

**IN THE MATTER OF AN ARBITRATION PURSUANT TO
Section 148.2(1) of the Revised Regulations to the Insurance (Vehicle) Act**

AND

Arbitration Act, RSBC 1996, c. 66

BETWEEN:

DE

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

**ARBITRATOR'S DECISION
REGARDING THE ADMISSIBILITY OF A PORTION OF AN EXPERT REPORT**

Counsel for the Claimant

Stanley Cope

Counsel for the Respondent

Fernanda Batista

Date of Decision

July 10, 2023

INTRODUCTION

1. This is a claim for compensation for injuries sustained by the claimant, pursuant to coverage afforded by the **Revised Regulations to the Insurance Vehicle Act**. It is set for a five day hearing, which is to commence on August 21, 2023.

NATURE OF THE APPLICATION

2. The claimant objects to the admissibility of a portion of a report delivered by the respondent dated May 31, 2021, prepared by a neurosurgeon, Dr. Scott Paquette, and seeks its redaction. The portion of the report that is objected to is as follows:

“She [the claimant] returned to the workplace on a fulltime basis. I think her ability to continue to work for the foreseeable future is excellent and I expect she will work until retirement.”

3. The claimant says that the statement regarding work performance and future survivability is “both speculative and argumentative”. Further, the claimant says that the opinion clearly encroaches on the purview of the of the trier of fact”. Finally, the claimant says that the statement is a “futuristic projection” that Dr. Paquette is not qualified to make.

4. The respondent says that the opinion is not speculative, and is grounded on information obtained by Dr. Paquette during his assessment. The respondent also says that the opinion does not encroach on my role as the trier of fact, but rather, provides an opinion on the claimant’s ability to work “from a medical perspective”.

THE LAW

5. The general legal principles governing the admissibility of expert reports are well known. A useful summary is that provided by the Supreme Court of Canada in *R. v. Mohan*, 1994 SCC 80 at page 20, where the Court stated:

“Admission of expert evidence depends on the application of the following criteria:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule;
- (d) a properly qualified expert.”

6. See also *Javorovic v. Booth*, 2021 BCSC 232, where the court found that a similarly worded opinion in an expert report constituted an attempt to persuade the court to “make a finding of primary fact”, and should be struck.

ANALYSIS AND DECISION

7. Dr. Paquette is purporting to provide an opinion regarding the claimant’s occupational capacity, and further whether the capacity that she currently demonstrates will continue in the future. The respondent says that this opinion is circumscribed by his expertise.

8. Dr. Paquette’s statement may be one based on his expertise, but the opinion clearly ventures beyond that. I do not consider his opinion to be either necessary or helpful to me in deciding this case: *R. v. Mohan*, supra. Further, whether deliberately or not, in my view it crosses over the line into advocacy: *Javorovic v. Booth*, supra.

9. Accordingly, if the respondent wishes to have Dr. Paquette’s report admitted into evidence at the hearing, the subject portion of his report should be redacted.

10. I wish to thank counsel for their helpful submissions.

Mark Tweedy

Mark Tweedy, C. Med, C. Arb.
Arbitrator
July 10, 2023