

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120104
Docket: M092513
Registry: Vancouver

Between:

William Michael Craik

Plaintiff

And:

**Keegan Lennie and
PML Professional Mechanical Ltd.**

Defendants

Before: Master Baker

Oral Reasons for Judgment

In Chambers
January 4, 2012

Counsel for the plaintiff:

D.J. Gomet

Counsel for the defendants:

S. Sharma

Place of Hearing:

Vancouver, B.C.

[1] **THE COURT:** This is an application for an order that the plaintiff attend for an IME, essentially a functional capacity evaluation, to take place tomorrow. The trial for this matter is set on the 5th of March this year for ten days. It all arises out of a motor vehicle accident which occurred in April of 2009.

[2] Defence was served with several expert reports marginally after the expiry of the 84 day deadline; in other words, in mid or late December. It is interesting to me that, firstly, the deadline was missed by the plaintiff and yet it is now opposing the defence's attempts to respond to one aspect of those reports, which is a functional capacity evaluation and report prepared by, I think, Mr. Williams, an occupational therapist. So it is ironic that they are opposed when they themselves apparently have missed, even by a marginal few days, the deadline.

[3] One of the emphatic points made in opposition by the plaintiff is that this is a veiled attempt to obtain new evidence; in other words, to essentially create and deliver an 84 day report, if I can call it that, as opposed to a 42 day report. That it is not a really proper responsive report at all.

[4] I am entirely in agreement with Mr. Sharma's submissions that that will be for the trial judge to decide. It is absolutely possible that experts out there might transgress and go over the lines a little bit, I do not know, but I am not prepared by any means to conclude at this time, nor do I think the case law directs that I consider that unless it is an obvious and egregious circumstance.

[5] I think *Luedecke v. Hillman*, 2010 BCSC 1538, a decision of then Mr. Justice Cullen on appeal from Master Scarth, has given a considerable direction, and also, I

think, direction to experts or professionals in the circumstances of Mr. Emnacen, the proposed OT examiner. I cannot add anything to Master Scarth's comments in that case as quoted by Judge Cullen, nor obviously to Judge Cullen's conclusion, which, while there is an evidentiary threshold to be met in a case like this, I do not think it is a very high threshold, and I am satisfied that Mr. Emnacen has tried to keep himself within those strictures and has in fact succeeded in that. Without addressing his affidavit in great detail, I am satisfied that para. 9, for example, indicates why it is he feels he has to personally examine the plaintiff and resolve what he thinks, one way or the other, are inconsistencies that he as a fellow professional perceives or suspects in Mr. William's report.

[6] Even Mr. Gomel acknowledged that the work of an occupational therapist on a task like this is a mixture of the objective and subjective, and I cannot see why Mr. Emnacen, in the circumstances, should not be given a reasonable opportunity to properly exercise that subjective judgment then, that that would be a huge aid to personally see Mr. Craik.

[7] I am also in sympathy with counsel's perspective. Mr. Swadden has said, look, this fellow was in construction. He was a carpenter before the accident happened. He re-entered the construction field, true, perhaps not as a carpenter, but working in an obviously taxing physical job, that is, rain screen remediation. I have a sense of what that includes: scrambling around on scaffolds, that sort of thing. It is not a light-duty job, and he did that after the accident, so it does not surprise me that counsel, as a tactician or strategist, would say, well, you know, he is back doing something like what he did before. I don't have to expend the costs

and financial commitments of a functional capacity evaluation, notwithstanding, as Mr. Gomel has pointed out, that that is part of the pleadings. I would not say anybody has lulled anybody, but I cannot argue at all with the perceptions that counsel has stated in his own affidavit.

[8] So I am satisfied in all the circumstances that this is an appropriate case for the IME as requested, so that a responding report can be prepared. As I say, whether that goes beyond the bounds of what is a proper response and contravenes the 84 day rule will be up to a trial judge to decide where it will go.

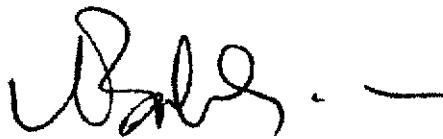
[9] Anything else?

[10] MR. SHARMA: Only on the issue of costs. It's our submission we were successful in this application. Mr. Swadden towards the end of his affidavit kind of talks about attempts to get plaintiff's consent. We started contacting plaintiff counsel December 21st, and so in my submission it's costs in any event of the cause.

[11] THE COURT: Mr. Gomel.

[12] MR. GOMEL: I have nothing on costs.

[13] THE COURT: Thank you. They are entitled to their costs. The usual rule should follow. You are entitled to your costs. Thank you.



Master D. Baker