ICBC Tort Claims, Part 7 Benefits And Multiple "Independent" Medical Exams

As I've previously written, ICBC can typically arrange an 'independent' medical exam (IME) in one of two ways. The first is when an 'insured' applies for first party no-fault benefits. Section 99 of the Insurance (Vehicle) Regulation gives ICBC the power to compel an IME in these circumstances. The second is under Rule 7-6(1) of the BC Supreme Court rules which allows the court to order an independent exam to "*level the playing field*" in an injury lawsuit.

As a monopoly insurer ICBC often has one adjuster assigned to look after a person's claim for no-fault benefits and at the same time look after the defendant's interests in the Plaintiff's tort claim. Often times ICBC will obtain a no-fault benefits medical exam and then once a tort claim is launched seek a second exam with a different physician pursuant to the BC Supreme Court Rules. Can ICBC do this? The answer is sometimes yes but is highly factually dependent and reasons for judgement were released today by the BC Supreme Court, Vancouver Registry, dealing with this area of law.

In today's case (Imeri v. Janczukowski) the Plaintiff was injured in a motor vehicle collision in 2005. The Plaintiff and Defendant were insured with ICBC. The same ICBC adjuster was looking after the Plaintiff's no-fault benefits claim and acting on behalf of the defendant in the tort claim. ICBC sent the Plaintiff for an IME with an orthopaedic surgeon (Dr. Boyle) as part of the no-fault benefits application process. In the course of the tort claim the Defendant then sought an order sending the Plaintiff for an IME with a different orthopaedic surgeon (Dr. McGraw). The Plaintiff opposed this motion and argued that if ICBC is entitled to a second exam it should be with the same doctor. Master Shaw sided with the Plaintiff. In doing so the Court provided the following useful reasons:

[17] Rule 7-6(1), which is the new Rule 30, provides 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 the result of the examination be put in writing and that copies be made available to interested parties of record.

[18] In Stainer v. Plaza, 2001 BCCA 133, Finch J.A. (as he then was) said at para. 8:

... the purpose of Rule 30 is to put the parties on an equal footing with respect to medical evidence.

[19] Although the first question would be whether the defence needs an IME of an orthopaedic specialist to put the parties on an equal footing with respect to medical evidence, counsel for the plaintiff did not oppose the plaintiff attending a defence IME with an orthopaedic specialist as long as it was Dr. Boyle. The plaintiff agrees to go back to Dr. Boyle for the IME.

[20] The plaintiff's submission is that the plaintiff has already attended a first IME for tort purposes with Dr. Boyle and, if a further IME is appropriate, it should be a follow-up with the original expert for the defence.

[21] In Rowe v. Kim, 2008 BCSC 1710, Master Keighley at para. 14 states:

A party seeking to have a second examination preformed by a practitioner practicing in the same speciality or discipline as a practitioner who has already examined a person faces an uphill battle: Hothi v. Grewal, [1993] 45 B.C.L.R. (3d) 394 (SC); Hamada v. Semple, [1983] B.C.J. No. 1307 (SC). Successful applicants are those who are able to demonstrate that something has happened since the first examination which could not have been foreseen or which could not, for some other reasons, have been addressed by the first examiner. It also seems to me that material filed in support of the application should indicate why a further examination by the doctor who performed the original assessment is not appropriate.

[22] The evidence submitted in this matter does not set out why it would not be appropriate to send the plaintiff back to Dr. Boyle. There was no evidence why Dr. McGraw should be preferred over Dr. Boyle.

[23] The plaintiff does not resist seeing Dr. Boyle. It is not necessary to find sufficient reasoning for the further examination by Dr. Boyle.

[24] I find the February 28, 2006 report of Dr. Boyle contains opinion relevant to both the Part 7 claim and the tort claim. The defence has not provided any evidence to explain the opinion content in the report relevant to the tort claim, other than the statement of the adjuster in her letter to the plaintiff setting the appointment that the IME is for the Part 7 claim purposes. It is not known what the request or instructions to Dr. Boyle were. Based on the content of the resulting report, there is opinion relevant to the tort claim. I find the IME by Dr. Boyle on February 28, 2006 is a first examination by an orthopaedic specialist in the tort claim as well as for a Part 7 claim.