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:

GH

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

RULING ON RESPONDENT RULE 7-6 APPLICATION

Counsel for the Claimant, GH	Maria Gladkikh
Counsel for the Respondent, Insurance Corporation of British Columbia	Matthew J. Straw
Notice of Application:	Undated
1st Affidavit of K. Baliong sworn:	September 15, 2023
2nd Affidavit of K. Baliong sworn:	September 19, 2023
Application Response dated:	September 19, 2023
1st Affidavit of Ashley Jurick sworn:	September 21, 2023
Date of Hearing:	September 28, 2023
Place of Hearing:	Vancouver, BC, by Zoom
Arbitrator:	Dennis C. Quinlan, K.C.
Date of Ruling:	October 6, 2023

I. BACKGROUND

1. 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 Arbitration").

2. By agreement, the Supreme Court Civil Rules govern the UMP Arbitration mutatis mutandis, and this application is brought pursuant to Rule 7-6.

3. The Respondent seeks an order the Claimant attend a vocational assessment on November 24, 2023 with Dr. Kimberly McGuire, psychologist in Kelowna, B.C.

4. On December 7, 2019, the Claimant sustained serious injury, most notably a cracked chest plate, concussion, bruised ribs, and neck and back soft tissue injuries when as a passenger, he was involved in a rollover accident that occurred near Oyama, B.C. (the "Accident")

5. At the time of the Accident, the then 35 year old Claimant had worked many years as a forestry firefighter and part-time as a landscaper. Since the Accident, he has not returned to any form of employment. Expert evidence suggests his functional abilities are at the sedentary to light strength levels such that he will not return to his previous occupations.

6. The Claimant served expert reports from two different neurologists, a psychiatrist, a physiatrist, a family physician, and an occupational therapist who conducted a functional capacity evaluation.

7. With the exception of the report from the first neurologist, the reports all range in date from May 25, 2023 to August 5, 2023.

8. The Respondent scheduled a functional capacity and cost of care assessment with an occupational therapist on September 25 and 26, 2023 (has now occurred but no report received), a psychiatric assessment on October 17, 2023, a neurological assessment on October 30, 2023, and the subject vocational assessment on November 24, 2023.

9. The Claimant consented to attending each of the assessments except for the vocational assessment with Dr. McGuire.

10. The Claimant does not intend on obtaining his own vocational assessment.

11. The UMP Arbitration is scheduled for 10 days commencing March 18, 2024. The deadlines for service of expert and response reports are respectively December 22, 2023 and February 2, 2024.

II. POSITION OF THE PARTIES

12. The Respondent points to the Claimant advancing a significant claim for "….loss of earnings, past and prospective, loss of income earning capacity and loss of opportunity to earn income, both past and prospective…"

13. In order to properly defend the earning capacity claim, the Respondent submits it is entitled to be placed on an equal footing in the litigation by being allowed access to the Claimant through a Rule 7-6 assessment conducted by a qualified vocational expert.

14. In support of its application, the Respondent tendered a letter from Dr. McGuire dated September 12, 2023 setting out what a vocational assessment involves and how it differs from other types of formal assessments:

> A vocational assessment includes a clinical interview that entails a review of the examinee's education and employment to date, as well as the individual's past and present physical, cognitive, and mental health functioning followed by administration of a number of standardized measures addressing intellectual abilities, academic skills, learning potential, specific occupational aptitudes (e.g., mechanical reasoning aptitude), personality style characteristics, and vocational interests and values.

> With this information obtained from interview and objective test data, the clinician is able to provide opinions regarding general training potential and suitability for specific training programs and specific occupations, as well as to address any reduction in employment potential due to illness or injury.
>
> Although there is some overlap between the measures used in a vocational assessment and other types of formal assessment, such as neuropsychological assessments and occupational therapy assessments, a vocational assessment is unique in that it includes an analysis of existing transferable skills, work-related aptitudes, and learning potential to specifically address training potential and viable vocational options.

15. Counsel's instruction letter to Dr. McGuire dated September 19, 2023 was also produced, wherein Dr. McGuire was asked to provide opinions concerning "…vocational prospects and potential vocational options given his circumstances, including his education, work experience and achievements to date."

16. The Respondent submits the practical effect of not allowing the assessment will be to preclude it from obtaining expert evidence on a "live issue" that has the potential of resulting in a significant damage award.

17. The Claimant in opposing the application, submits the Respondent has not met its onus to adduce sufficient evidence establishing that a vocational assessment is necessary in order to place the parties on an equal footing: ***Stocker v. Osei-App*ıah**, 2015 BCSC 2312 at para. 19.

18. In particular the Claimant notes the Respondent has not produced instruction letters to the neurologist, psychiatrist and occupational therapist, their reports (recognizing the reports have yet to be prepared),

or adduced evidence from those experts indicating they were unable to form conclusions on the issue(s) now being requested of Dr. McGuire.

19. It is submitted this evidentiary vacuum raises the spectre of improper overlap as between the various experts.

20. The Claimant cites the decisions of ***Stocker*** at para. 36 and ***Walsh v. Riley***, 2023 BCSC 135 at para. 64, where the Court commented on potential overlap between functional capacity evaluations and vocational assessments. In such cases, a determination must be made as to whether any overlap is incidental or of a type that would constitute improper bolstering.

21. It was also submitted there was sufficient medical evidence, including functional capacity assessments, for the Respondent to have a vocational expert prepare a report without the need for a full assessment.

22. The Claimant summarized his position by stating "….it is unclear, on the evidence, that a vocational assessment report prepared by a psychologist such as Dr. McGuire would provide greater insight into the Claimant's condition and prospects than the anticipated reports of the other defence experts."

III. LEGAL FRAMEWORK

23. The parties agree the guiding principles in respect to a Rule 7-6 application for a further assessment are set out in ***Tran v. Abbott***, 2018 BCCA 365.

24. Justice Savage speaking for the court stated the underlying rationale for the Rule as follows:

> [17] Rule 7-6 is a rule of discovery. It is designed to balance the plaintiff's advantage in obtaining expert opinions, by providing the defendant with access to the plaintiff for such prior to trial.

> [18]The rule is consistent with the "modern philosophy" that procedural rules should work to promote settlement before trial, and to ensure the speedy and inexpensive determination of each dispute on its merits.

25. The Court cited the earlier decision of ***Gergely v. Ellingson***, [1978] B.C.J. No. 562 (C.A) for the principle that as the intention of the Rule was to give litigants the right to know each other's case in advance, it should not be given a "restricted interpretation" (at para. 19).

26. Justice Savage then stated:

> [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.

27. Other considerations to be taken into account on a Rule 7-6 application include the following:

    a. the Respondent's choice of experts is not governed by the choice made by the Claimant: ***Edgar v. Moore***, 2005 BCSC 1877 at para. 12,

    b. the Respondent should be allowed to advance its own hypothesis (***Tran*** at para. 39), and not be limited by accepting the Claimant's theory of the case: ***White v. Fan***, 2019 BCSC 785 at para. 16,

c. different expert opinions do not entitle the Respondent to an assessment merely to match "expert for expert": ***Bowden v. Lund***, 2023 BCSC 869 at para. 5,

d. the fact the claim might be significant, does not in and of itself, establish grounds for a further assessment: ***Hunter v. Martell***, 2021 BCSC 1962 at para. 7, and

e. the Respondent must establish the subsequent assessment is necessary, having regard to where there is overlap or an attempt at "bolstering" evidence: ***Gray-Verboonen v. Mandurah***, 2019 BCSC 1697 at paras 15, 16.

IV. DISCUSSION

28. In ***Wildemann v. Webster*** (1990), 50 B.C.L.R. (2d) 244 (C.A.), the Court of Appeal in considering an appeal from an order directing the plaintiff to attend an inter-disciplinary assessment under the then Rule 30, stated the following at page 246:

> "[t]he Rules are designed to secure a just determination of every proceeding on the merits and to encourage full disclosure. <u>This being so, the Rule should be given a fair and liberal interpretation to meet those objectives</u>.
>
> Emphasis added

29. As confirmed in ***Tran*** at para. 30, this statement is as applicable today as it was in 1990.

30. The Respondent based upon the letter of instruction, seeks an opinion on the Claimant's vocational future, or what is often described as residual capacity. Simply put, what does the future hold from a vocational perspective, given the Claimant's post accident circumstances?

31. Such post-accident circumstances could include education, vocational interests, transferable skills, re-training options, available accommodations and the physical and mental limitations arising from the accident.

32. It is common in personal injury cases for the injured party to focus on what he or she **cannot do** as a result of the tortious event, whereas the responsible party directs its emphasis towards what the injured party **can do** going forward. Such is the nature of an adversarial system.

33. As stated in ***Tran***, the parties are to be put on an even footing in terms of advancing their respective theories of the case.

34. I have reviewed the Claimant's reports from Dr. MacKean, physiatrist and Mr. Kowalik, occupational therapist who each assessed the Claimant, albeit virtually.

35. It is clear both experts directed their opinions to the question of what the Claimant would not be able to do.

36. Dr. MacKean at page 8 of his May 25, 2023 report stated:

> "In my opinion he would not be able to return to work as a forestry firefighter.
>
> He would not be able to do physical activities that require bending or lifting with the spine.
>
> He would not be able to do activities where he is moving quickly or lifting with the spine.
>
> He would not be able to do heavy lifting or carrying activities.
>
> He would not be able to work with his arms above shoulder level as this would cause aggravation of his neck and back pain symptoms as well as

> precipitate dizziness and aggravate his headache symptoms."

37. Dr. MacKean did not address, nor was she asked to address, what the Claimant's vocational options were going forward.

38. Similarly Mr. Kowalik in his August 5, 2023 report provided the opinion that the Claimant did not meet the critical job demands to safely work as a professional firefighter.

39. As to the future, he opined the Claimant was best suited for sedentary to light strength category jobs and would benefit from ergonomic accommodations as well as increased breaks and/or time off. No specifics were offered.

40. It is significant in my view that Mr. Kowalik, whose resume indicates he was qualified to perform vocational assessments, actually recommended the Claimant undergo vocational rehabilitation. However he did not perform a vocational assessment in preparation for rehabilitation, presumably because he was not instructed to do so.

41. I have no difficulty in concluding that all else being equal, the Respondent should be entitled to a vocational assessment to explore vocational options for the future, in order to be placed on an equal footing with the Claimant.

42. My reasoning is similar to that of Justice Pearlman in ***Stocker:***

> [41]Somewhat different considerations apply with respect to the vocational assessment. That assessment would evaluate Mr. Stocker's future vocational options, his vocational aptitude and interests, and may assist in the assessment of the plaintiff's income loss claim….. Her assessment would focus on the identification of any employment options for which the plaintiff is suited, and the income he might generate from

> those occupations, rather than the identification of the plaintiff's physical and psychiatric limitations and their impact upon his employment and daily life activities.
>
> Emphasis added

43. The Claimant does not dispute such conclusion in a general sense. What the Claimant says is the Respondent has not shown such investigation is necessary, given that the vocational issues may already have been addressed by the other experts retained by the Respondent, most notably the psychiatrist Dr. Smith and occupational therapist Ms. Percy.

44. As highlighted by the Claimant, the opinions of the other experts retained by the Respondent are unknown at this point, and the instruction letters provided to those experts, have not been disclosed.

45. There is no requirement for a party to deliver its expert evidence prior to the 84 day service period: ***Bowden*** at para. 8.

46. However the instruction letters could easily have been produced and the fact they were not creates difficulty because it is not known what issues those experts were asked to opine on.

47. I was assured by Mr. Straw, counsel for the Respondent that Ms. Percy was given "very general instructions within the scope of an occupational therapist performing a functional capacity evaluation." Submissions of counsel are of course not evidence.

48. Such was the difficulty addressed by Master Muir in ***Gray-Verboonen*** at para. 17:

> [17] Many courts have considered the difficulty of ascertaining the need for a subsequent opinion when there is overlapping expertise and the scope of the earlier opinion is unknown.

49. I see there being little risk of improper overlap or bolstering as between opinions proffered by Dr. Smith and Dr. McGuire. Psychiatrists do not as a rule stray into the area of providing specific opinion evidence on future employability in the nature of that outlined by Dr. McGuire in her September 12, 2023 letter, particularly in circumstances where the injuries have a significant physical component, which is the case here.

50. To the extent that was to occur, the evidence could be subject to objection as being inadmissible.

51. I agree the opportunity for overlap and improper bolstering is much greater as between an occupational therapist and vocational expert. As with Mr. Kowalik, occupational therapists are often qualified to perform both functional capacity evaluations and vocational assessments.

52. The question however is not so much the qualifications of the expert and whether they overlap, but rather the particular issues upon which the expert is instructed to provide an opinion.

53. For example, Mr. Kowalik although qualified to conduct a vocational assessment, only performed a functional capacity evaluation. Dr. McGuire while seemingly not having the qualifications to offer a functional capacity opinion, was instructed to provide a vocational opinion.

V. CONCLUSION

54. I have considered at some length the forceful and cogent submissions of Ms. Gladkikh, counsel for the Claimant, and in particular the decisions of ***Gray-Verboonen***, ***Walsh*** and ***Bowden*** wherein the applications for further assessments were dismissed because the applicants were not able to meet their onus to establish the assessments were necessary.

55. In the result however I have concluded that a dismissal of the application herein in the circumstances of this claim would not accord with a “fair and liberal interpretation” of the Rule as directed by the Court of Appeal in ***Tran.***

56. Having arrived at that conclusion, I am of the view that I can build into my ruling sufficient protection to ensure that any evidence offered by Dr. McGuire does not traipse over, (as that description was used by Master Muir in ***Gray-Verboonen*** at para. 16), or improperly bolster opinion evidence, given by Dr. Smith, Dr. Teal or Ms. Percy.

57. In that regard, it is important to recognize that an order made pursuant to Rule 7-6 is only for an assessment, and any expert evidence ultimately tendered is subject to objection for reasons of admissibility. I am aware of my "gatekeeper" role as it applies to such evidence.

58. I adopt the approach taken by Justice Mayer in ***Larsen v. Karimi***, 2019 BCSC 1477:

> [23] As was stated by Justice Skolrood in ***Irvine v. Bradley***, (22 February 2019) Vancouver, M172655 (BCSC):
>
> > A trial judge is in the best position to determine the overlap and redundancy of reports, having been provided with an opportunity to review the reports in their entirety.
>
> [24] In this case the trial judge will have the opportunity to consider the reports to be filed by Dr. Thompson and Dr. Aion. To the extent that there is inappropriate overlap, the question of relevance can be addressed by the parties at trial when the reports are tendered. I agree with Justice Skolrood's comment in Irvine that it is preferable that the trial judge have the best evidence before them.
>
> Emphasis added

59. For greater clarification, my order contemplates strict separation in the expert evidence of Dr. Smith, Dr. Teal, Ms. Percy from that of Dr. McGuire in terms of the opinions offered. In particular Ms. Percy should confine her opinion to that of a functional capacity assessment and Dr. McGuire is to do likewise for the vocational assessment in accordance with her instruction letter.

60. Last I must address the Claimant's argument that there was sufficient medical evidence for Dr. McGuire to provide an opinion without actually conducting an assessment.

61. Dr. McGuire provided evidence in her September 12, 2023 letter as to why such method was not satisfactory and I have no reason to doubt her explanation.

62. Further such approach opens the Respondent up to adverse comments as were made by the courts in ***Preston v. Kontzamanis***, 2015 BCSC 2219; ***Petrovic v. Stetsko***, 2017 BCSC 741; and ***Wong v***. ***Campbell,*** 2020 BCSC 243, where the opinions tendered were based upon a review of records and reports without the benefit of an actual assessment.

63. In summary, I make the following orders:

    a. The Claimant will attend and submit to a vocational assessment on 24 November 2023 with Dr. Kimberly McGuire, psychologist, in Kelowna, BC;

    b. The Respondent will provide the Claimant with an appropriate amount (as agreed or determined) to pay the Claimant for his reasonable costs of transportation and conduct money to and from the assessment;

    c. Within 30 days following the Claimant's counsel's request, the Respondent will provide any notes prepared during the assessment that capture the factual history given by the Claimant, any notes that record Dr. McGuire's observations or findings, and raw data gathered by Dr. McGuire;

d. Costs of this application will be in the cause.

Dated: October 6, 2023

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