

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120530
Docket: M59086
Registry: Nanaimo

Between:

Amanda Jean Pitts

COPY

Plaintiff

And:

Jeffrey Bruce Martin and A.O.K. Equipment Ltd.

Defendants

Before: The Honourable Mr. Justice Dley

Oral Ruling re Admissibility of Evidence of Mark Swain

Counsel for the Plaintiff:

D. Brooks

Counsel for the Defendants:

N. Cederberg

Place and Date of Trial/Hearing:

Nanaimo, B.C.
May 30, 2012

Place and Date of Judgment:

Nanaimo, B.C.
May 30, 2012

[1] **THE COURT:** The issue before me is whether or not the evidence given by Mr. Swain with respect to his examination of Ms. Pitts, as completed last Wednesday, is admissible.

Background

[2] Mr. Swain provided a report in 2009, when he examined Ms. Pitts in his capacity as a kinesiologist and tendered a functional capacity evaluation summary report. That report has been submitted by Ms. Pitts as an expert's report, providing an opinion with respect to four questions that related to Ms. Pitts' "current functional abilities".

[3] The questions that were asked of Mr. Swain were as follows:

1. Did this client provide a full physical effort during testing?
2. Are this client's subjective symptom reports reliable?
3. What are this client's overall safe functional abilities?
4. What are this client's current limitations?

[4] Mr. Swain, after conducting a number of tests, provided his opinions with respect to those four questions. That opinion evidence has been ruled as admissible in these proceedings.

[5] The short question asked to Mr. Swain with respect to his testing was whether or not that resulted in any significant change to his findings of 2009. In my view, the answer that was given, and his answer was that there was no significant change to his findings, related specifically to the four questions that were asked of him in 2009. Those four questions were answered and based on the results of tests that he and Mr. Stevens conducted.

[6] As pointed out by Mr. Brooks, if the drawing of inferences from facts cross the border from straight facts to opinion, then Mr. Swain's testimony with regard to last week's examination would be expert evidence. In my view, it does cross the line.

Even though the testimony that he has provided dealt only with his findings of fact, the inevitable result is that I am going to be asked to draw inferences from that finding and relate it back to what he found in 2009.

[7] Accordingly, that would be expert evidence and the appropriate notice and format has not been followed.

[8] I should also say that the defence is put in the very untenable position of trying to respond or prepare for a response to Mr. Swain's testimony without any written material that is either understandable or legible. Mr. Swain conceded that his notes might be difficult for someone else to follow.

[9] As a result, in order to ensure that this is a fair trial, and that the defence be given the opportunity of a full answer and defence, and one that is based on a reasonable understanding of the case that it is to meet, I agree with Ms. Cederberg's position that it would have been very difficult, if not impossible, to prepare for a meaningful cross-examination of Mr. Swain based on the materials provided and with respect to this short notice.

[10] Accordingly, I am not going to admit Mr. Swain's testimony with respect to last week's examination as expert evidence, and I will not consider it in my decision.

DLEY J.

A handwritten signature in black ink, appearing to be 'DLEY J.', written over the printed name.