IN THE MATTER OF AN ARBITRATION PURSUANT TO S. 148.2 OF THE INSURANCE (VEHICLE) REGULATION, B.C. Reg. 447/83 and the Arbitration Act [SBC 2020] c. 2

BETWEEN:

SM

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

SUPPLEMENTAL AWARD RE COSTS

Counsel for the Claimant, SM	Wesley D. Mussio
Counsel for the Respondent, Insurance Corporation of British Columbia	Robert D. Shaw
Submissions of the Respondent dated:	June 29, 2023
Submissions of the Claimant dated:	July 19, 2023
Arbitrator:	Dennis C. Quinlan, K.C.
Date of Award:	August 17, 2023

I. INTRODUCTION

1. On June 19, 2023, I delivered an arbitration award (the "Award") dismissing the Claimant's application for a declaration that she was an insured pursuant to section 148.1 (1) of the **Insurance (Vehicle) Regulation** B.C. Reg. 447/83 (the "Regulation").

2. In respect to costs I stated at paragraph 172:

> In the circumstances, my preliminary view would be that each party bear its own costs. Should the Respondent wish to pursue costs, then it should deliver its written submission within ten days from delivery of this Award, with the Claimant having seven days to respond.

3. The Respondent subsequently delivered Submissions Regarding Costs dated June 29, 2023 wherein it sought an order that it "….be awarded costs at Scale B and disbursements of this proceeding".

4. I extended the time for the Claimant to respond and on July 19, 2023, she delivered her Submissions Regarding Costs seeking an order that "….each party bear its own costs".

II. BACKGROUND

5. The Claimant sustained serious injuries on December 7, 2019 while riding as a passenger in a single vehicle accident wherein the vehicle left the roadway and went down an embankment (the "Accident").

6. The vehicle was operated by an "uninsured motorist" as that term is defined in section 20 of the **Insurance (Vehicle) Act** [RSBC 1996] Chapter 231 (the "Act").

7. On November 17, 2021, the Claimant and Respondent entered into an agreement whereby the Respondent would pay the Claimant the sum of $50,000 in respect to her section 20 claim (the "Agreement").

8. The Agreement further provided, inter alia, that:

    - the remaining issues would be resolved by an underinsured motorist protection ("UMP") arbitration pursuant to section 148.2 (1) of the Regulation;
    - the issues to be resolved in the UMP arbitration would include entitlement to UMP, liability for the Accident, assessment of damages and deductibles;
    - the Supreme Court Civil Rules (the "Rules") would apply to the UMP arbitration;
    - the costs of the arbitration would be shared equally, subject to the parties agreeing otherwise, or the arbitrator ordering otherwise; and
    - the issue of costs and disbursements would be decided by the arbitrator.

9. In March, 2022 I was appointed arbitrator in respect to the within matter and three other UMP claims arising out of the Accident.

10. In a pre-arbitration telephone conference with counsel on June 2, 2022, a joint liability arbitration hearing involving the four claimants and Respondent was scheduled for six days commencing July 4, 2023. The only issue for determination at the July 4, 2023 hearing was to be the Respondent's allegation of contributory negligence against each of the four claimants for accepting a ride with an impaired driver.

11. The Respondent confirmed at the June 2, 2022 telephone conference that it was continuing to challenge the Claimant's entitlement to UMP

coverage on the basis she was not an insured as defined in section 148.1 (1) of the Regulation. This position was repeated in the Respondent's Statement of Defence dated June 14, 2022.

12. On or about July 13, 2022, the Respondent admitted liability for the actions of the uninsured driver, subject to the allegation of contributory negligence against the four claimants. Previous to that admission, liability was denied.

13. The Claimant delivered a Notice of Application dated April 13, 2023 seeking a declaration that she was an insured for the purpose of UMP coverage at the time of the Accident, together with an order for costs payable forthwith by the Respondent.

14. The arbitration hearing in respect to the Notice of Application was conducted May 18, 2023.

15. On May 26, 2023, the Respondent through counsel, gave notice that the allegation of contributory negligence would not be pursued against the four claimants. As a result the July 4, 2023 hearing was no longer necessary.

16. Following delivery of my Award, I was made aware that by letter from counsel dated February 17, 2023 (that is three months prior to the May 18, 2023 arbitration hearing), the Respondent sought a consent dismissal of the UMP claim on the basis the Claimant did not meet the definition of insured in section 148.1 of the Regulation and therefore was not entitled to UMP.

17. The February 17, 2023 letter referenced and enclosed what the Respondent described as "….overwhelming evidence that [the Claimant] was living alone at the time of the Accident" and as such was not a

member of a household of a person named in an owner's certificate or driver's certificate.

18. The February 17, 2023 letter concluded as follows:

> We have instructions to seek a consent dismissal of the arbitration proceedings on a without costs basis to any party. This proposal remains open until 03 March 2023. If [the Claimant] does not agree to a consent dismissal on a without costs basis by 03 March 2023, ICBC will be pursuing its costs and disbursements of the arbitration proceeding against [the Claimant].
>
> On acceptance of this offer, [the Claimant] agrees to execute and deliver a full and final release in respect of ICBC and to consent, by her solicitor, to a consent dismissal order.

19. The offer contained in the February 17, 2023 letter was not accepted by the Claimant.

III. POSITION OF THE PARTIES

20. The Respondent submits that as the successful party, it is entitled to costs in accordance with Rule 14-1 (9).

21. It asserts the presumption that costs be awarded to the successful party is a strong one, requiring of special circumstances for there to be a departure from the usual rule.

22. The Respondent says there are no such special circumstances. The February 17, 2023 letter provided the Claimant with clear notice that if she did not accept the offer, costs and disbursements would be pursued against her.

23. The Claimant submits she will suffer severe hardship if she is forced to bear the Respondent's costs, which hardship is directly connected to her injuries sustained in the Accident as she has been left with an inability to earn an income and pay for treatment not otherwise covered by the Respondent.

24. In the Claimant's submission, the issue of whether she was an insured was relatively novel for which there was limited court or arbitration direction. Given the all or nothing potential outcome, she was forced to advance a meritorious claim, which she did without misconduct.

25. Further she necessarily incurred time and expense in successfully defending the issues of liability and contributory negligence which the Respondent ultimately decided not to pursue.

26. As to the February 17, 2023 letter, the Respondent says the letter was not a formal offer to settle because it did not include the required sentence as specified in Rule 9-1 (1)(c). Even if deemed to be a formal offer to settle, it was not one that should reasonably have been accepted because it provided no more than the Claimant's worst outcome if she was to advance her claim through the arbitration hearing.

27. I note at this point the decision of ***Roach v. Dutra***, 2010 BCCA 264 at para. 52 held that word for word compliance was not necessary for there to be a valid offer under Rule 9-1, so long as there was substantial compliance such that no reasonable person could be mislead as to the intent of the offer.

28. Finally the Claimant submits the Respondent "…does not come to the arbitration with clean hands…" for reasons related to its "aggressive hard nail approach" which drove up cost and expense. While the Respondent

had every right to take such approach, it risked not receiving costs even if successful in the arbitration.

IV. APPLICABLE PRINCIPLES

29. The parties helpfully in their submissions set out the leading authorities and I will extract those principles most relevant to the question before me.

30. Rule 14-1 (9) provides that costs in a proceeding must be awarded to the successful party unless the court otherwise orders.

31. Costs are very much in the discretion of the judge, but the discretion given by Rule 14-1 (9) must be exercised judicially and in a manner consistent with the Rules and long standing principles governing such awards: ***Gichuru v. Smith***, 2014 BCCA 414 at para. 100.

32. Such discretion is limited and dependent upon whether there are special circumstances arising out of and connected with the litigation itself: ***Sutherland v. the Attorney General of Ca*nada,** 2008 BCCA 27 at para. 26; ***Dairy Queen Canada Inc. v. M.Y. Sundae Inc.***, 2017 BCSC 358 at para. 131.

33. At its most basic level the successful party is the plaintiff who establishes liability under a cause of action, or a defendant who obtains a dismissal of the plaintiff's case: ***Loft v. Nat***, 2014 BCCA 108 at para. 46.

34. Sympathy and financial hardship, standing alone, are not sufficient to justify departure from the general rule that costs follow the event: ***Morris v. D*oe**, 2011 BCSC 1053 at para. 36.

35. Rule 9-1 dealing with offers to settle was described in ***Wafler v. Trinh***, 2014 BCCA 95:

> [79] Pursuant to Rule 14-1(9) of the Supreme Court Rules, Mr. Wafler, as the successful party, is entitled to his costs unless the court orders otherwise. Pursuant to Rule 9-1(4), the court may consider an offer to settle when exercising its discretion in relation to costs. Rule 9-1(5) enumerates the orders the court may make. In making an order under subrule (5), the court may consider the factors listed in subrule (6).

Emphasis in judgment

36. In circumstances where an offer to settle is made so as to invoke the criteria set forth in Rule 9-1 (6), and in particular the relative financial circumstances of the party described in subrule (c), the involvement of an insurer such as the Respondent may well play a role in an award of costs. In ***Smith v. Tedford***, 2010 BCCA 302 at para. 19, Justice Lowry stated that to preclude such consideration would be "very artificial indeed".

V. DISCUSSION

37. There is no debate the Respondent, having effectively achieved a dismissal of the Claimant's claim, was the successful party.

38. Given the Claimant did not make any offers to settle so far as I am aware, the only question is whether there is a principled basis for me to make an order that departs from the usual rule of costs following the event.

39. Justice Ker in ***Morris v. Doe***, 2011 BCSC 1053 at para. 31 summarized the applicable analysis as follows:

> [31] The parameters within which this exercise of discretion is governed have been variously stated as:
>
> - unless special circumstances can be

> established that would warrant depriving the successful party of an award of costs following trial, the successful party should receive their costs.
>
> - a judge ought not to exercise their discretion against a successful party except for some reason connected with the case or leading up to the litigation.
>
> Citations omitted

40. I should say that similar to the comments expressed by Justice Ker in ***Morris*** at para. 56, I have some sympathy for the position of the Claimant given her difficult life and financial circumstances as outlined in the Award. I accept however that such considerations, standing alone, are not grounds upon which I may depart from the usual rule of costs following the event.

41. I will address each of the arguments advanced by the Claimant.

42. The Claimant relies upon the decision of ***Anderson v. Kozniuk***, 2016 BCSC 783 where a defendant was not awarded costs even though the amount awarded to the plaintiff was less that the amount of the offer. She also cites a number of cases following ***Smith v. Telford*** for the principle that relative financial circumstances can be considered in a cost award.

43. While I agree with the statements made in those decisions, they must be viewed in a cautionary light, given none of them involved an outright dismissal of the plaintiff's case.

44. The Claimant also referred to the decision of ***Rabnett v. Halliday***, 2022 BCSC 1759 stating that the involvement of an insurer carries no weight unless the insurer used its financial resources in a way that distorted the

litigation process, created an unfair advantage or lead to unnecessary costs.

45. ***Rabnett*** leads into the Claimant's argument that the Respondent did not conduct the arbitration with clean hands and therefore should be deprived of costs.

46. I have reviewed the complaints of the Claimant in terms of how the Respondent conducted its defence and can see no basis for such assertion.

47. The Respondent was entitled to thoroughly investigate the living arrangements alleged by the Claimant, particularly in light of statements to social assistance authorities and various medical practitioners that she was living alone at the time of the Accident which on its face were directly contrary to her position in the arbitration that she was living together in a family unit with her parents and boyfriend.

48. I therefore reject the submission that any actions of the Respondent in its conduct of the litigation amounted to acting without clean hands so as to warrant a denial of costs: ***Latkin v. (Vancouver)***, 2014 BCSC 484 at paras. 30, 32.

49. I return to the Claimant's principle argument that her financial circumstances in conjunction with the advancement of a novel and meritorious case should be taken into account in the exercise of my discretion as to a cost award.

50. Such argument, if limited as I have described it, would not reflect a principled basis upon which to deprive the Respondent of its costs. While the facts were unusual, the legal principles involved were long standing. Further, in ***Chen v. Beltran***, 2011 BCSC 41, Justice Greyell stated:

> [15] To conclude otherwise, would undermine the rationale underlying Rule 14-9 and would likely lead to the promotion of litigation rather than to promote the "winnowing" function described by Hall, J.A. in *Catalyst Paper.* It would lead to the collapse of the general principle discussed in the authorities and result in the unacceptable proposition that costs in each case would be measured not by a party's success but by the personal financial circumstances of the litigants.

51. However the exercise of my discretion should in my view, take into account the context within which the Claimant is required to advance her claim. The mechanism for resolution of an UMP dispute and the financial impact such mechanism has on the parties to the dispute carries importance which cannot be ignored.

52. UMP is a statutory form of first party insurance which provides compensation to an insured person in the event an at-fault motorist has insufficient or no liability insurance or other assets with which to pay a judgment.

53. Pursuant to section 148.2 of the Regulation, any dispute as to whether a person is entitled to UMP coverage, and if so, the amount of compensation, must be submitted to arbitration under the **Arbitration Act.**

54. As a consequence of the mandatory requirement to proceed by way of arbitration, the parties are required to pay for the cost of the arbitration including most significantly, the arbitrator's fees.

55. This was confirmed in the November 17, 2021 Agreement where the Claimant and Respondent confirmed they would share the cost of the

arbitration equally, subject to agreeing otherwise, or the arbitrator ordering otherwise.

56. In ***Insurance Corporation of British Columbia v. E.B.***, 2023 BCSC 120 at para. 112, Justice Crossin stated "….it is clear that the arbitrator's fees are not incurred because of the "circumstances of the litigant" <u>but rather the fact that the claimant is involved in an UMP arbitration."</u>

Emphasis added

57. The legislated mandate requiring arbitration to determine UMP disputes thereby creates an important distinction from a Supreme Court proceeding, where the litigant(s) does not have to pay for the cost of the judge or courtroom.

58. The cost of an arbitration can be significant to the parties, particularly a person in the financial position of the Claimant, who then sustains serious injury as a result of an accident.

59. I repeat the observation I made at paragraph 96 of the Award:

> 96. I pause here to say that subject to the Claimant being able to establish she meets the definition of an insured, she would be a person contemplated by UMP legislation – that is a person who suffered loss as a result of an at fault motorist who had no liability insurance or other assets with which to pay a judgment.

60. I note the Respondent does not seek an order for double costs, which given the dismissal it might have sought: ***Evans v. Jensen***, 2011 BCCA 279 at para. 44.

61. The issue is whether an order should be made to effect some departure from the usual rule.

62. I have concluded such order should be made.

63. In fashioning my order, I will deal with the issue of the Claimant's status as an insured separately from the liability and contributory negligence issues.

64. The Claimant was faced with the all or nothing proposition of being an insured, or not. On that question there was no "in-between" answer.

65. The only incentive provided by the February 23, 2023 offer from the Respondent, was the opportunity to avoid the cost remedy now being sought.

66. This is not to say an offer which does not provide an incentive to settle is determinative. It is not, but in the circumstances, I cannot say it was unreasonable for the Claimant to have rejected the offer: ***Ward v. Klaus,*** 2012 BCSC 99 at para. 39.

67. In considering an offer to settle, Rule 9-1 (6)(c) provides that the relative financial circumstances of the parties may be considered. In my view, the fact that this is an arbitration imposed by legislation upon the parties and in particular the Claimant, creates a special circumstance which I can take into account in the exercise of my discretion as to costs.

68. The ability of the Claimant to deal with the cost of the arbitrator, even if equally shared, pales in comparison to that of the Respondent. Such circumstance would necessarily not have factored into actions brought within the Supreme Court.

69. Finally, the Claimant believed in the strength of her position. It cannot be said her claim was frivolous or completely devoid of merit.

70. Having said that, the Claimant was clearly put on notice by the letter of February 17, 2023 that there were considerable difficulties in her case and costs would be pursued if she was unsuccessful.

71. In summary by the time the Respondent's offer expired on March 3, 2023 and certainly by April 13, 2023 when the Claimant delivered her Notice of Application and supporting affidavits, the evidence and main issue had crystallized such that she was fully aware of the potential risk and cost consequences of moving forward.

72. As stated it ***Morris*** at para. 23, "…it must be inferred [she] weighed the risks of proceeding and implicitly accepted the risk of having her action dismissed and costs awarded against her if unsuccessful."

VI. CONCLUSION

73. I conclude therefore that the appropriate result related to the entitlement issue is for the Respondent to be awarded, in accordance with section 148.2 (3) of the Regulation, its costs and disbursements on a party and party basis at Scale B from April 13, 2023 onward.

74. In respect to the liability and contributory negligence issues raised by the Respondent, these were eventually abandoned as earlier outlined. Until then, time and expense were incurred by the Claimant in dealing with them.

75. Rule 14-1 (15) allows for an award of costs related to a particular matter or issue which is in keeping with the basic objects of the Rules: ***Lee v. Jarvie,*** 2013 BCCA 515 at paras. 28, 31, 39.

76. In respect to these two matters, I am of the opinion that a fair result is for each party to bear their own costs.

77. Given there has been divided success, I order that each party bear their own costs of this application.

Dated: August 17, 2023

Dennis Quinlan

Arbitrator – Dennis C. Quinlan, K.C.