IN THE MATTER OF AN ARBITRATION pursuant to s. 148.2(1)
of the Revised Regulation under the *Insurance (Motor Vehicle) Act*, (B.C. Reg. 44/83)
And the *Commercial Arbitration Act*, R.S.B.C. 1996 c. 55

BETWEEN:

RAH

CLAIMANT

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

Donald W. Yule Q.C., Arbitrator

Dates of Hearing:	**March 31, April 1 and 2, 2008**
Place of Hearing:	**Victoria, British Columbia**
Date of Award:	**April 24, 2008**

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INTRODUCTION

1. Pursuant to the provisions of s. 148.2(1) of the Revised Regulation (1984) under the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996 c. 231 and the *Commercial Arbitration Act*, R.S.B.C. 1996 c. 55, the parties have submitted for determination the assessment of the quantum of damages attributable to the personal injuries sustained by RAH (the "Claimant") arising out of a motorcycle accident that occurred on June 21, 2002 in Powell River, B.C. (the "Accident").

2. Liability for the Accident has been admitted. It is admitted that the Claimant was a person insured for the purposes of entitlement to UMP compensation. The amount of any applicable deductible amounts has been agreed upon. The quantum of damages for loss of housekeeping and loss of handyman ability has been agreed upon at $19,000.00. Accordingly, the issues for determination are the quantum of general damages, past income loss and loss of future earning capacity.

BACKGROUND CIRCUMSTANCES

3. The Claimant, born March 11, 1952, is a Registered Nurse. He is married to his wife, J. and lives in Powell River, B.C. They have four children, ranging in ages from 16 years to 27 years. At the time of the Hearing, only their 16 year old son still lived at home. At the time of the Accident the Claimant was working as an industrial nurse/medic for P.A. Service Ltd. ("P.A.") at Swimming Point, Northwest Territories. He had been employed in this capacity with P.A. since September, 2000. Swimming Point is approximately 100 kms north of Inuvik, Northwest Territories. P.A.'s clients were mostly in the energy and mining industry and occasionally in the forestry industry. The work involved remote locations. Immediately prior to the Accident, the client had worked two shifts of 28 days on and 14 days off. All his transportation, food, accommodation and

living expenses were paid by P.A. once he departed the Comox, B.C. airport. In the Accident he sustained a severe injury to his left knee. This has necessitated two surgeries to date with the prospect of a total knee replacement in the future. The Claimant has not worked since the Accident. The Respondent concedes that the Claimant can no longer work at his former job with P.A. but asserts that with some upgrading of his existing skills he is, and should have been for some time, capable of less physically onerous employment. The Claimant asserts that he is permanently, competitively unemployable, although he may be capable of earning a very minimal income in the future.

INJURIES, TREATMENT AND PROGNOSIS

4. The Accident occurred in Powell River on June 21, 2002. The Claimant was transported by ambulance to the Powell River & District Hospital where his left leg was x-rayed. He was transferred by helicopter to Vancouver General Hospital and admitted under the care of Dr. Blachut. On June 22nd, 202 Dr. Blachut operated to reduce a comminuted fracture of the left medial and lateral tibial plateaus which were stabilized with two plates and screws. There was articular damage in both compartments. The Claimant was discharged on June 26th but seen next in follow up by Dr. Blachut on September 23, 2002. He was still non-weight bearing, and x-rays showed a good overall result. There was a 15° left knee flexion deformity.

5. The Claimant was seen by Dr. Blachut in follow up on two further occasions in October and December, 2002 and some concern was expressed that the Claimant was still taking Percocet and seemed reluctant to weight-bear through the left leg. Self-directed rehabilitation was encouraged.

6. Subsequently the Claimant came under the care of another orthopedic surgeon, Dr. Botsford who assessed the Claimant in July, 2003 and performed further

surgery on March 2, 2005 by way of left knee arthroscopy and removal of hardware.

EXPERT REPORTS

7. Both parties filed expert reports from orthopedic specialists. Dr. Leete's two reports are dated January 4, 2005 and August 2, 2006 (Exhibits 9 and 10). Dr. Ellis' reports for the Respondent are dated September 28, 2005 and November 1, 2005 (Exhibits 16 and 17). Neither expert was required to be produced for cross-examination. There is not a great deal of disparity between their respective opinions.

OPINION OF DR. LEETE

8. Dr. Leete examined the Claimant on January 4, 2005. He reviewed a number of clinical and other records not in evidence. At the time of his examination, the Claimant asserted (left) knee discomfort at a level of 2 – 3 (out of 10) which could worsen with extreme activity. There was discomfort in both shoulders at a level of 3 out of 10. (In March, 2002, approximately 3 months before the Accident, the Claimant underwent surgery on his left shoulder for a pre-existing rotator cuff condition.) On clinical examination the Claimant had a slight valgus deformity at the left knee and the knee was held in 5°- 10° short of full extension. The Claimant walked with a limp favouring his left side and used a cane in the right hand. Surgical scars were present. There was a 10°loss of full extension and a 5° loss of flexion. There was swelling but not effusion of the left knee. There was no ligamentus instability of the knee nor crepitus on flexion or extension of the knee joint.

9. Review of x-rays from the Powell River & District Hospital showed a Schatzker-type V fracture of the proximal tibial metaphysis. The articular surfaces were splayed both medially and laterally. Post-reduction films showed overall

satisfactory realignment of the tibia with two plates and ten screws but marked disruption of the articular surface, both medially and laterally and depression of the articular surface on both sides and disruption of the articular surface, especially laterally.

10. Dr. Leete concluded that the Claimant had sustained a very severe fracture through the proximal tibia and had obtained a very satisfactory overall alignment of the fragments through surgery, although the degree of initial damage was so great that a total anatomical restoration of the joint surface was impossible. In the result, the Claimant was left with marked disruption of the articular surface which accounted for on-going pain and inability to regain full movement of the left knee. The long term outlook was for a gradual worsening of symptomatology and the requirement of further surgery in the future, most likely a total knee replacement. Although estimating the time when this surgery would be required was somewhat difficult, Dr. Leete thought it would occur "within a five year time frame", (ie. around 2010).

11. Dr. Leete agreed that the Claimant was not fit to return to his former employment although there were other more sedentary occupations to which the Claimant would be more suited. A total knee arthroplasty would involve a period of morbidity of 4 to 6 months, during which the Claimant would not be able to work. There would probably be further loss of range of movement. A further revision of the total knee arthroplasty would probably be required 15 years later and result in further loss of range of movement.

12. In his second report, in August, 2006, Dr. Leete agreed that the Claimant might be able to work at an immunization centre or something of that nature but that many aspects of community nursing would be too much for him. The Claimant ought to avoid prolonged standing, heavy lifting or work on uneven surfaces and stairs. Occupations that involved repetitive knee flexion and standing with the knee flexed would be extremely harmful. The Claimant required a job which would

enable him to move around freely to avoid prolonged sitting and prolonged standing and walking. Any heavy lifting and working with the knee in one position or working in confined spaces would be out of the question.

13. Dr. Leete thought that the Claimant's shoulder discomfort was not severe. He had recently undergone left rotator cuff surgery and the shoulder problems were exacerbated by his having to use crutches. A multiplicity of x-rays had not shown any significant pathology. Once the Claimant was free of orthotic aids, most of the shoulder problems should resolve.

DR. ELLIS

14. Dr. Ellis examined the Claimant on one occasion on September 26, 2005. He also reviewed a number of medical records and reports not proven in evidence. On clinical examination the Claimant showed no evidence of "pain behaviour". The left knee had a 10° flexion contracture; there were residual soft tissue swelling about the left knee. There was some patellofemoral crepitus on the left knee but no joint effusion. There was global tenderness around the medial and lateral joint lines and proximal tibia. Because of the flexion contracture of the left knee, the left iliac crest was 1 cm. lower than the right.

15. Review of x-rays indicated a markedly comminuted fracture of the proximal left tibial plateau involving both medial and lateral aspects, with articular irregularity. Post-reduction x-rays showed satisfactory alignment with evidence of residual articular irregularity in both compartments, most markedly laterally.

16. Dr. Ellis supported a recommendation of on-going active rehabilitation, utilizing pool and strengthening exercises and discouragement of the Claimant using a motorized scooter. Dr. Ellis thought that the Claimant would eventually be able to manage without a cane but would not likely regain the last 10° of left knee joint extension. It was also more probable than not that the Claimant would have on-

going intermittent discomfort in his left knee, particularly with prolonged time on his feet, especially on uneven ground or stairs or slopes. He would not be able to assume a full squat or kneeling position on the left side. These limitations would render him less competitively employable in other than sedentary or light physical work. His intolerance to cold would also contribute to future knee symptoms. He would not be able to return to his pre-Accident work in the Arctic.

17. Dr. Ellis thought that it was likely that the Claimant would be able to manage for day-to-day activities for at least a further 10 to 15 years, assuming he completed a rehabilitation program, controlled his weight, and avoided aggressive physical activities that would increase the stress on his knee. He would eventually progress to post-traumatic degenerative arthrosis, with increasing symptoms as a result, so that he would likely require anti-inflammatory medication and possibly unloader bracing or walking assists and eventually reconstructive surgery, likely in the form of joint arthroplasty. Dr. Ellis estimated the joint arthroplasty (knee replacement) would not likely be required for 20 years (ie. 2025). The surgery would involve 3 – 4 day hospitalization, a potential complication rate and a post-surgery recovery period of some 3 to 6 months. Dr. Ellis recommended a functional evaluation after a further period of 3 months which might permit a trial return to limited nursing work; otherwise alternative less demanding work would be required.

18. In his supplementary report dated November 1, 2005, with respect to future employability, Dr. Ellis wrote:

> "If there was a position such as at an immunization centre or medical clinic, [the Claimant] would more probably than not be able to manage the work. However, the more intensive aspects of community nursing, which can involve lifting elderly patients, walking on uneven surfaces, standing for prolonged periods or considerable stair climbing, would likely hasten the onset of symptoms related to post-traumatic arthritis in his knee.

> While I would expect there is potential for employment in the nursing field, especially with his emergency training, the specifics of each job would have to be known to allow for avoidance of those activities that would aggravate his symptoms or hasten the degenerative process in his knee."

19. With respect to left shoulder symptoms, Dr. Ellis' clinical exam on September 26, 2005 did not reveal any evidence of rotator cuff disruption or functional impairment of the left shoulder.

EVIDENCE OF THE CLAIMANT

20. The Claimant describes his left knee as having been "shattered" in the Accident. He was 12 hours in emergency at the Powell River Hospital before being air evacuated to Vancouver General Hospital. He had surgery there to put in two plates and 10 screws the next day. Although the hardware was intended to stay in place, ultimately the screws became painful and he had a second surgery to remove the hardware. He was bedridden for a period of time after returning to Powell River. He could not weight-bear for about 18 weeks. He then progressed to a walker and half-crutches which he continued to use for about 1½ – 2 years. He now uses a cane, especially if on uneven surfaces; otherwise his leg gets very sore. His wife took "stress leave" from her job at the Powell River Hospital in order to look after him during the initial months after the Accident.

21. The Claimant has participated in various rehabilitation activities. He attended On Trac Physiotherapy in Powell River for about a year, receiving strengthening ultrasound and laser treatments. He attended Avid Fitness Exercise Club and under the guidance of a kinesiologist engaged in a swimming pool therapy program. He still exercises in a pool. He has weights which he uses at home for leg and body strengthening.

22. With respect to pain, after the initial surgery, the pain level has never been below 3 on a scale of 10. Weather and activities can increase the pain level to an 8.

After 45 minutes of sitting, he can feel a build up of pain in the knee. He currently takes Extra Strength Tylenol every 4 to 6 hours and Percocet for "break through" pain. Percocet is used as a back up only and not taken on a regular basis. He can sometimes go 2 to 3 weeks without taking any narcotic for pain.

23. The left knee still swells and is very painful if he walks on it too much or sits for too long. The knee feels like it gives way if he steps on a small rock or does not notice a change in elevation.

24. His sleep continues to be affected. He wakes up at night a lot because the leg twitches or is in spasm. Some nights he only gets 1½ to 2 hours sleep. Because his sleep is so disturbed, he now sleeps in a separate bedroom from his wife and has bought a new bed with head and foot elevation.

25. There have been times when he has felt depressed and more than five years after the Accident he still wonders at times, when his knee is particularly painful, why he should carry on. He can now quickly put those thoughts aside by thinking of his wife and family.

26. Although he has an electric scooter he only uses it for long distances. He walks as much as possible and with some satisfaction observes that his leg muscles have not deteriorated. He is not able to go up or down stairs normally. He pulls his way up stairs and "bounces" downstairs on his right leg. His left knee becomes sore if it remains flexed at 90°. The knee discomfort eases if he can sit with his leg elevated for an hour or so. He has a lazy boy chair which he uses for this purpose. He understands that knee replacement surgery is not expected to occur until the knee pain becomes intolerable. If he takes his time and uses his cane he can walk a kilometer on even pavement.

ACTIVITIES

27. The Claimant obtained a Bachelor of Theology degree from the Burrard Inlet Bible Institute. He was an elder in the Mormon Church and active in church activities. He remains active in a leadership position in his church, helping to organize a "good food box", a program to distribute wholesome food to low income residents in Powell River.

28. The Claimant has been involved with the Boy Scouts organization since 1960. Prior to the Accident he enjoyed camping, hiking and fishing. He now only does administrative tasks for the Scouts.

29. The Claimant was previously a member of the Fourth Ranger Group, a military organization. He used to be able to go out on maneuvers with this group but it requires being able to hike 4 miles with a pack up a mountainside. His involvement now is restricted to acting as "camp watch".

30. The Claimant is keenly interested in his youngest son's hockey and lacrosse activities. However, he cannot sit in a hockey arena to watch games because of the cold and must, instead, stay in the warm-up room. At present he also volunteers running a noon hour canteen at his youngest son's school.

GENERAL DAMAGES

31. The Claimant sustained severely comminuted medial and lateral tibial plateau fractures of the left knee. He has undergone two surgeries, one to reduce the fractures with two plates and 10 screws and a second procedure to remove the hardware. He faces the prospect of further surgery for a total knee joint replacement with a possible further revision 15 years later. He has permanent on-

going pain which will inevitably worsen over time until the first knee joint replacement surgery is done. He has permanent loss of flexion of the left knee and knee joint replacement surgery will likely increase the loss of flexion. He cannot return to his former occupation as industrial nurse/medic. He cannot walk or sit for prolonged periods of time without causing an increase in left knee pain. He takes non-morphine analgesics on a daily basis and occasionally Percocet for break-through pain. He continues to use a cane. Prolonged standing, walking on uneven surfaces, and going up and down stairs all aggravate his symptoms and will hasten the time when knee joint replacement surgery is required. The Claimant was physically active outdoors, apart from his work, before the Accident, both in the Scouting and Fourth Ranger groups and for recreational hiking, hunting, fishing and camping. These activities except in a most limited and superficial manner, are now foreclosed to him.

32. I have reviewed the case authorities provided by both counsel respecting general damages. The Claimant submits that non-pecuniary damages should be assessed in the range of $105,000.00 to $125,000.00, relying particularly on the cases of *French v. Ft. St. John* [2003] B.C.S.C. 932 and *Kosugi v. Krueger* [2007] B.C.S.C. 278. The Respondent submits that non-pecuniary damages should be assessed in the range of $85,000.00 to $90,000.00 relying particularly on the cases of *Barkman v. Roy* [2005] B.C.S.C. 837, *Graham v. Lee* [2004] B.C.S.C. 1287, and *Ashe v. Werstiuk* [2003] B.C.S.C. 184. There are certainly similarities between this case and the *Graham* and *Ashe* cases. Both the latter involve fractures to the lateral tibia plateau, initial surgery to install hardware for "fixation", subsequent removal of the hardware, and the expectation of future total knee replacement. Awards in cases of a similar nature are a useful guide to the assessment of damages, but they are only a guide, as no two injured persons are ever exactly the same. Counsel themselves have defined a comparatively narrow range. I assess the Claimant's non-pecuniary damages at $95,000.00.

INCOME LOSS

33. While the parties were fairly close together in their assessments of non-pecuniary damages, the same cannot be said regarding the issues of past income loss and loss of future earning capacity. The parties do agree that the Claimant can no longer work in his pre-Accident occupation of "Industrial Nurse/Medic", and the Respondent concedes that the Claimant cannot use his existing certification as a licenced nurse to work as a Ward Nurse because the requirements of that job are too strenuous. With respect to income loss, the three fundamental questions are:

1. What would the Claimant have earned but for the Accident up to the date of hearing?

2. What is the Claimant's loss of future earning capacity?

3. What is the Claimant's residual earning capacity?

EVIDENCE RE EMPLOYABILITY

EVIDENCE OF THE CLAIMANT

34. The Claimant graduated from Sardis Secondary School in 1971. He served in the Armed Forces from 1971 until discharged in 1975 with the rank of "Sergeant". He was a member of the Special Forces seconded to the United States and served two tours of duty of four to six months each in Vietnam. He was a "medic/sniper" and was in Vietnam within three to four months after the My Lai Massacre. The Claimant says the massacre occurred in 1970 and he was there for its "fall out" dealing with soldiers who were traumatized by having murdered women and children. The Claimant was out of Vietnam prior to the collapse of the South Vietnam regime. The Claimant obtained a Bachelor of Theology Degree in 1974 from the Burrard Inlet Bible Institute. This was a three year

program that he took primarily through correspondence. In 1977 he became a Licenced Practical Nurse following successful completion of a course at Vancouver Vocational Institute. From 1977 until 1992, he worked as a Licenced Practical Nurse at Peace Arch Hospital in White Rock, at Trail Regional Hospital and at Enderby Hospital, and also worked at West Star Coal Mine in Sparwood, B.C. as an Industrial Nurse/Paramedic and as a Pathology Assistant at Burnaby General Hospital. He attended the program at Okanagan University College and became a Licenced Registered Nurse in 1993. In 1993/1994 he worked as a Registered Nurse at Scott & White Hospital in Temple, USA, and received a document purporting to be a Diploma for a Bachelor of Science in Nursing degree from the Texas A & M University at College Station Texas (Exhibit "7"). The Claimant returned to British Columbia and worked as an RN from 1995 to 1999 at Powell River General Hospital and also worked for periods during that time as a Community Health Nurse at the Tahsis Medical Centre, as an Industrial Nurse/Paramedic for P.A. at a nursing station in northern Alberta, as a general duty nurse at the R W Large Hospital in Bella Bella, BC and as a General Duty Nurse at Inuvik Regional Hospital.

35. In the course of his career, the Claimant has also worked as a truck driver, rancher, rodeo rider, fireman, and a cat operator.

36. The Claimant left Powell River General Hospital following an employment dispute. It was alleged that he had been negligent as an RN and he was temporarily suspended. He challenged the suspension, was vindicated and reinstated but following advice from his lawyer and Union representative elected to leave. He worked for a short time for T. Health Care (THC) in the north and at Bella Bella, BC. At Inuvik, he lived in a nursing station and worked three months on/three months off. His family remained in Powell River. He commenced to work for P.A. in September, 2000 as an Industrial Nurse Medic. At Swimming Point, he had a first aid room, was responsible for a crew of between 20 and 110 employees; he dealt with everything from suturing to cases of cardiac arrest and

communicating with medical specialists elsewhere for advice and consultation in the event an employee had to be helicoptered out for treatment. He also had some office functions including booking flights coming in and out of the work site. After the Claimant obtained employment with P.A., and was thus away from Powell River for stretches of weeks at a time, his wife changed from working full time at the Powell River Hospital to working part time so that she could be at home in the afternoons with their youngest son. The Claimant loved working in the north. In March, 2002, he had rotator cuff surgery on his left shoulder. He returned to work from that surgery prior to the Accident. He had just finished two rotations of 28 days working and 14 days off prior to the Accident. At the time of the accident he was paid $325.00 per day. He was also paid all his expenses from the time he left Comox until he returned to Comox at the end of a rotation. The P.A. job was the highest paying job the Claimant had ever had. P.A. did not have any pension plan. The Claimant said he had no plans for retirement and intended to "drop dead on the job" (which I took to be an indication of his genuine enthusiasm for the job).

POST ACCIDENT TRAINING/WORK INVESTIGATION

37. The Claimant commenced but discontinued a course to qualify as an Occupational Nurse. He completed the first module by correspondence, but it was rejected. He redid the project and received a "B" grade mark. Taking this upgrading course was aimed at obtaining a job in Powell River at either the Hospital or the Mill, the two main employers. Upon inquiry, he determined that the Hospital had only one (unionized) position and it was filled. Someone at the Mill told him that they would not hire an Occupational Nurse who walked with a cane and in any event his duties would require him to walk throughout the site, climb on machines, etc. in order to assess the ability of recuperating employees to handle their jobs. The Claimant concluded that there was no prospect of his getting a job as an Occupational Nurse in Powell River. I understand that to be the primary reason that he did not complete the training course himself.

38. The Claimant also took a number of courses on-line that prepare or assist one to find appropriate jobs or job vacancies and to do job interviews. He made some inquiries with the Provincial Wildlife and Forestry Management branch, because of his interest in the outdoors, but concluded he could not meet the physical requirements. He did not consider trying to relocate to Vancouver because of the high house prices in Vancouver compared to Powell River. He made inquiries at the Powell River Health Unit of the job requirements for a Public Health Nurse there. He was told that he needed a Bachelor's Degree in nursing and he would also have to be able to lift patients, go up and down stairs, assist patients in and out of baths, etc. He made inquiries about working as a Foot Care Specialist. He determined that there was only one person in Powell River working four hours per month in this capacity and that it involved a working position of sitting low on a chair. He concluded there was no job opportunity in this field in Powell River and he could not do the work. He made inquiries about becoming an audiologist. Although it did not require a university degree, it involved a four year training program in Edmonton. There was one audiologist in Powell River and one in Courtenay. The most he could do would be to provide vacation coverage. He did not have the financial resources to pay for four years of training nor did he think there was a viable job opportunity.

TEXAS BSN DEGREE

39. As noted earlier, the Claimant worked as a Registered Nurse at Scott & White Hospital in Temple, Texas in 1993 and 1994. He took that job after becoming licenced as an RN in B.C. in 1993. His family joined him in Texas in September, 1993. He returned to B.C. in 1994 when the Hospital's promise to obtain a "Green Card" for him was contingent on his agreeing to work another three years at the Hospital. The Claimant says that he took his transcripts into someone at the Hospital and inquired whether they were sufficient to entitle him to a Bachelor's Degree in nursing in Texas. The person indicated that his credits far surpassed

the Texas requirements and he subsequently received in the mail his transcripts back together with a "Diploma". The Claimant says that until shortly before this arbitration hearing, he believed that the "Diploma" was genuine. Shortly before the hearing he contacted Texas A & M University, College Station and was advised that it did not have any Nursing program. He also determined that although Texas A & M Prairie View did have a Nursing program, the Diploma was not from that institution. The Claimant acknowledged that he never paid tuition fees; he never held a student card; he had never attended classes or wrote exams. He now accepts that the "Diploma" is not genuine and may have been a joke. He submitted this "Diploma" to the Registered Nurses' Association of British Columbia when he returned to Canada. He has now advised the RNABC of the dubious authenticity of the "Diploma"; the circumstance does not affect his RN credentials here because he completed the Okanagan University College program and wrote and passed his RN nursing exams in B.C.

40. The Claimant has made some inquiries about upgrading his qualifications by obtaining a Bachelor of Science Degree in Nursing. Okanagan College has a four year program and with his existing qualifications and experience, he might be able to obtain a degree in 8 to 12 months. However, Okanagan College does not offer "distance education" for this program.

41. The Claimant made other inquiries at American colleges but they all require attendance on campus to complete practicums. BCIT offers distance education for a BSN but also requires living on campus during practicums. The Claimant considered that he would not be able physically to complete the required practicum. He did not make any inquiries to anyone in person at UBC. The Claimant also says, somewhat inconsistently, that until a few weeks before the hearing he believed that he already had a BSN degree from Texas.

EVIDENCE OF DAVID MUIR

42. Mr. Muir is the president of P.A.. The Claimant commenced to work for his company in 2000 as an Industrial Nurse/Medic. Mr. Muir considered the Claimant to be in the elite or top group of his industrial nurses. He was very reliable, liked by P.A.'s clients and requested back by them. He interacted well socially. At the time of the accident, the elite group of Industrial Nurse was paid $325.00 per day. At present, they are paid $500.00 per day which is increasing to $525.00 per day as of June 1, 2008. All the Claimant's travel, accommodation, meals and living expenses were paid from the Comox Airport. At present, Industrial Nurses are working 28 days in and 10 days out. There is a constant demand for high quality Industrial Medics and P.A. competes with other employers for them.

43. While acknowledging the cyclical nature of the businesses of his customers, Mr. Muir considered the current prospects of his own company to be excellent. All the field positions at P.A. required heavy physical work. The Medic must carry a back pack weighing 60 lbs. There were not likely any positions available for the Claimant at the management level of P.A. as the management group had been together without change for quite some time. A person of the Claimant's abilities was "always in demand". Industrial Medic positions for remote locations are the most difficult position to fill. Most of the medics are between the ages of 45 and 60 years. The employees who work in remote camps typically collect EI benefits as a lot of the positions are seasonal.

44. In the 23 weeks prior to the Accident, the Claimant earned $51,024.47 gross. (This evidence is inconsistent with the Claimant's tax return for 2002. I think Mr. Muir was in error, and I rely upon the Claimant's tax return.) An employee of the Claimant's elite level working full time could earn $100,000.00 per year.

45. Mr. Muir provided gross earning figures for the two top medics just below the Claimant for the period from June 21, 2002 until April 1, 2008. Those gross earnings are as follows:

June 21, 2002 – December 31, 2002	$42,123.00
January 1, 2003 – December 31, 2003	$70,820.00
January 1, 2004 – December 31, 2004	$75,286.00
January 1, 2005 – December 31, 2005	$91,438.00
January 1, 2006 – December 31, 2006	$104,290.00
January 1, 2007 – December 31, 2007	$96,404.00
January 1, 2008 – April 1, 2008	$30,428.00
TOTAL:	$510,789.00

PRE-ACCIDENT INCOME TAX RETURNS

46. The Claimant's income tax returns for 1997-2002 show annual earnings from employment, inclusive of EI benefits as follows:

1997	$34,760.00
1998	$52,461.00
1999	$37,129.00
2000	$50,922.00
2001	$46,899.00
2002	$39,503.00

(Agreed Statement of Facts – paragraph 10)

47. The Income Tax Returns show EI benefit payments for the same period as follows:

1997	$11,254.00
1998	$ 5,521.00

1999	$ 5,073.00
2000	$ 9,875.00
2001	$9,481.00

(Agreed Statement of Facts – paragraph 11)

48. It is further agreed that on average the Claimant earned $53,039.00 annually, inclusive of EI earnings between 1997 and 2001. (Agreed Statement of Facts, paragraph 10).

VOCATIONAL ASSESSMENTS

49. Janice Hilliard assessed the Claimant for the purposes of a medical legal report on behalf of the Claimant dated March 14, 2006 (Exhibit "11"). Colleen Quee Newell of Vocational Pacific Limited assessed the Claimant on May 2, 2007 for the purposes of a medical legal report dated June 21, 2007 (Exhibit "19"). A reply report of Ms. Hilliard dated February 5, 2008 in severely redacted form was admitted as Exhibit "12". Neither Ms. Hilliard nor Ms. Quee Newell gave evidence at the hearing.

50. Ms. Hilliard's initial report was to some extent in response to a prior vocational assessment in December, 2003 by Dr. Christopher Cooke in which inter alia he identified some 15 jobs as potentially suitable for the Claimant. Ms. Hilliard concluded that none of those jobs were suitable for the Claimant as of March, 2006 given his then level of functioning, age and labour market outlook. The Claimant was then 54 years of age and expected to be undergoing knee replacement surgery with a six month recuperation time. Given his age and upcoming surgery, Ms. Hilliard thought it was not prudent to pursue occupations requiring formalized academic training or long apprenticeship programs. She also noted that the labour market for the potential occupations was extremely poor. At the time of her assessment, the Claimant was suffering from mild depression, was using morphine two times per month to two times per week for pain control and

Ms. Hilliard concluded that the Claimant was for all practical purposes not competitively employable.

51. Ms. Quee Newell agreed that extensive retraining for the 55 year old Claimant was not recommended. She, however, considered that the Claimant might be able to work in selective community or public health nursing positions that did not require a BSN degree or accepted diploma level education supplemented by work experience and which positions involved limited or light strength work with ample opportunity for postural flexibility. She then identified various current job postings including community nurse positions at the Powell River Health Unit, a casual intake nurse at Richmond Community Continuing Health Services, a mental health nurse at the ACT Bridging Team in Vancouver. Ms. Quee Newall also suggested that the Claimant could obtain an Occupational Health Nursing Specialty Certificate through a distance education course at BCIT. She also recommended vocational rehabilitation counseling in order to develop a viable return to work plan.

52. In her redacted reply report, Ms. Hilliard expressed the view that because of his chronic pain and functional restrictions, that are expected to be ongoing, prospective employers would be less likely to accommodate and take on a new employee with these disabilities.

MEDICAL EXPERTS

53. I have previously reviewed the medical expert evidence in the reports of Dr. Leete and Dr. Ellis regarding the restrictions on the Claimant's work capacity at paragraphs 12 and 18 above.

LAY WITNESS EVIDENCE

54. Graham Gilbert is a Health Management Consultant employed by Sun Life Financial. His role is to coordinate a return to work of employees whose employers are insured with Sun Life. This involves reviewing file material referred to him by a Sun Life case manager, meeting with the employee, developing a return to work plan, consulting with treatment providers and the employer, and monitoring a graduated return to work. Mr. Gilbert holds a Bachelor of Kinetics degree from UBC (which required four years of full time studies). He operates out of his home. Although he often has to drive to meet disabled employees at their homes, much of the work is sedentary and is done at his computer inputting information and preparing reports. The Vancouver area office of Sun Life employs 13 such health management consultants; Mr. Gilbert is the only one outside the Lower Mainland area. The salary for this position is between $43,000.00 and $73.000.00 per year.

55. Randolf L'Heureux is the director of Air Ambulance programs for the BC Ambulance Service. Although he assumed this position two days prior to the hearing, he has been employed with the BC Ambulance Service for 32 years and was previously Superintendent of Operations and Clinical Development. He described the role of and requirements for critical care paramedics. They accompany patients from an accident/injury site accessible by foot from an aircraft landing site to a hospital and also accompany intensive care patients being transferred between hospitals. There are no posted physical requirements for this job although paramedics have to be able to walk to an accident/injury site, get in and out of aircraft, carry an equipment pack, and assist with others in carrying the 350 lb. patient by stretcher. This is a union position covered by collective agreement. There is no mandatory retirement age and the oldest staff members are in their late 50s or early 60s. To qualify, one must be licenced as an advanced care Paramedic; there follows a one year in house program of further training.

56. Joan Gillie is the coordinator of student affairs at the University of Victoria School of Nursing. She is responsible at both the undergraduate and graduate levels for admission, progression through the school and recruitment, including the distance education programs. UVic does offer a distance education program for existing RNs wishing to obtain their BSN degree. The requirements are an active practicing licence, an accredited RN diploma and a current certificate in CPR. Admission is non competitive. The program can be completed in 12 to 16 months of full time study; most students complete the program in about 2½ years of non full time study. Practicums are required but can be done in a wide variety of locations and settings. UVic adheres to a policy of accommodating to undue hardship students with disabilities. The tuition cost of the program is $10,000.00. There are currently 600 students registered in the distance education undergraduate BSN program. UVic also offers a distance education program leading to a Masters' degree in nursing focusing on one of three areas, advanced practice leadership, nurse practitioner or nurse education. The distance education program does involve a high degree of reading and it requires fairly good reading and comprehension skills as well as base line keyboarding skills. Students are required to move to do their practicums, if nothing suitable is available where they reside.

57. Adrienne Hook is the regional manager of the Claims Centre of the Vancouver Coastal Health Authority. She had previously held the same position in the Vancouver Island Health Authority for 20 years. Her responsibilities include all Work Safe BC claims, all return to work programs and accommodation for employees with disabilities. At any one time approximately 900 employees of the Health Authority are on LTD and approximately 1,200 employees annually are participating in some form of return to work program. The Health Authority has approximately 26,000 employees including casual workers. The Health Authority is responsible for Vancouver, Richmond, the Sunshine Coast including Powell River. Most of the employees are either RNs or care aides. There are various

jobs within the Health Authority that require only light duties including some administration, the pre-admittance clinic, teaching or research, the Safer Sharps program and the Fit Testing program (masks against infectious diseases). Ms. Hook described the activities involved in these various positions. A BSN degree is not required, but helpful. Ms. Hook reviewed two extensive charts (Exhibit "14" and "15") of current open vacancies for both hospital employee positions (HEU) and nursing positions (BCNU). She made it clear that the Vancouver Coastal Health Authority (and other health authorities) are desperately short of qualified nurses and many positions require only light or sedentary duties.

SUBMISSION OF THE CLAIMANT – PAST INCOME LOSS

58. The Claimant submits that he should recover $510,781.00, the actual post Accident earnings of the next two top medics at P.A. just below him, reduced for income tax. The evidence is clear that the Claimant was very enthusiastic about his comparatively new job with P.A.. It was the best paying job he had ever had. P.A. considered him as one of their "elite" employees and there has been no shortage of work for Industrial Nurse/Medics of his calibre. The Claimant's reported T4 employment earnings of $29,185.00 for the tax year 2002 (until the Accident in June, 2002) is misleading because the Claimant was off work for a period of time in the Spring of 2002 in connection with his left rotator cuff surgery in March, 2002. There should be no reduction from the past income loss claim because of any alleged failure to mitigate. The Claimant's own vocational expert has advised him that he is competitively unemployable. Although neither of the orthopedic specialists say that the Claimant is not now employable, both set out similar quite restrictive conditions that would be required. Dr. Leete describes Ms. Hilliard's report as "very realistic" and Ms. Hilliard concludes that the Claimant is for all practical purposes not competitively employable. The medical evidence is clear that the more active the Claimant is, the sooner his left knee will deteriorate and hasten the onset of knee replacement surgery. Ms. Quee Newell's report indicates that the Claimant has well below average clerical and finger

dexterity skills and below average vocabulary reading and comprehension skills for someone of his educational level. The foregoing suggests he would have difficulty in programs to upgrade his training and in many of the sedentary or physically light occupations suggested by the respondent.

SUBMISSION OF THE RESPONDENT

59. The Respondent submits that the past loss of income ought properly to be assessed in the range of $125,000.00 to $175,000.00 net. Such an award would reflect what the Respondent asserts is a "life style" choice by the Claimant to work roughly half time. This pattern is said to span different employers, including P.A., throughout the 1997-2002 period, during which time the Claimant routinely collected Employment Insurance each year. The evidence of Mr. Muir is that an Industrial Nurse/Medic in the elite group such as the Claimant could expect to earn $100,000.00 if he worked full time and there was a big demand for elite medics. Thus, past income loss could be calculated on the basis of annual past earnings at $50,000.00 for six years (equals $300,000.00 reduced for income tax) or alternatively $50,000.00 per year for two years of total disability plus $50,000.00 per year for an additional two years to upgrade his qualifications by obtaining a BSN degree so that by the end of 2006, he could be reemployed in an occupation earning an income commensurate with his pre-Accident income.

60. The Respondent raises the issue of the Claimant's credibility and says his evidence should be treated "with care". The Claimant is described as an engaging raconteur who exaggerates when it will enhance his position. Two examples are relied upon. The first is the Claimant's stated belief in the validity of the Texas A & M University BSN "Diploma". The second is the Claimant's claim to have been in Vietman very shortly after the My Lai Massacre. Thus, the Claimant's evidence regarding his stated level of disability and the reasons why he has not returned to school for any type of skills upgrading must be regarded with a degree of scepticism.

61. With respect to mitigation, the Respondent submits that the Claimant did nothing meaningful with respect to systematic inquiries about upgrading his skills and obtaining other employment. He discontinued a distance education program to become accredited as an Occupational Health Nurse even though he received a "B" grade on rewriting the first assignment. He did not contact anyone at either the University of Victoria or the University of British Columbia to discuss seriously what would be required of him if he enrolled in a distance education program to obtain his BSN. Ms. Gillie's evidence suggests there was no barrier to the Claimant obtaining his BSC at UVic and there is considerable accommodation for students with disabilities. Ms. Hook's evidence indicates that there is an extreme shortage of RNs in the Province and there are a variety of vacancies in sedentary/light occupations for persons with RN qualifications, particularly, but not necessarily, with a BSN degree. The Respondent does not assert that the Claimant has a duty to move permanently from Powell River to the Lower Mainland to take work but does say that the Claimant should be prepared to move to Vancouver temporarily in order, for example, to take advantage of a short fixed term job vacancy.

62. Finally, although this may apply more to the loss of future earning capacity claim than to the past income loss claim, the Respondent asserts, relying upon the cases of *Steward v. Berezan* (2007 BCCA 150) and *Parypa v. Wickware* (1999 BCCA 88), that the onus of proving a substantial possibility of a loss rests on the Claimant.

DISCUSSION AND ANALYSIS

63. I do not consider the Claimant's credibility to have been seriously undermined. I find he is an honest witness who is prone to occasional exaggeration or inaccuracy. Like every witness, his evidence must be scrutinized against other relevant evidence. Given the admission that the My Lai Massacre occurred in

March, 1968, and the Claimant's service in the Armed Forces was between 1971 – 1975, he could not have been in Vietnam "within a few months" of the massacre, as he said in evidence, although he could well have been there for "the aftermath" depending upon how long the aftermath extended. I am sceptical of the Claimant's professed belief in the validity of the Texas A & M University "diploma". The photocopy marked in evidence looks to the casual observer like something that could have been produced on a home computer. The Claimant would have to have been very naïve to believe that he could obtain a University undergraduate degree without ever having enrolled as a student, attended classes, studied, completed assignments, or written exams. By the time he was at Scott & White Hospital in Texas in 1994, he had already received a Bachelor of Theology Degree in 1974 from the Burrard Inlet Bible Institute, a certificate as a practical nurse from the Vancouver Vocational Institute, and a diploma in nursing from Okanagan University College in 1992. There is also the curious reference in the history given to Ms. Hilliard that he attended Simon Fraser University (years not indicated) and was 1 1/2 credits short of a BA in Sociology. This course of studies does not appear on the Claimant's Resume (Exhibit "6") and was not referenced in evidence. These degrees, certificates and courses all imply a certain understanding of what is required to obtain a University degree. Notwithstanding the foregoing, it must be kept in mind that it is admitted that the Claimant sustained a very severe left knee injury and there is a considerable amount of objective medical and other evidence with respect to the restraints and limitations arising from the injury.

64. With respect to the income that the Claimant would have earned up to the date of this hearing, in the absence of the Accident, the pre-Accident income tax returns from 1997 to 2002 do in my view establish a regular pattern of less than full time work, supplemented by annual EI payments. There are substantial EI payments in every year ranging from about $5,000.00 (1998 and 1999) to around $10,000.00 (1997, 2000 and 2001). I accept that the Claimant loved "the north", his job with P.A. and that it paid him more than any other job he had ever had. Nevertheless

work in the north came at a price, namely significant separation from his family in Powell River. His wife agreed to this arrangement, which also involved her changing from full time to part time employment to be at home more with their son, because the family needed to save money. I find support for the conclusion that the Claimant chose not to work full time in these circumstances from the fact that he continued to receive significant EI benefits in the years 2000 and 2001 after he began working in the north, first for THC and, after September, 2000 for P.A. The Claimant says that his 2002 T4 showing employment earnings of approximately $29,000.00 to the date of the Accident is not representative of his earning capacity or practice because he underwent shoulder surgery in March, 2002. The evidence does not indicate exactly how long the Claimant was off work because of the shoulder surgery. The Claimant's own evidence is that the Accident occurred as he was ending his second rotation of one month on – fourteen days off, which would place his return to work sometime in March, 2002 i.e. the same month as the surgery. Moreover, the Claimant did not give evidence that he was unable to work in 2002 prior to the shoulder surgery because of the shoulder injury. The shoulder injury occurred some time in 2000. Apart from a few months off work immediately following the injury, it does not appear that the shoulder injury prevented the Claimant from working as much as he wished. The injury predated his employment in the north and there is no evidence that he ever turned down the offer of work in the north from P.A. because of any ongoing left shoulder injury. The employment income and EI benefits in the year 2001 are similar to the pattern of previous years. I accordingly conclude that even when the Claimant had employment at jobs he loved in the north, he nevertheless elected, as was his right, not to work full time.

65. The Respondent's approach to the question of what the Claimant would have earned up to the date of hearing but for the Accident seems to me to contain a fundamental flaw. Although the Claimant never did accept that he elected to work less than full time prior to the Accident, which I have concluded was the case, there is at the same time no evidence to suggest that the Claimant would

altered his work pattern. The Respondent takes the average annual earnings including EI benefits between 1997 and 2001, which is a little over $50,000.00, and assumes that $50,000.00 is a reasonable "cap" on what the Claimant would have earned. There are, however, at least two ways to increase one's income; one way is to work more, but another way is to work the same amount but get paid more for doing so. The evidence in this case from Mr. Muir is that the daily wage at P.A. for an Industrial Nurse/Medic of the Claimant's calibre has risen from $325.00 per day in 2002 to $500.00 per day presently (with a further increase to $525.00 per day as of June 1, 2008). The increase to $500.00 per day amounts to an increase of approximately 55 per cent from what the Claimant was earning at the date of the Accident. There is no evidence as to when the incremental increases in the daily wage rate occurred between 2002 and 2008. On the assumption of annual earnings in 2002 of $50,000.00, a 55 per cent increase in the wage rate alone would translate into annual earnings of $77,500.00 by 2008. If that increase were distributed equally over the six year period, then the gross earnings for the full years 2003-2007 would be approximately $317,500.00 and adding an additional amount for lost earnings in the last half of 2002 and the first quarter of 2008 would bring the total gross earnings to approximately $367,500.00, assuming the Claimant did not change his work pattern. I appreciate that this is a rough and ready calculation, because the initial assumed annual income of $50,000.00 includes EI benefits which are not increasing incrementally.

66. Another way of approaching the question of what the Claimant would have earned but for the Accident is to look at the actual earnings post Accident of the two top medics at P.A. just below the Claimant. Their average actual gross earnings up to the hearing date were $510,781.00. There is no evidence suggesting these two medics were not working full time. A comparison of the Claimant's T4 earnings for the first six months of 2002 ($29,185.00) with the average earnings of the next two top medics from the date of the accident to December 31, 2002 ($42,123.00) suggests that the next two top medics were

working approximately 25% more than the Claimant. The employment earnings of the next two top medics for the calendar year 2003 ($70,820.00) is significantly higher than the Claimant's T4 earnings in either 2000 or 2001. If one assumes the next two top medics were working 25 per cent more than the Claimant, then reducing their post Accident average gross income by 25 per cent results in a gross income that would have been earned by the Claimant of approximately $382,500.00. All of which leads me to conclude that the Respondent's estimation of gross past income loss at between $200,000.00 to $300,000.00 before any reduction for mitigation is low. I recognize that I am addressing a past hypothetical event, and taking into account the uncertainties inherent in such an assessment, I conclude that the Claimant would have had gross income of $400,000.00 from the date of the Accident to the hearing date.

MITIGATION

67. I now address the issue of mitigation. The Respondent submits that the Claimant has failed to mitigate his loss. He should have, not retrained for an entirely new occupation, but undertaken educational upgrading to take advantage of his existing registered nursing qualifications and experience, and had he done so, the Claimant would have been able partly to replace his pre-Accident income. Simply put, there are other nursing or health related occupations of the light, sedentary category that are within the Claimant's post-Accident physical and intellectual capabilities, and the Claimant's failure to mitigate reduces his entitlement to both past income loss and loss of future earning capacity.

68. The argument is framed as one of mitigation (Exhibit "2", Statement of Defence, paragraph 8; Arbitration Brief, paragraph 30; Respondent's Oral Submissions). The Respondent also relies on the cases of *Steward v. Berezan* (2007 BCCA 150) and *Parypa v. Wickware* (1999 BCCA 88) for the proposition that there is an onus on the Claimant to prove a substantial possibility of a future event leading to an income loss, in the absence of which a claim for loss of future earning capacity

would fail. I understand that the Respondent says that the same onus applies to a Claimant seeking to recover past income loss based on past hypothetical circumstances. This raises the question of whether there is an onus on the Claimant to establish not only that he cannot work at his pre-Accident occupation, but also that there is no other occupation for which he is or could be reasonably suited at which he could work.

69. The leading case on failure to mitigate is *Janiak v. Ippolito* (1985) 16 DLR (4th) 1 (SCC). The failure to mitigate involved the Plaintiff's refusal to undergo spinal surgery, recommended by his surgeon, that had a 70 per cent chance of being successful and if successful would have allowed him to return to work. With respect to the onus of proof, Wilson, J. for the Court at page 14 said as follows:

> "While the plaintiff has the burden of proving both the fact that he has suffered damage and the quantum of that damage, the burden of proof moves to the defendant if he alleges that the plaintiff could have and should have mitigated his loss. That this is the law in Canada has been clearly stated by this Court in *Red Deer College v. Michaels* (1975), 57 D.L.R. (3d) 386, [1976] 2 S.C.R. 324, [1975] 5 W.W.R. 575, and more recently reaffirmed by Estey J. in the *Asamera Oil* case, supra."

70. The Claimant here relies upon a similar statement of the law by Madam Justice Stromberg-Stein in *Middleton v. Morcke* (2007 BCSC 804) at para 37 as follows:

> "The plaintiff is required to act reasonably to mitigate or lessen her loss and whether she did act reasonably is a question of fact. If the plaintiff did not act reasonably, no damages are recoverable for any loss that the plaintiff could have avoided through reasonable action. On this issue, the burden of proof rests upon the defendants to demonstrate on a balance of probabilities that the plaintiff did not act reasonably. The plaintiff is not held to a high standard of conduct in mitigation; the law is satisfied if the plaintiff takes steps that a reasonable person would take in the circumstances to reduce the loss."

71. In the *Steward* case relied upon by the Respondent, the Plaintiff was a 55 year old realtor who was awarded $50,000.00 at trial as compensation "for the impairment of his earning capacity in other occupations that may now be closed to him". The Plaintiff had worked as a realtor for 20 years. Prior to that he had worked as a carpenter. There was no suggestion that the Plaintiff intended to return to carpentry. At trial, the loss of future earning capacity claim was based on a reduced capacity to earn money as a realtor because of reduced energy. The trial Judge made the award for loss of future earning capacity on the basis that it was "impossible to say at this juncture that the residual injuries to his back, neck and arm will not harm his income earning capacity over the rest of his working life". The Court of Appeal quashed the award for loss of future earning capacity concluding that the Plaintiff had not met the onus to prove a substantial possibility of a future event leading to an income loss. The Plaintiff was still working as a realtor at the time of trial. The trial Judge declined to "calculate potential loss of earnings for the Plaintiff in the future" because "it appears that the Plaintiff may earn as much in the future as he would have if not injured". The trial Judge proceeded then to make a lump sum award for diminished earning capacity for the reasons mentioned above, citing the *Parypa* case. In my view, the "substantial possibility of a future event leading to an income loss", referenced by the Court of Appeal in *Steward* is a future event that would have prevented the Plaintiff from continuing to work as a realtor. The Plaintiff's injuries would have interfered with strenuous physical work but it appears that there was no "substantial possibility" that the Plaintiff would at his age and in his circumstances chose a strenuous physical occupation even if he could not continue to work as a realtor. There is no reference in *Steward* to the principle of mitigation. In *Parypa*, cited by the Court of Appeal in *Steward*, the Plaintiff sustained inter alia, a closed head injury resulting in cognitive deficits. She was a practical nurse who had just passed the licencing exam for registered nurses and was intending to obtain a nursing degree and then work as a registered nurse. Post Accident she was no longer capable of professional employment and would only be suited for mundane work. The trial Judge concluded that the Plaintiff would not likely have worked

at her career full time but for the Accident, and that her post Accident success in completing some courses increased the likelihood that she would be able to retrain for a sedentary position in the future. The Plaintiff's appeal against the award for loss of future earning capacity was dismissed by a majority of the Court of Appeal. Cumming, J.A., for the majority at para 63 said the following:

> "...The significance of compensating earning capacity as a capital asset as opposed to projected future earnings is seen in the following passage from Palmer, supra, at 59:
>
> > 'Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning capacity'."

72. Further, at para. 67, Cumming J.A. stated:

> "These cases demonstrate that the trier of fact, in determining the extent of future loss of earning capacity, must take into account all substantive possibilities and give them weight according to how likely they are to occur, in light of all the evidence. However, in calculating such likelihoods, the plaintiff is not entitled to compensation based solely on the type of work she was performing at the time of the accident. There is a duty on the plaintiff to mitigate her damages by seeking, if at all possible, a line of work that can be pursued in spite of her injuries. If the plaintiff is unqualified for such work, then she is required, within the limits of her abilities, to pursue education or training that would qualify her for such work. If the plaintiff claims she is not able to mitigate by pursuing other lines of work or by retraining, she must prove this on a balance of probabilities. The requirement for mitigation is addressed by this court in *Palmer,* supra at 59:

> 'A plaintiff is not entitled at the cost of the defendant to say, "The only sort of work I like is such and such. I cannot do that. Therefore, you must give me sufficient capital to replace the income I cannot earn on that sort of job".
>
> What the respondent proved in this case was that he had lost his capacity to follow the sort of occupation he was pursuing at the time of the accident. But that did not prove, on a balance of probabilities, that he could not earn by pursuing some other sort of occupation, as much as before'."

73. Thus *Parypa* cites *Palmer* for the requirement for mitigation in determining loss of future earning capacity. *Palmer* involved the over-turning of a jury award for $494,000.00 for loss of future earning capacity. Prior to the Accident, the Plaintiff had worked as a clerk at Canada Safeway earning about $30,000.00 per year. After the Accident, because of his injuries, the Plaintiff was working as a stereo installer earning about $12,000.00 per year. The Court of Appeal considered that the trial Judge's charge to the jury invited them to make their award for loss of future earning capacity on the basis that the Plaintiff was entitled to be compensated (subject to contingencies) for the whole of his working life for the difference between what he would have earned as a clerk at Safeway and what he was going to earn as a stereo installer. Such a charge was erroneous. The jury should have been told that it was for the Plaintiff to show the extent to which his ability to earn a living as it existed before the injury had been impaired. A plaintiff might show that he required retraining in order to restore his earning capacity in which event the cost of retraining would be compensable. What the Plaintiff had proved was a loss of capacity to work as a clerk at Safeway but that did not prove on a balance of probabilities that he could not earn by pursuing some other sort of occupation as much as before. The Respondent/Plaintiff argued that it was for the Appellant/Defendant to establish a failure on the part of the Respondent/Plaintiff to mitigate, citing *Red Deer College v. Michaels* (1975) 5 WWR 575 (SCC). That argument was dismissed in the following single sentence:

> "In my opinion, the *Red Deer* principle as such, has no application to the question of loss of earning capacity".

74. *Red Deer College* was a wrongful dismissal case. One issue was who bore the burden of showing whether or not the dismissed employees had mitigated their damages by obtaining other employment opportunities. Laskin C.J.C. for the Court (de Grandpré, J concurring in the result) said at p. 579:

> "In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial Judge's assessment of the plaintiff's evidence on avoidable consequences."

75. The Court in *Palmer* does not explain why the *Red Deer* principle has no application to the question of loss of earning capacity. The Court in *Parypa* cites *Palmer* for the requirement of mitigation in loss of earning capacity claims, yet the Court in *Palmer* appears to reject the application of the mitigation principle with the associated principle that the burden of proof is on the party asserting a failure to mitigate.

76. I have some difficulty in reconciling completely these cases. The narrow question is this. In assessing a claim for past income loss or loss of future earning capacity where the claimant has established a permanent inability to do his pre-Accident

occupation, is the issue of his ability to work at some alternative employment part of what the Claimant must prove in order to establish his loss, the burden of which is on the Claimant, or is it a mitigation issue, the burden of proof being on the Respondent? The *Parypa* and *Palmer* decisions suggest that the ultimate burden of proving an inability to do other work lies on the claimant as part of the obligation to prove the extent of the loss of earning capacity. None of the *Janiak, Red Deer College,* or *Middleton* cases involves a claim for loss of future earning capacity and this may be the unexpressed reason why the *Red Deer College* principle was dismissed by the Court of Appeal in *Palmer* as inapplicable. It is clearly not sufficient for a claimant simply to prove that he is unable to perform his pre-Accident occupation (*Palmer*). If the Claimant cannot perform his pre-Accident occupation, then he must determine if there is other work he can do with his existing education training and physical limitations, and if there is not, then the Claimant must determine whether with additional education or training he would then be capable of working at another occupation within his existing physical limitations (*Parypa*). The *Steward* case has subsequently been held not to establish any new principle of law. (*Djukie v. Hahn*, 2007 BCCA 203).

77. In the present case both parties have adduced evidence on the Claimant's ability to perform other work. The Claimant's vocational assessment expert has concluded that the Claimant is for all practical purposes competitively unemployable. This evidence, supplemented by the reports of Dr. Leete, overcomes the "gap" in the evidence in *Palmer* and satisfies the evidentiary burden on the Claimant. The Respondent has also adduced evidence regarding the availability of upgrading courses within the Claimant's educational capability and other occupations within his physical limitations. All this evidence must be considered in order to determine whether the Claimant has not acted reasonably in failing to pursue further skills upgrading and other employment and that there are other job positions within the broad nursing field that are within his capability. Because of the evidence that has been adduced by both parties in this case, the outcome does not depend on which party bears the ultimate burden of proof.

78. Some facts regarding the Claimant's residual earning capacity are either conceded by the Respondent or in my view are clearly established by the evidence. These facts are:

1. The Claimant is permanently incapable of returning to his pre-Accident occupation of Industrial Nurse/Medic;

2. The Claimant is not now able to use his existing RN qualification to work as a "Ward Nurse";

3. There are very significant physical limitations on any type of work the Claimant could do, as set out in the reports of Doctors Leete and Ellis (see paragraphs 12 and 18 above;

4. Only occupations in the "light/sedentary" categories would be potentially suitable and even they would be subject to the constraints outlined in the orthopedic reports;

5. The Respondent concedes that the Claimant is not required to move permanently from Powell River to the Lower Mainland to take up potentially suitable job opportunities in the Lower Mainland. Given the disparity in house prices between Powell River and the Vancouver area, such a move would not likely make any economic sense for the Claimant and could not therefore in any event be regarded as a reasonable step in satisfaction of a duty to mitigate;

6. Given the Claimant's age, it is not prudent to pursue occupations requiring extensive retraining (Exhibit "19", p. 4; Exhibit "11", p. 15). This would rule out, for example, commencing a 3-4 year program leading to a university degree;

7. I do not consider the occupations of home management consultant, as described by Mr. Gilbert or critical care paramedic as described by Mr. L'Heureux of the B.C. Air Ambulance Service as realistic occupations for the Claimant. Mr. Gilbert is the only consultant for Sun Life not residing in the Lower Mainland. His job involves traveling to members' homes. The Claimant resides in Powell River. I cannot imagine there being sufficient number of members living within ready driving distance from Powell River to warrant having a consultant based in Powell River. In addition, Mr. Gilbert at least had a university degree in kinesiology. I conclude that the physical requirements of the air ambulance paramedic exceed the Claimant's abilities. He would be required to carry an

equipment bag, get in and out of air craft, assist with others in carrying up to a 350 lb. patient onto a stretcher. Travel in the aircraft would subject him to cold temperatures and vibration.

79. On the other hand, the following facts are also established or admitted:

1. The Claimant is a qualified Registered Nurse whose licence can be activated on payment of a fee. He has considerable experience particularly with his emergency care training;

2. There is in British Columbia at present an extreme shortage of qualified nurses as evidenced by the more than 900 current vacant RN positions in the Vancouver Coastal Health Authority area alone. Many of these positions are in the "light/sedentary" category;

3. The Claimant wants to work. He would consider any job that at 56 years of age he can do. He would be willing to go back to school if it led to a viable work option. He would be willing to work away from home, as he did with P.A., if it were viable.

80. The Respondent asserts that the Claimant never undertook a persistent systematic pursuit of upgrading his existing skills and seeking other employment. It also asserts that the Claimant could and should have obtained by the end of 2006 a university BSN degree through a distance education program following which he could have obtained employment. In its written Brief, the Respondent suggests an annual residual earning capacity of $30,000.00; in its oral Submissions no specific monetary figure was proposed. The Respondent also asserts that the Claimant should not have withdrawn from the program leading to an Occupational Health Nurse certificate in 2004. The Claimant acknowledges that he withdrew from the course of his own volition, and not on the advice of his doctors.

81. I would not fault the Claimant, or consider that he has acted unreasonably in failing up to the present time to obtain any formal level of upgraded skills or in failing to obtain alternate employment. The Claimant resides in Powell River. Given his age and circumstances, and in the absence of a very attractive employment offer elsewhere, he is in a real practical sense financially locked into

the Powell River area. That is one reason why the P.A. job with its full payment of expenses from door to door was so beneficial to him. It appears to me that the purpose of the Claimant commencing the program to become an Occupational Health Nurse was so that he could obtain a job in that position in the Powell River area. Part way through the course, he discovered, upon inquiry, that there was no realistic possibility of his obtaining such a job with either of the two employers, the hospital or the mill, that had such positions. It is not surprising then, nor unreasonable in my view if, in combination with having done poorly on the first module of the program, he concluded that there was no point in continuing the course.

82. Moreover, up the date of hearing, I think it is reasonable for the Claimant to be guided by the opinions of his medical and vocational advisors. Ms. Hilliard in particular, considered the Claimant to be in a practical sense competitively unemployable. Accordingly, I would not reduce the past income loss claim for a failure to mitigate. Applying the 39.5 per cent combined income tax and EI contribution deduction from Exhibit "18", Table 2, the net past income loss claim is $242,000.00 ($400,000.00 minus $158,000.00).

LOSS OF FUTURE EARNING CAPACITY

SUBMISSIONS

83. The Claimant submits that his loss of future earning capacity claim should be based on annual earnings of $100,000.00 to age 65, discounted to a present value, and subject to a reduction of 15 to 30 per cent for contingencies. While conceding that he has some residual earning capacity, the Claimant says the contingency reduction should be closer to 15 per cent because his residual earning capacity is minimal. The Respondent submits that the claim should be assessed at $200,000.00 taking into account the Claimant's established pattern of part time work, the average retirement for Canadian males aged 50 and over employed in

the health care and social assistance sector (61 years) (Agreed Statement of Facts, paragraph 12) and the Claimant's residual earning capacity.

MITIGATION

84. Not withstanding my conclusion in paragraph 82, I think that the Claimant does have some residual earning capacity which must be taken into account in assessing the loss of future earning capacity claim. It is important to appreciate that Ms. Hilliard's first report (March 14, 2006) in which she concluded that the Claimant was for all practical purposes not competitively employable, was primarily addressing the conclusions of Dr. Cooke in a prior vocational assessment (December 4, 2003) not in evidence. Dr. Cooke apparently identified some 15 jobs (listed on page 14 of Ms. Hilliard's report) that he considered suitable for the Claimant. None of them involved the utilization of the Claimant's existing nursing qualifications and experience. Ms. Hilliard concluded that the Claimant's physical limitations, age, or the labour market rendered all 15 jobs identified by Dr. Cooke as not suitable for the Claimant. At trial, the Respondent did not suggest that the Claimant should retrain for an entirely different occupation, but could use his existing qualifications and experience as a Registered Nurse to work in nursing related positions, preceded by upgrading his qualifications by obtaining a university BSN degree. In her rebuttal report (Exhibit "12"), Ms. Hilliard indicates that in all probability, the Claimant would be physically capable of working as an Occupational Heath Nurse in a hospital setting such as the Powell River General Hospital. Ms. Hilliard also expresses the opinion that prospective employers would be reluctant to hire as a new employee a person with the Claimant's disabilities. That concern is addressed by the evidence of Ms. Hook. Her evidence satisfies me that there are many current vacancies within the Vancouver Coastal Health Authority that the Claimant could fill relying on his existing RN qualifications, without further academic upgrading, if he resided in the Lower Mainland. The need for persons with RN qualifications is so desperate that the absence of the "preferred" university degree would not

prevent the Claimant from being hired. The description of some of the existing vacancies appears to meet the physical constraints outlined by Doctors Leete and Ellis. Ms. Hook also commented on the anticipated high number of existing RNs expected to retire in the next few years and further diminish the existing supply of RNs. There is then a possibility, beyond speculation of a full time position becoming available in the Powell River area that the Claimant could fulfill. There is a greater possibility of the Claimant being able to fulfill a short or fixed term vacancy either in the Powell River area or more likely in the Lower Mainland.

85. The Claimant has existing skills and work experience that are desperately in demand in British Columbia. The Claimant wants to work and is willing to consider any job that he can do. He would consider work away from Powell River, which would be necessary if he obtained short or fixed term positions in the Lower Mainland. He would consider returning to school if that were "viable" by which I understand the Claimant to mean that it would lead to an actual job. Without doubt the obtaining of a university BSC degree would satisfy the preferred requirements for a broader number of nursing related positions. The evidence of Ms. Gillie establishes that it is possible to obtain a BSN degree by distance education at the University of Victoria at a tuition cost of $10,000.00 and that the university is acutely interested in accommodating students with disabilities in order to satisfy practicum requirements. Given the length of time the Claimant has been away from a school setting and his lower than expected reading skills and average to low average comprehension skills, I expect it would more likely take the Claimant 24 months rather than 12 to 16 months of full time study to complete the program. In this regard, the Respondent indicated during the course of the hearing that it would agree to pay special damages of $10,000.00 towards the tuition fees of a university program leading to the obtaining of a BSN degree.

86. I conclude that the Claimant has some residual earning capacity with his existing qualifications and experience, even without obtaining a university BSN degree.

In his present circumstances, I do not think that the Claimant is obliged to try to obtain his BSN degree to fulfill an obligation to mitigate. The Claimant is currently 56 years of age and it would likely take him two years of study to obtain the degree. (This assumes he is able satisfactorily to perform the required practicums). He would then be 58 years of age in the year 2010. 2010 is the time when Dr. Leete believes knee surgery will likely be required. The surgery is not to be done until the knee pain is intolerable. This implies a period prior to the actual surgery date when work would not be possible, in addition to the 4-6 months when he could not work after the surgery whilst recuperating. This takes the Claimant to the threshold of age 60, before he could realistically seek employment, assuming there were no surgical complications impacting employability. In this scenario, it would not make a lot of sense to spend two years acquiring a BSN that would likely be of no practical utility. On the other hand, if Dr. Ellis is correct, knee replacement surgery will not likely be required until the year 2025, and if the Claimant were to work to age 65, obtaining the BSN by age 58 would afford the opportunity of seven years more employment and would be a reasonable course to follow. I cannot say that one forecast is more likely than the other, or that it is unreasonable for the Claimant to rely upon the forecast of his own treating specialist.

LEGAL PRINCIPLES

87. The legal principles relevant to determining the quantum of damages for future loss of earning capacity are well established. Both parties rely upon the *Parypa* case. Similar recitation of legal principles is contained in *Rosvold v. Dunlop* (2001 B.C.C.A.) 1 at paras 8-11. In brief, it is loss of earning capacity as a capital asset rather than the lost earnings themselves that requires compensation. The factors to be taken into account include those set out by Taggart, J.A. in *Kwei v. Voiclar* (1991 60 B.C.L.R. (2d) 393 C.A.) quoting Mr. Justice Finch (as he then was) in *Brown v. Golaiy* (1985) 26 B.C.L.R. (3d) 353 (S.C.), namely:

1. Whether the Plaintiff has been rendered less capable over all from earning income from all types of employment;

2. Whether the Plaintiff is less marketable or attractive as an employee to potential employers;

3. Whether the Plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

4. Whether the Plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

88. The trier of fact must take into account all substantial possibilities and give them weight according to how likely they are to occur. The task is to assess damages, not to calculate them on some mathematical formula (*Mulholland v. Riley Estate* (1995) 12 B.C.L.R. (3rd) 248 (C.A.) at para 43). While the first step in measuring the loss can be done by extrapolating a present income into the future and discounting it to a present value, that is only an indicator of loss of capacity and is not the compensable loss itself (*Duhra v. Basram* (1991) 60 B.C.L.R. (2d) 78 (C.A.) at p. 83). Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable.

CONCLUSIONS AND ASSESSMENT

89. The Claimant meets all of the conditions set out in *Brown v. Golaiy*. I think it is probable that the Claimant would have continued to work as an Industrial Nurse/Medic at P.A. I am not, however, satisfied that he would have remained working there to age 65. I note Mr. Muir's evidence that although P.A. had no mandatory retirement age, the oldest Industrial Nurse/Medics were in their early 60s and most were between the ages of 45 and 60. I reject the Respondent's submission that the Claimant can, even with upgrading, obtain permanent full time alternative employment that will come close to approximating the income he would have earned at P.A. Because of his physical restrictions, location in Powell River and ongoing pain, I consider his residual earning capacity to be very

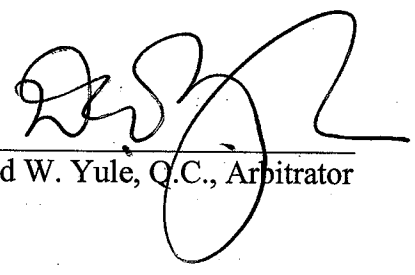
limited. I also take into account the possibility that knee replacement surgery may occur prior to any intended retirement date. Weighing these factors as best I can, I assess the Claimant's loss of earning capacity at $325,000.00.

90. I have considered whether to make the Respondent's offer to pay $10,000.00 for the tuition course leading to a BSN, a conditional award i.e. award the sum on the basis that the Claimant uses the funds for the stated purpose within a fixed period of time. Given my conclusion that the Claimant is not now required to pursue a BSN degree as part of his obligation to mitigate, I think it is preferable to leave the offer and the Claimant's response to it to be resolved between the parties outside the scope of this award.

91. In summary, I assess the Claimant's damages as follows:

Non-pecuniary damages	$ 95,000.00
Past income loss	$242,000.00
Loss of future earning capacity	$325,000.00
Loss of housekeeping capacity	$ 19,000.00
TOTAL:	$681,000.00

Dated at the City of Vancouver, this 24th day of April, 2008.



Donald W. Yule, Q.C., Arbitrator