Wong?

[43] The second question is whether having concluded the Respondent is entitled to a further examination with a physiatrist, can that physiatrist be of the Respondent's choosing or must it remain Dr. J. Wong?

[44] The Respondent submitted a further IME with Dr. Hawkeswood would allow two well regarded physiatrists who had each conducted current assessments to provide helpful evidence to the decision-maker. Counsel suggested the evidence of Dr. Hawkeswood could assist in resolving the case and might even benefit the Claimant if it confirmed Dr. Waseem's opinion.

[45] A party seeking to have a second examination performed by a practitioner with the same speciality or discipline as a practitioner who has already examined the Claimant faces an uphill road: ***Hothi v. Grewal***, [1993] 45 B.C.L.R (3d) 395 (SC).

[46] In such circumstances it will be necessary for the applicant to present evidence to indicate why the further examination by the doctor who performed the original assessment is not appropriate: ***Rowe v. Kim***, 2008 BCSC 1710 at para. 14.

[47] Successful applicants are those who demonstrate that something has happened since the first examination which could not have been foreseen or for other reasons not addressed by the first examiner: ***Rowe*** at para 14; ***Wocknitz v. Donaldon,*** 2010 BCSC 1991 at para. 17.

[48] A second examination with a different examiner may be appropriate where there is some question that could not be dealt with on the first examination. An example would be where some of the injuries or a medical issue fall outside the first examiner's expertise: **Tran** at para. 31.

[49] Counsel for the Respondent Mr. Cahan concedes the sole reason for seeking a further IME with a physiatrist other than Dr. J. Wong relates to the negative judicial comments surrounding the objectivity of Dr. J. Wong, which only came to the attention of the Respondent in early 2024 after the pre-emptory adjournment in November, 2023.

[50] As Mr. Cahan put it, "Dr. J. Wong was appropriate in 2019 but he is not appropriate now".

[51] In that regard I was provided the decision of ***Lai v. Griffin***, 2020 BCSC 377 as an example of the concerns raised about Dr. J Wong. At paragraph 33 after identifying a number of concerns that arose on cross examination, Madam Justice Jackson stated:

> [33] Finally, despite my advising Dr. Wong during his initial direct examination that he was to limit his answers to providing the clarifications of his reports, he repeatedly attempted to expand on his evidence to further bolster and substantiate his opinion. This causes me concern that he viewed his role as an advocate for the defendant rather than as an independent expert whose primary duty was to the court. For all these reasons, I am concerned with the reliability of Dr. Wong's opinion.

[52] I was advised there were a number of other decisions of the same tenor but those were not put before me and I am not aware as to their timing.

[53] Prior to the November, 2023 adjournment the Respondent was clearly prepared to go forward with Dr. J. Wong as its expert and his somewhat dated report. The four years which had elapsed since the report was authored and the ensuing medical records that now form part of the Respondent's justification for a further IME, were seemingly not of concern at that time.

[54] As set out in paragraph 21 herein, the Respondent in its AMC brief identified Dr. J. Wong as a witness to be called on the issues of causation and damages and requiring one hour of hearing time.

[55] Further the report of Dr. Wong dated October 11, 2019 was identified in the AMC brief as the only expert report which the Respondent intended to offer as evidence at the arbitration hearing.

[56] Had it not been for the last minute adjournment sought by the Respondent and agreed to by the Claimant, the arbitration hearing would have proceeded as scheduled on November 29, 2023 with the Respondent relying upon the expert evidence of Dr. J. Wong.

[57] There is no doubt the comments made of Dr. J. Wong would be concerning to any party who may have retained him as an expert. The question becomes whether such concerns provide sufficient justification to order a further IME with a different expert?

[58] Mr. Dennis rhetorically posed the question this way: Does this mean every time a party employing a retrospective analysis concludes it is not happy with its expert, that this subjective conclusion may form the basis for a further IME with a new expert having the same specialty as the first examiner? What level of unhappiness would be sufficient?

[59] As set forth in ***Tran*** and other case authority, the objective of an IME is to put the parties on an equal footing in respect to the medical evidence.

[60] To accomplish this objective, a further examination may be necessary in circumstances where a variety of injuries are alleged, the etiology of the illness is not straight forward, the injuries fall outside the first examiner's expertise, or some other unforeseen event related to the medical evidence or issues.

[61] I fail to see any support in the ***Tran*** principles for the proposition that a party may be entitled to a further examination with a new expert simply because it becomes unhappy with the expert it originally retained.

[62] In my view the factors addressed in Tran are related to the assessment itself and the examiner's ability to address the issues at play in order to fulfill the purpose of an IME to put the parties on an equal footing. Such factors are not meant to assist a party who may have chosen an expert, even innocently, who has issues related to objectivity, credibility or bias.

[63] The only authority which Mr. Cahan was able to provide in support of his position was ***Hothi*** which is a 1993 decision. The facts in that case involved an expert who provided a wrong opinion resulting in the court concluding for "cogent medical reason" that the circumstances warranted an IME with a highly skilled expert in the area of knees.

[64] As Mr. Dennis submitted there is no suggestion Dr. J. Wong provided a wrong opinion. In fact the Respondent is hopeful Dr. Hawkeswood provides the same opinion.

[65] In conclusion my view is that having elected to proceed with Dr. J. Wong as its expert witness in this UMP Proceeding, it is not now open for the Respondent to "change horses" and seek an IME with a different physiatrist, due to what have become "late in the day" concerns about the objectivity and reputation of Dr. J. Wong.

[66] In arriving at this decision, I am alive to the caution in ***Tran*** that I must consider the effect of refusing the order sought on the conduct of the trial. The Respondent is in the same position it was several days before the first hearing date of November 29, 2023. It can tender Dr. Wong and his report. It can even bring an application for a further IME to be conducted by Dr. Wong. Or it can

proceed without Dr. Wong and rely upon cross examination and the evidence of other witnesses.

[67] I therefore dismiss the application for an order that the Claimant attend an IME with Dr. Hawkeswood, Physical Medicine and Rehabilitation Specialist.

Dated: October 23, 2024

Dennis Quinlan
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Arbitrator – Dennis C. Quinlan, K.C.