

**IN THE MATTER OF AN ARBITRATION PURSUANT TO S. 148.2(1)
OF THE INSURANCE (VEHICLE) REGULATION, B.C. REG 447/83 TO THE
INSURANCE (VEHICLE) ACT [RSBC 1996] c.231
and the
ARBITRATION ACT [SBC 2020] c.2**

BETWEEN:

BD

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

**Ruling on Respondent Objection to Admissibility
of Dr. Henry Report Dated November 24, 2021**

Counsel for the Claimant, BD

Wes Mussio

Counsel for the Respondent,
Insurance Corporation of British Columbia

Lyle G. Harris, QC

Respondent's Submissions

February 11, 2022

Claimant's Submissions

February 18, 2022

Arbitrator:

Dennis C. Quinlan, QC

Date of Ruling:

February 28, 2022

Introduction

- [1] This is an Underinsured Motorist Protection (“UMP”) Arbitration conducted pursuant to section 148.2 of Part 10 of the **Insurance (Vehicle) Regulation B.C. Reg. 447/83** to the **Insurance (Vehicle) Act RSBC 1996, c.231**.
- [2] On June 29, 2019, the sixty year old claimant BD (hereinafter referred to as the “Claimant”) was involved in a motorcycle accident wherein he sustained serious injuries, including trauma to his lower extremity resulting in an above knee amputation, and a fracture dislocation of his hip which required two operative procedures.
- [3] The Arbitration hearing to determine the Claimant’s entitlement to UMP compensation is scheduled for eight days, commencing March 21, 2022. The parties have agreed the UMP proceeding is to be conducted in accordance with the Supreme Court Civil Rules (the “Rules”).
- [4] On February 4, 2022 an arbitration management conference (“AMC”) was conducted. At that time the Respondent advised it was objecting to the admission of a report from Dr. Henry dated November 24, 2021 (“Dr. Henry’s Report”), on the basis that (1) it was in contravention of section 12.1 (2) of the **Evidence Act, R.S.B.C. 1996, c. 124** which limits the number of expert reports in a vehicle injury proceeding to three, and (2) Dr. Henry was not qualified to give the opinions set out in her report.
- [5] The parties agreed the admissibility issue would be dealt with on the basis of written argument in advance of the arbitration hearing. Counsel have now provided their written submissions.
- [6] The Respondent in its written argument delivered February 11, 2022, stated it was withdrawing its objection based upon section 12.1(2) of the **Evidence Act** and proceeding only on the basis that Dr. Henry was not qualified to give the opinions proffered.
- [7] It is evident that while the Respondent has several concerns regarding Dr. Henry’s Report, its primary concern (and the central issue on this application) is Dr. Henry’s opinion stating “He will develop osteoarthritis in

his L hip and will require a total hip replacement in the next 2-10 years". The Respondent seeks to have this opinion redacted.

- [8] The Claimant in his written argument delivered February 18, 2022 indicated that while it was agreed the issue of admissibility could be determined by way of written submissions, it was on the proviso that if I was unable to determine whether Dr. Henry had the necessary qualifications to opine on the matters in her report, a voir dire on qualifications might be necessary during the arbitration hearing.

Report of Dr. Henry, Family Physician

- [9] Dr. Henry has been the Claimant's family physician since 2017. Her report is very short, numbering 3 ½ pages plus a curriculum vitae which extends onto a second page. She describes the purpose of her report as being "...to answer the questions put to me by the firm of Mussio Goodman"
- [10] Under the heading Professional Background and Qualifications, Dr. Henry states she qualified as a medical doctor after having completed her Medical Doctorate in 2007. She completed her residency in Family Medicine in 2009 and then received her Certification in Family Medicine from the College of Family Physicians of Canada in 2009. She is a physician in good standing with the College of Physicians and Surgeons of British Columbia and the College of Family Physicians of Canada and British Columbia.
- [11] Dr. Henry's curriculum vitae describes her education, teaching experience, leadership experience, clinical experience (clinic, hospital, obstetrical, palliative care and inpatient psychiatric unit), awards and professional memberships.
- [12] There is no mention in Dr. Henry's Report as to the make up of her family practice, what experience she has in the diagnosis and treatment of hip osteoarthritis, or the timing of when a hip replacement might be required.
- [13] Dr. Henry's Report goes on to concisely set out in one page, the nature of the Claimant's injuries, the treatment he received, and his present

condition. The latter appears to be based upon what the Claimant may have told Dr. Henry.

- [14] Finally Dr. Henry provides brief opinions as to causation, prognosis for further recovery, the extent of any permanent or partial disability, limitations with respect to employment past and future, and a summary of anticipated future treatment.
- [15] The opinion in dispute concerning the time requirement for a hip replacement is set out both under the heading of Permanent or Partial Disability and heading of Anticipated Future Treatment:

The extent of any permanent or partial disability.

[Mr. D] is permanently disabled. He has lost his left lower leg. He will develop osteoarthritis in his L hip and will require a total hip replacement in the next 2-10 years. He will have permanent disability as a result.

A summary of anticipated future treatment including the cost of such treatment

I anticipate he will require a left hip replacement in the next 2-10 years.

Reports of Dr. Sidky and Dr. Horlick

- [16] The Claimant and Respondent both retained orthopaedic surgeons to provide expert opinion in connection with the traumatic injuries sustained by the Claimant. Dr. Sidky on behalf of the Claimant authored a report dated August 25, 2021 and Dr. Horlick on behalf of the Respondent provided a report dated September 21, 2021.
- [17] I do not understand either party to be taking objection to the qualifications of the opposing orthopaedic surgeon.

[18] I have reviewed the two reports. They are both thorough, comprehensive, and on their face, objectively written in accordance with the expert's duty to assist the finder of fact and not be an advocate for either party.

[19] Each expert addressed the issue of arthritis and hip replacement.

[20] Dr. Sidky opined the Claimant would likely experience further symptoms of pain and disability as his hip arthritis progresses. Further treatments would be needed as the pain level increased. Dr. Sidky then stated on page 13:

These treatments involve activity modification, pain medication, intra articular injections of cortisone/ viscosupplementation/platelet rich plasma into his hip and then ultimately when the injections stop working a hip replacement would be the only remaining option.

[21] Dr. Sidky does not offer an opinion as to when a hip replacement might be required, but does state a hip replacement has an average life span of 20-25 years and it was possible a second hip replacement might be required in the future.

[22] Dr. Horlick opined that the Claimant was undoubtedly developing post-traumatic osteoarthritis which likely would increase. In respect to the issue of a hip replacement, Dr. Horlick stated the following at page 10, lines 353 to 355:

Based on his current history and physical examination, he does not meet indication for hip replacement surgery and whether or not he will need to do so is not discernable at this time. However, I would anticipate that within the next 10 to 15 years this may be a requirement.

Position of the Parties

- [24] It is the Respondent's position that there is nothing in Dr. Henry's qualifications to establish any particular expertise in respect to whether a patient requires a hip replacement and if one is needed, when that might occur. The Respondent references the requirements set out in Rule 11-6 (1) (a) and (b) in respect to an expert's qualifications.
- [25] The Respondent submits it is presumed Dr. Henry possesses the qualifications of a general practitioner/family medicine practitioner to deal with "...ordinary things that come up and require treatment by a family practitioner...", and that complicated issues are referred to a specialist.
- [26] In summary the Respondent argues that issues as to the need for a hip replacement and timing are "...the province of an orthopaedic surgeon, and not a family practitioner."
- [27] In response the Claimant disagrees with the Respondent's position that only orthopaedic surgeons can speak to the need for a hip replacement. He submits that as a front line doctor to her patients, Dr. Henry deals with almost every type of medical condition.
- [28] The Claimant's Submission sets out that it is "expected" Dr. Henry will testify she regularly deals with individuals in need of hip replacements or who have hip issues, and that such medical issues are a common procedure in an aging population.
- [29] The Claimant concludes by saying that all of the Respondent's arguments go to weight as opposed to admissibility and if there are any deficiencies in Dr. Henry's qualifications or her report, they can be dealt with on cross examination and in argument.

Legal Framework

- [30] The Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 and more recently in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015

SCC 23, addressed the common law principles for the admissibility of expert opinion evidence. In *Mohan* at pages 12, 13, the Court stated:

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

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

- [31] At page 17, *Mohan* described a properly qualified expert as someone who is shown to have acquired special or peculiar knowledge through study or experience in respect to the matters on which he or she undertakes to testify.
- [32] The qualifications of a proposed expert witness must be assessed in light of the areas in which the opinion evidence is sought: *MacEachern v Rennie*, 2009 BCSC 939 at para 15.
- [33] Evidence that does not meet the threshold requirements should be excluded: *White Burgess, at para. 23*.
- [34] Simply stated, qualification is a prerequisite to admissibility: *Pausch v. Vancouver Coastal Health Authority*, 2014 BCSC 2036 at para. 14.
- [35] The common law principles as set forth in *Mohan* are supplemented by Rule 11-6(1) which governs the form and content of expert reports.
- [36] Relevant to this application, subsections (a) and (b) require the expert to identify his or her area of expertise, and set out their qualifications, employment and educational experience within the identified area of expertise. Subsection (f) mandates that the expert identify the reasons for his or her opinion, including the facts and assumptions, research, and all documents relied on.

[37] The requirements of Rule 11-6 (1) are mandatory, but subject to Rule 11-7 (6) which provides discretion to allow an expert to testify where the Rules have been breached provided there is no prejudice to the opposing party or the interests of justice require it: *Paur v. Providence Health Care*, 2015 BCSC 1008 at paras. 76 to 80.

Discussion and Conclusion

[38] The critical question before me is whether it can be said Dr. Henry has acquired special or peculiar knowledge through study or experience, such that she should be qualified to provide expert opinion evidence on the specific issue of whether the Claimant will be required to undergo a hip replacement and if so when.

[39] The role of the expert is to provide assistance of an impartial and objective opinion on matters outside the experience and knowledge of the trier of fact: *Hanson-Tasker v Dr. D. Brian Ewart*, 2022 BCSC 201 at para. 11. Subsumed within that role is the requirement that the expert has the requisite qualifications to provide such assistance to the trier of fact.

[40] My consideration of the question is complicated by the fact that Dr. Henry's Report is brief and the opinion in issue is "bare bones". This potentially raises issues with respect to the applicability of Rules 11-6 (1) and 11-7(6).

[41] As already noted, the description of qualifications in Dr. Henry's Report make no reference to her experience with hip injuries, the treatment and progression of such injuries, or her knowledge of the factors involved when considering surgery.

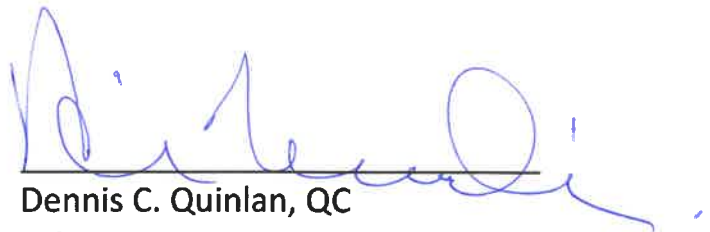
[42] Further Dr. Henry's opinion that the Claimant "...will require a total hip replacement within the next 2-10 years...." is devoid of any stated reasoning, including what facts and assumptions, research or documents she relied upon in reaching that opinion.

[43] The Claimant's injuries are obviously serious and I have been advised by Mr. Mussio that Dr. Henry's Report is important for the advancement of the case. As previously mentioned, the submission is made that to the extent

there are any weaknesses in Dr. Henry's opinion, they can be addressed through cross examination and argument as a matter of weight. While that may be true to a point, I am alive to my "gatekeeper role" of ensuring it is only opinion evidence which properly meets the legal requirements and is within the bounds of expertise, that is admitted: *Paur* at para. 9.

- [44] My first task must be to determine whether Dr. Henry's qualifications meet the initial threshold. The question of weight only becomes relevant once I am satisfied that this threshold criteria has been met.
- [45] As such I have concluded it would be premature for me to make any ruling at this juncture on the admissibility of all or part of Dr. Henry's Report, without permitting the Claimant to lead evidence as to the doctor's qualifications and the Respondent to cross examine on those qualifications in respect to the opinions which the Claimant's seeks to introduce.
- [46] As was stated in *Pausch* at para 4, there should be "...separation between the statement of and cross examination on [her] qualifications, from the testimony in chief clarifying [her] report and cross examination."
- [47] Therefore there will be a voir dire on the qualifications of Dr. Henry at the appropriate time within the arbitration hearing. If there are any admissibility arguments to be advanced based upon Rules 11-6(1) and 11-7 (6), they should be made at the same time.

DATED: February 28, 2022


Dennis C. Quinlan, QC
Arbitrator