In the matter of an Arbitration pursuant to s.148.2(1) of the *Insurance (Vehicle) Regulation* BC Reg. 447/83

BETWEEN

DG

CLAIMANT

AND

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

RULING RE: INDEPENDENT MEDICAL EXAM AND PRODUCTION OF DOCUMENTS

Arbitrator: Donald W. Yule, Q.C.
Date of Ruling: May 4, 2012

Davie & Associates
Barristers & Solicitors
103, 301 Main Street
Penticton, BC V2A 5B7

Mark Davie
Counsel for the Claimant

Eyford Macauly Shaw & Padmanabhan LLP
Barristers & Solicitors
1510, 650 West Georgia Street
Vancouver, BC V6B 4N9

Robert D. Shaw
Counsel for the Respondent

INTRODUCTION

1. This is an UMP arbitration in which the Claimant, (the "Claimant") seeks compensation for injuries sustained in a motor vehicle accident on December 26, 2008 on Highway 97 . He was at time of the accident a passenger in a 1997 Toyota Camry that was in a head on collision with a Dodge Ram truck. It is common ground that the Claimant sustained a severe traumatic brain injury in the accident, together with other injuries.

2. The Respondent seeks an order requiring the Claimant to submit to a Fetal Alcohol Syndrome Disorder (FASD) Assessment to be conducted by a multi-disciplinary team at the Asante Centre in Maple Ridge, BC, on May 16-17, 2012.

   The arbitration hearing is set for 3 weeks commencing October 15, 2012.

3. In addition, the Respondent seeks production of a number of documents, or alternatively signed authorizations for the production of the documents. The documents sought are the Claimant's clinical records from Peace Arch Hospital relating to his birth on ; any other early development or education records not previously produced; raw test data from the neuropsychological evaluations of Dr. Bailey and Dr. Kaushansky and the scores for a BASC-2 behavioral assessment administered on contained in the Secondary School records.

4. The Claimant opposes the further independent medical exam ("IME") on multiple grounds. He says that the Respondent is improperly attempting to bolster earlier opinions of other defence experts where no new matter has arisen; that there are no exceptional circumstances, as required by the case authorities; and that the Respondent has not met the higher standard required for a subsequent medical exam where there have already been prior multiple IMEs.

5. I have come to the conclusion that the application for the FASD Assessment should be dismissed for the reasons that follow. I understand from counsel that notwithstanding the denial of the application for a further IME, the Respondent seeks production of the raw test data of Drs. Bailey and Kaushansky as well as the BASC-2 Behavioral Assessment from the Secondary School records, and there is no objection from the Claimant to the production of these records. I accordingly order that the Claimant provide signed authorizations for the production of these records within 30 days of the date of this ruling.

6. Upon reflection, I do not think I can order the School to produce records as it had no notice of the application nor any opportunity to address any relief sought against it.

7. I am advised by Plaintiff's counsel that in the absence of the FASD assessment, the Respondent does not request production of the Claimant's birth records from Peace Arch Hospital.

BACKGROUND

8. The Claimant has been medically assessed, on multiple occasions, by different experts for both parties. At the request of Claimant's counsel, the Claimant has been assessed as follow by:

    a) Dr. Kaushansky, a neuropsychologist, whose report is dated October 27, 2010;
    b) Dr. Smith, a psychiatrist, whose report is dated April 22, 2010;
    c) Dr. Cameron, a neurologist, whose report is dated September 1, 2009;
    d) Dr. Elliott, a specialist in sexual and fertility rehabilitation medicine, whose report is dated December 30, 2010; and
    e) Dr. Vallentyne, a specialist in physical medicine, whose report is dated February 17, 2011.

The Respondent has obtained IMEs of the Claimant as follow by:

a) Dr. Bailey, a neuropsychologist, whose report for the Respondent's rehabilitation department, is dated September 8, 2009;
b) Dr. Dost, a neurologist, whose report is dated June 11, 2010;
c) Dr. Solomons, a psychiatrist, whose report is dated January 19, 2011;
d) Dr. Laidlow, a specialist in physical medicine, whose report is dated June 1, 2011; and
e) Dr. Iverson, a neuropsychologist, whose report is dated September 22, 2011.

PRE-ACCIDENT RECORDS

9. In addition, there is a pre-accident consultation report dated April 8, 2004 from Dr. , a psychiatrist who diagnosed the Claimant as having attention deficit hyper-activity disorder ("ADHD") combined type. Of particular significant is a reference in the "developmental history" portion of the report which states:

> *Mother did use alcohol while she was pregnant with . She also used crack cocaine and her usage of above-mentioned increased towards the end of the pregnancy.*

10. The Claimant and his father () are the only persons referenced in this report which does not state expressly the source of the information regarding the use by the Claimant's mother, during pregnancy, of alcohol or crack cocaine. My assumption however is that the information came from .

11. The Claimant's mother was murdered in 2006. Counsel have indicated that at present the only known original source of information regarding what the Claimant's mother may have consumed during pregnancy, is .

12. has not been consistent in the statements he has made regarding possible use by the Claimant's mother during pregnancy of alcohol and/or drugs.

13. On Discovery on July 28, 2011, denied that the Claimant's mother took any drugs during the pregnancy but indicated that she did drink red wine.

14. Dr. Smith notes on page 3 of his report that the Claimant may have been exposed to alcohol in-utero, "but the father did not report this." Dr. Kaushanksy at page 9 of his report notes that reported that:

> "*In the first month of her pregnancy (although before she knew she was pregnant) she drank a case of beer a week and then ceased completely when she learned of her pregnancy; however she did drink to excess once a week in the last 4 months of her pregnancy.*"

15. There is information in some of the expert reports indicating may himself have had some medical problems.

16. As noted above, in 2004, approximately 4 ½ years before the accident, the Claimant was diagnosed by Dr. with ADHD. The history recorded at that time noted significant concerns during the 1998 Kindergarten year. In elementary school there were comments that the Claimant lacked organization, was silly, at times defiant and poorly organized, unable to stay on task, was handing in assignments late or incomplete and acting before he thinks.

17. A confidential behavioral assessment report was done on at the Secondary School when the Claimant was in Grade 10. This assessment, which in the Application Record is incomplete, was done approximately 1 year before the accident. The reason for the assessment was to determine whether "intensive behavior interventions" were required. The report indicated safety concerns both to the Claimant and to others indicating that the Claimant's behavior was so disruptive that it was impossible to teach the class. Apparently as well as some school staff were concerned about the possibility of some serious underlying mental health issues. The behavior profile indicated that the Claimant was chronically disruptive, often non-compliant, chronically withdrawn, chronically depressed, often verbally aggressive although seldom physically aggressive, and often used both alcohol and marijuana.

18. It is accordingly clear, as the Respondent asserts, that the Claimant's pre-accident condition, and what his future would have been in the absence of the accident is an important issue in the lawsuit.

POST-ACCIDENT IMES

DR. BAILEY

19. The Respondent's first post-accident medical assessment was conducted by Dr. Bailey in September, 2009, for the Respondent's Rehabilitation Department. Dr. Bailey was aware of Dr. report with its reference to the use by the Claimant's mother during pregnancy of both alcohol and crack cocaine.

DR. DOST

20. The Respondent's first "tort IME" was conducted by Dr. Dost, a neurologist, in June, 2010. He had and reviewed the reports of both Dr. and Dr. Bailey. Dr. Dost concluded that the Claimant sustained a severe traumatic brain injury in the accident. He

noted that there was a well-documented history of behavioral disturbance and a diagnosis of ADHD for which the Claimant did not follow up on treatment in the context of substance abuse (marijuana). Dr. Dost recommended a psychiatric evaluation on the question of whether the severe traumatic brain injury had altered the course of the Claimant's ADHD. He found there was neurocognitive impairment and suggested that any treatment for neurocognitive impairments would be best addressed by a neuropsychologist in conjunction with a psychiatrist with expertise in ADHD. Dr. Dost did not refer to any possible diagnosis of FASD nor did he recommend any investigation of that possibility.

DR. SOLOMONS

21. Dr. Solomons, a psychiatrist, conducted an IME for the Respondent in January, 2011. He had for review inter alia the reports of Dr. Bailey, Dr. Dost and Dr. . Dr. Solomons was asked specifically to address the causal relationship between the accident and the injuries that he diagnosed and to provide his opinion concerning the Claimant's pre-existing condition. Dr. Solomons noted in paragraph 9, page 4, of his report the significant pre-accident history which he described as follows:

> "*His history prior to the accident is significant for his being born to a mother who was an alcoholic and substance abuser, and who, according to the history recorded by a psychiatrist in 2004 drank and used cocaine during his pregnancy. He was noticed from kindergarten onwards to have difficulties with concentration and attention. He had documented behavior and academic difficulties. He was diagnosed eventually with attention deficit/hyperactivity disorder (ADHD) and treated with psychostimulants from 2004. It is not clear from the records whether or not the ADHD treatment was successful, but he continued to have academic and behavior difficulties and dropped out school some months before the accident."*

22. Dr. Solomons also diagnosed a severe traumatic brain injury. He expressed the opinion that the Claimant has:

> "*Largely, if not completely, recovered (from the traumatic brain injury). He did not develop any specific psychiatric complication as a result of his injuries. ...he (has) experienced a spontaneous recovery from the initial neurocognitive and neuropsychiatric sequelia of the head injury, consistent with a natural course of head injury and traumatic brain injuries. ...he has a significant pre-accident history of cognitive and behavioral difficulties, and his current status and long term expectations and prognosis is and will be determined primarily by the natural course of these difficulties rather than the lingering effects of this traumatic brain injury."*

23. Dr. Solomons does not address the possibility of a FASD diagnosis nor recommend any investigation into the possibility of it. He does however specifically address the causation issue of the relationship between the Claimant's pre-accident condition and the brain injury sustained in the accident.

DR. LAIDLOW

24. Dr. Laidlow, a specialist in physical medicine, conducted an IME for the Respondent on May 25, 2011. Dr. Laidlow had for review the reports of Dr. Kaushansky, Dr. Smith, Dr. Cameron, Dr. Vallentyne, Dr. Solomons, Dr. Elliot and Dr. Wallace. He also had Dr. report which is reviewed on page 4. Dr. Laidlow notes at page 12 in his "opinion" section that the Claimant "may well have been exposed to the effects of, at least, alcohol and possibly other drugs while in utero".

25. Dr. Laidlow expresses the opinion that:

> "*The majority of fallout from this traumatic brain injury has been a cognitive fall out. I think it is quite likely that this head injury has resulted in a greater degree of effect as a result of the fact that he has been involved in at least two previous concussions and had been having problems with ADHD prior to the accident."*

26. Dr. Laidlow also states:

> *"I do attribute all of his current symptoms to the motor vehicle accident, as indicated, bearing in mind that the symptoms may have been aggravated by some of his pre-existing issues, as indicated."*

27. Dr. Laidlow does not raise the possibility of a FASD diagnosis nor recommend any further investigation into the possibility of it. He does, however, express an opinion on the relationship between the Claimant's pre-accident condition and the traumatic brain injury.

DR. IVERSON

28. Dr. Iverson, a neuropsychologist, conducted an IME for the Respondent in July, 2011. He had for review all of the medical reports referenced in paragraph 8 above, together with various school records. He assumed that the Claimant was likely exposed to alcohol and drugs (cocaine) while in his mother's uterus. He assumed that when the Claimant entered school it was immediately apparent that he was having difficulty with attention, learning and behavior. He assumed the Claimant was diagnosed formally with ADHD in 2004 and was prescribed Dexedrine for this condition. He assumed it was possible that the Claimant had a learning disability in addition to ADHD prior to the accident. Dr. Iverson also attempted to address the relationship between the Claimant's pre-accident condition and the traumatic brain injury. At page 8, he states:

> "*Conceptualizing the extent to which recovered from his traumatic brain injury is very difficult because he had serious and persistent cognitive and behavioral problems prior to the motor vehicle accident."*

29. Dr. Iverson then makes 6 separate diagnoses. They are:

1) Personality change secondary to traumatic brain injury;
2) Mild cognitive impairment (pre-existing but exacerbated by his TBI);
3) Anxiety disorder NOS;
4) Attention deficit/hyper-activity disorder (pre-existing condition)
5) Possible learning disability (pre-existing condition); and
6) Possibly cannabis dependent (in early possible remission).

30. Dr. Iverson discusses at length on pages 9 and 10 of his report whether the Claimant's mental health problems are related to the accident and whether his cognitive impairment is related to the accident. Dr. Iverson does not identify FASD as a possible diagnosis nor does he recommend any investigation into this possibility.

31. There is in the Respondent's counsel's submission only one explicit reference to fetal alcohol syndrome in the multiple medical/legal reports in this case. The reference is at page 6 of Dr. Vallentyne's report. The reference is as follows:

> "*Dr. Kaushansky and Dr. Smith stated that it was not clear that there was excessive in utero exposure to alcohol although this could not be entirely excluded; in other words, likely did not have fetal alcohol syndrome. I defer to these mental health specialists with regard to these diagnostic impressions."*

32. In my view, Dr. Vallentyne is not expressing his own opinion that the Claimant did not likely have fetal alcohol syndrome. Dr. Vallentyne is placing his own interpretation upon what is stated in the reports of Dr. Kaushansky and Dr. Smith. Those reports speak for themselves. In any event, Dr. Vallentyne defers to mental health specialists with respect to this type of diagnosis. What can be said is that fetal alcohol syndrome is specifically identified by Dr. Vallentyne as a possible diagnosis based upon the history of substance use by the Claimant's mother originating in Dr. report in 2004. Dr. Vallentyne's report was available to and reviewed by both Dr. Laidlow and Dr. Iverson.

POSITION OF THE PARTIES

Submission of the Respondent ICBC

33. The Respondent submits that among the issues for determination at the hearing are two related issues relevant to this application. The first issue is what degree of recovery has there been from the Claimant's admitted traumatic brain injury sustained in the accident? The second related issue is what was the Claimant's original, or pre-accident, position in the sense of what would the future have held for the Claimant in the absence of the accident? The Respondent refers to the passage from the letter from Asante Center dated February 29, 2012 which states:

> *"Having a full medical and social history and possible diagnosis of an FASD for will assist the Court by providing a more comprehensive picture of what his life could likely have been in the absence of the MVA."*

34. None of the medical experts for either party have engaged in a full FASD assessment. Indeed, as noted, the only reference to fetal alcohol syndrome is Dr. Vallentyne's comment upon the reports of Dr. Kaushansky and Dr. Smith. Although the reports of the Respondent's experts include reference to the available evidence concerning the possible substance use of the Claimant's mother during pregnancy, none of the Respondent's experts have purported to make a diagnosis of fetal alcohol syndrome. ADHD is not the same as fetal alcohol syndrome although there may be some overlap in symptomology. The proposed multi-disciplinary assessment is appropriate for an FASD assessment and the personnel at the Asante Centre are well qualified to conduct the assessment (the Claimant does not challenge either of these points). In essence, the Respondent submits that the proposed FASD assessment is relevant to 2 important issues to be determined at the hearing and there has not been any prior opinion directly addressing the fetal alcohol syndrome issue. The possible substance use by the Claimant's mother during pregnancy has been "mentioned in passing" but no one has dug deeply into it. It is an issue on which the burden of proof rests upon the Respondent ie. it is the Respondent's onus to prove what the consequences of the Claimant's original position would have been, if the Respondent seeks thereby to reduce the impact of the traumatic brain injury admittedly sustained. The Respondent relies primarily upon three decisions, *Wildemann v Webster and Webster* (1990) 50 BCLR 2nd 244 (BCCA), *Thomsen v Gorrill* (2001) BCSC 826, and *Belke v Bennett* (2006) BCSC 536. I will discuss each of these case authorities subsequently.

Submission of the Claimant

35. The Claimant opposes a FASD assessment on multiple grounds. First, there have already been 5 medical assessments by the Respondent, and a further home study and cost of care assessment is scheduled for this month by agreement. Secondly, there is no new information giving rise to the need for a further assessment. The evidence relating to the Claimant's mother's possible substance use during pregnancy has been known to the Respondent since at least September, 2009, when Dr. Bailey commented on Dr.
report. Third, the Respondent has had multiple opportunities to assess the fetal alcohol syndrome issue. Two of its experts, Dr. Solomons and Dr. Iverson, both aware of both the evidence respecting possible substance use and the Claimant's pre-accident ADHD diagnosis and educational and behavioral difficulties were asked specifically to address the causal relationship between the Claimant's pre-existing condition and his traumatic brain injury, and both have provided opinions on this issue. To permit a further assessment now is to permit the Respondent to bolster prior opinions, something that is prohibited in the caselaw.

36. Fourth, to permit an FASD assessment now on the basis that fetal alcohol syndrome has not yet been thoroughly addressed potentially opens up the possibility of even more IMEs to formally address the consequences of ADHD or a potential pre-accident learning disability.

37. Fifth, the only evidence of what the Claimant's mother may have consumed during pregnancy comes from . His evidence as noted has not been consistent. The Claimant submits that it cannot be shown on a balance of probability what substances were consumed in what quantity and when during the pregnancy. It is a highly speculative exercise. Even if, as Respondent's counsel asserts, a FASD diagnosis can sometimes be made in the absence of any evidence concerning what substances were consumed during pregnancy, the absence of such information must go to the weight of any diagnosis. The likelihood of significantly diminished weight accorded any diagnosis that might be made is a factor to be taken into account in the exercise of the discretion whether to allow a further assessment.

38. Sixth, the Claimant submits that the Respondent has no need to have a FASD assessment to meet the Claimant's evidence because the Claimant has no report addressing fetal alcohol syndrome.

39. Finally, the Claimant notes the not insignificant inconvenience of travel from his home in to another assessment in the Lower Mainland. He has travelled to the Lower Mainland on 4 separate occasions for 6 days' worth of assessments to date. As he is unable to travel independently, must take time off work to accompany him.

40. With respect to caselaw, the Claimant relies particularly on *Hamilton v Pavlova* (2010) BCSC 493. I shall address this case in the discussion of the legal authorities below.

LEGAL AUTHORITIES

41. *Rule* 7-6 provides for the medical examination of a party as follows:

> *Order for medical examination*
>
> *(1) If the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order under this subrule, the court may also make*
>
> *(a) an order respecting any expenses connected with the examination, and*
> *(b) an order that he result of the examination be put in writing and that copies be made available to interested parties of record.*
>
> *Subsequent examinations*
>
> *(2) The court may order a further examination under this rule.*

42. I have considered all of the authorities provided by the parties, including those not specifically referred to in oral submissions.

43. A useful summary of the legal principles respecting the ordering of subsequent medical exams is found in the *Hamilton* case at paragraphs 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 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.*

44. A similar list of principles is set out at paragraphs 15 – 18 of the decision in *McKay v Passmore* (2005) BCSC 570. The *McKay* decision is cited in the *Hamilton* case and is one of the cases relied upon by the Respondent. The summary in the *McKay* case is as follows:

> *[15] The principles to be followed in deciding whether the defendants have shown an adequate basis for a second IME are set out in* Trahan v. West Coast Amusements Ltd.**,** *2000 BCSC 691, at para. 48:*
>
> > *The authorities establish that additional medical examinations are in the discretion of the court. (citations omitted)*
> >
> > *That discretion is to be exercised judicially, considering the evidence adduced. A second examination to permit the defendant a second opinion on the same subject matter will not be allowed. A second examination may be appropriate where there is some question which could not have been dealt with on the first examination. ... (Citations omitted)*
> >
> > *That the magnitude of the loss is greater than previously known is not in and of itself sufficient to permit a second examination. ...(Citations omitted)*
> >
> > *Where diagnosis is difficult and existing assessments are aged, further assessment may be required ....*
>
> *And in* Roberge v. Canada Life Assurance Co.*, 2002 BCSC 1500 at para. 9:*
>
> > *The distinction is quite important. Simply put, when a person in litigation makes a claim for a 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 examination of the plaintiff.*
>
> *[16] The overriding question is whether a second medical examination is necessary to ensure reasonable equality between the parties in their preparation of a case for trial:* Wildemann v. Webster *(1991), 50 B.C.L.R. (2d) 244 (C.A.).*
>
> *[17] Reasonable equality does not mean that the defendant must be able to match expert for expert or report for report. I refer to* Trahan v. West Coast Amusement Ltd. and to MacNevin v. Vroom *(21 December 2004), New Westminster S072995 (S.C.).*
>
> *[18] The defendants must satisfy the court that there is some question or matter that could not have been dealt with at the first examination:* Jackson v. Miller**,** *[1999] B.C.J. No. 2751 (S.C)*

45. Both parties rely upon the *Wildemann* decision in the Court of Appeal. In that case, the Defendant sought an IME by a three person medical team at the Third Party Assessment Clinic in Vancouver. Hollinrake JA held that there was nothing in the Supreme Court Rules that would prohibit examinations by a medical team, although such examinations should be reserved for cases where there are "exceptional" circumstances. McEachern

CJBC added that such exams would also be available "where it is necessary to ensure "*reasonable equality between the parties in the preparation of a case for trial*." There is no indication that this case involved a second or subsequent IME.

46. In *Thomsen*, relied upon by the Respondent, the Claimant alleged inter alia permanent disability from teaching resulting from a brain injury. The Defendant sought a psychiatric exam. There had been previously been IMEs by a neurologist and an orthopedic specialist. The Defendant raised a causation issue from alleged pre-psychological difficulties and depression. The Court concluded that a central issue in the case was whether the cognitive functioning of the Plaintiff was compromised as a result of head injuries sustained in the accident, as she alleged. The Court ordered a psychiatric assessment on being satisfied that the Defendant was not "*seeking to obtain a second opinion on the same matter*" nor "*attempting to pursue every remote medical possibility*."

47. In *Belke*, also relied upon by the Respondent, the Defendant sought an IME by a neurologist with particular expertise in headache conditions. The Plaintiff suffered from serious migraine headaches prior to the accident and the Court ordered an independent medical exam notwithstanding the fact that the Plaintiff had abandoned her claim to the extent that it related to headaches. The Defendant successfully argued that the exam was necessary to establish what the Plaintiff's original position would have been but for the accident. The issue was whether the headaches were increasing in either frequency or severity or whether they were static and under control. The case does not appear to involve a second or further IME.

48. In the *Hamilton* case, relied upon by the Claimant, the Plaintiff alleged extensive and long-lasting injuries, including cognitive difficulties consistent with a mild traumatic brain injury. The Defendant had had prior IMEs by an orthopedic specialist and a neurologist. The neurologist had provided an opinion that there was no evidence to support a diagnosis of a brain injury. The Defendant sought a further IME by a psychiatrist on the basis that psychological or psychiatric symptoms might be the root cause of the cognitive symptoms of the Plaintiff rather than a true brain injury. The Court declined to order a further IME on the basis that the Defendant already had an opinion from the neurologist on the critical issue of cognitive defects. There was nothing new, no new question or matter in the material that would require the assessment of a psychiatrist. The Court concluded that the Defendant was seeking only to bolster the opinion of the neurologist by providing a similar opinion from someone with perhaps a more appropriate specialty.

49. I summarize the legal principles applicable to this application as follows:

1. An order for a subsequent medical exam is discretionary but the discretion must be exercised judicially;
2. Independent medical exams are granted to ensure "a reasonable equality between the parties in the preparation of a case for trial"; reasonable equality does not mean that a defendant should be able to match expert for expert or report for report;

3. A second exam will not be allowed for the purpose of attempting to bolster an earlier opinion of another expert; there must be some question or matter that could not have been dealt with at the earlier examination; and
4. There is a higher standard required where the Defendant seeks subsequent medical exams.

APPLICATION OF THE LAW TO THIS CASE

50. I agree with the Respondent's submission that establishing what the Claimant's original position was is an important issue for determination and that, all else being equal, an IME would be appropriate in order to permit the Defendant to investigate this issue in order to prepare its case for hearing (*Belke*, para 5). I also agree with the Respondent that it should not be refused this requested assessment simply because the Claimant does not have any expert report addressing fetal alcohol syndrome. Where the issue is the impact of a pre-accident condition, the Claimant has no interest in obtaining an opinion regarding fetal alcohol syndrome. The burden of establishing the consequences of the Claimant's original position, in order to reduce the claim for accident related injuries is upon the Respondent. In this circumstance, therefore, I do not think the authorities relating to "matching of experts" are particularly relevant.

51. In my view, however, all else is not equal. First, there is nothing new in the sense of new information that has come to light. The evidence relating to the Claimant's mother's possible substance use during pregnancy has been known to the Respondent since at least September, 2009. The further details contained in Dr. Kaushansky's report were known to the Respondent prior to the IMEs of Dr. Laidlow in June, 2011, and Dr. Iverson in July, 2011. Both Drs. Laidlow and Iverson also had Dr. Vallentyne's report with its single specific reference to fetal alcohol syndrome. At best there may be a new appreciation of the potential significance of information that has been known for a considerable time. I do not think that meets the requirement of some question or matter that could not have been dealt with at the earlier examinations.

52. A second and more compelling reason not to exercise discretion in favor of a further exam is the fact that the Respondent already has reports from experts who have provided their opinions on the relationship between the Claimant's pre-accident condition and the consequences of his traumatic brain injury. Dr. Solomons has given his opinion that the Claimant has largely if not completely recovered from the traumatic brain injury and his current status, long term expectations and prognosis are primarily based upon the natural course of his significant pre-accident history of cognitive and behavioral difficulties. Dr. Laidlow has provided his opinion that all of the Claimant's current symptoms are attributable to the motor vehicle accident although some of the symptoms may have been aggravated by his pre-existing condition. Dr. Iverson has provided his opinion that the Claimant now has mild cognitive impairment; that he likely had mild cognitive diminishment or impairment prior to the accident; but his brain injury superimposed on his pre-existing difficulties has likely adversely affected different aspects of his cognitive functioning. All of these experts were aware of the evidence in Dr. report. None expressed any reservation about providing an opinion on the Claimant's pre-accident condition. A subsequent exam to permit the obtaining of a second opinion on the same subject matter will not be allowed (*Trahan, McKay, Hamilton*). I appreciate that the

Respondent says there has been no previous attempt to diagnose fetal alcohol syndrome and hence there is no prior opinion on that diagnosis or its consequences. There have, however, been multiple opinions in prior IMEs addressing the Claimant's pre-accident condition and its relationship with the traumatic brain injury. I regard the "subject matter" as the Claimant's pre-accident condition and its effect upon the Claimant's ultimate outcome. Had any of the Respondent's experts considered that a "stand alone" diagnosis of fetal alcohol syndrome was a potentially significant diagnosis in the sense that it carried potential consequences significantly different from the known ADHD diagnosis and accompanying cognitive and behavioral difficulties, I would have expected that issue to have been identified.

53. I also think that the case of *Vermeulen-Miller v Sanders* (2007) BCSC 1258, relied upon by the Claimant, is of assistance. In *Vermeulen-Miller*, the Defendant having had an initial IME from a neurologist, sought a second IME from a psychiatrist in order to meet the report of the Plaintiff's psychiatrist, which had diagnosed mild-traumatic brain injury. The prior neurologist's report had directly critiqued and disagreed with the Plaintiff's psychiatrist. In declining to order a second IME, the Court noted that as between neurologists and psychiatrist "*there is considerable overlap as to the specialties of these medical experts as they opine on matters central to the case"* (para 44) and to order a further IME would be "*be almost tantamount to a second exam in the same area*" (para 40). To permit the Respondent in this case a further exam now as requested is, in my view, tantamount to a further exam in the same area, namely the impact of the Claimant's pre-accident condition.

54. There are 3 other factors of less but not insignificant importance that I take into account in declining to order a further assessment. First, the Respondent has had the benefit of 5 prior IMEs by consent. Many of the cases deal with second or third exams. I appreciate that the number of independent medical exams required to provide a defendant with reasonable equality is determined by the nature, severity and complexity of the claim presented and not by any arbitrary number. Having said that, the exam, if ordered, would have been the 6th IME.

55. Second, I place some significance on the available evidence (at least on this application) concerning what substances the Claimant's mother may have used during pregnancy. If that evidence is problematic, the weight to be given to any diagnosis is diminished and it may not materially assist the trier of fact at the hearing.

56. Finally, I note the inconvenience a further assessment would impose on the Claimant, namely a 5th trip with his father from Penticton to the Lower Mainland.

57. Taking all of these factors into account, I decline to order that the Claimant submit to a FASD assessment. That part of the application is dismissed.

58. No submissions were made with respect to the costs of this application. If the parties require a determination, I invite brief written submissions within 7 days.

Donald W. Yule, Q.C., Arbitrator