

IN THE MATTER OF AN ARBITRATION PURSUANT TO SECTION 148.1
(UNDERINSURED MOTORIST PROTECTION)
OF THE INSURANCE (VEHICLE) REGULATION

BETWEEN:

M.T.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

DECISION

Re: Part 7 Deductions

Counsel for the Claimant, [REDACTED]
[REDACTED]

Lyle G. Harris, Q.C.

Counsel for the Respondent, Insurance
Corporation of British Columbia

Scott Baldwin

Written Submission of the Claimant

April 15, 2020

Written Submission of the Respondent

May 6, 2020

Arbitrator:

Donald W. Yule, Q.C.

Date of Decision:

May 19, 2020

Background

1. In this Underinsured Motorist Protection (“UMP”) arbitration the Claimant seeks compensation for injuries arising out of a motor vehicle accident on December 18, 2015 (the “Accident”). At the time of the Accident the Claimant was employed as a host/producer [REDACTED]

[REDACTED] The Claimant has not worked since the date of the Accident, except for a brief unsuccessful trial return to work.

2. As an employee, the Claimant was entitled to long term disability insurance with Great West Life (“GWL”). She became eligible to receive benefits from April 26, 2016 and has been in receipt of benefits since then. From mid-February 2020 the GWL benefits are \$2,332.80 per month.

3. The Claimant is also an “insured person” for the purposes of entitlement to Part 7 No Fault Disability Benefits from ICBC. ICBC has been paying “top-up benefits”, based on its understanding of its obligations under the *Insurance (Vehicle) Regulations*, Part 7. The total amount of “top-up” benefits paid to date is approximately \$46,700.

4. UMP compensation is calculated on the basis of an assessment of damages from which assessment there must be deducted so called “deductible amounts”. Section 148.1(1) of the *Regulation* contains a list of deductible amounts which include amounts “paid or payable under Part 7” (subsection (c)) as well as amounts “paid or payable to the insured under any benefit or right to claim to indemnity (subsection (i)). The “top-up” Part 7 payments made by ICBC will be deducted from the ultimate assessment of the Claimant’s damages if they were payments required to be made under the *Regulation*. There is arbitral authority for the proposition that where ICBC makes a payment that it is not authorized by the *Regulation* to make, it is not a deductible amount (*X v. ICBC*,

decision dated October 28, 2011, Arbitrator Boskovich). In that case the Corporation, apparently in error, paid taxable costs to a claimant who was injured by an unidentified motorist where the *Regulations* provided that the maximum payment of \$200,000 was inclusive of costs.

5. In this case, the Claimant asserts that ICBC has been making “top-up” payments in error as on a proper interpretation of the *Regulations*, there is no requirement for such payments. The consequence is that the total of the “top-up” payments, which are continuing after April 27, 2020 at \$699.80 every four weeks, are not deductible from the ultimate assessment of damages.

6. ICBC’s position is that the “top-up” payments have been properly made in accordance with the *Regulations* and are a deductible amount.

7. The narrow issue is the interpretation of the *Insurance (Vehicle) Regulations* sections 80 and 81.

The *Regulations*

8. Section 80 of the *Regulations* provides as follows:

“Disability Benefits for Employed Persons

Section 80(1) – Where, within 20 days after an accident for which benefits are provided under this Part, an injury sustained in the accident totally disables an insured who is an employed person from engaging in employment or an occupation for which the insured is reasonably suited by

education, training or experience,
 the corporation shall, subject to Section 85, pay to the insured for
 the duration of the total disability or 104 weeks, whichever is
 shorter, the lesser of the amounts determined under paragraphs (a)
 and (b):

- (a) the applicable amount of disability benefits set out in
 Section 2 of Schedule 3;
- (b) in respect of an accident that occurred
 - (iii) on or after January 1, 1991 an amount per week
 calculated by taking 75% of the insured's gross
 earnings for the 12 month period immediately
 preceding the accident and dividing by the number
 of weeks and fractions of weeks actually worked
 during that period."

9. Section 81 of the Regulations provides as follows:

Deduction of Other Benefits

Section 81(1) -In this section:

“Other disability compensation” means compensation similar to
 benefits

- (c) paid or payable under a policy of accident, sickness or life
 insurance purchased by a group or individual ...

“Weekly Net Lost Earnings” means the amount by which the
 disability benefits payable to an insured is calculated under Section
 80(1)(b) exceed the weekly gross total of payments to the insured
 of all other disability compensation.

Section 81(2) -Where an employed person is injured in an accident for
 which disability benefits are payable under Section 80 and some or all of

the insured's lost earnings arising from the accident are payable as other disability compensation, the corporation shall not pay any disability benefits to the insured under that section unless the weekly gross total of other disability compensation payable to the insured is less than 75% of the weekly gross lost earnings of the insured, in which case the corporation shall pay to the insured the lesser of

- (a) the amount of disability benefits payable under Section 80
- or
- (b) the weekly net lost earnings of the insured.

10. Schedule 3, Section 2(a) of the *Regulations* provides that the amount payable under Section 80 in respect of an accident is \$300 per week.

Submission of the Claimant

11. The Claimant submits that Section 81(2) must be read in context of the definition of "weekly net lost earnings" in Section 81(1) and Section 80(1) which is the insuring agreement that governs the application of the other sections. It is submitted that the effect of the three sub-sections, 80(1), 81(1) and 81(2) is that where an insured has "other disability compensation" that pays in excess of \$300 per week, ICBC's obligation to pay or "top-up" is extinguished.

12. To illustrate the submission, the Claimant uses three hypothetical cases in which three employed insureds each made \$2,000 gross per week. A does not have other disability compensation. B has other disability compensation of \$750 per week. C has other disability compensation of \$1,000 per week. Applying what is said to be the ICBC analysis, A would receive TTD benefits from ICBC of \$300 per week. B would receive a "top-up" of \$750 per week to bring his benefits from both sources to \$1,500 per week. C

would receive a “top-up” of \$500 per week bringing his benefits from both sources to \$1,500 per week.

13. It is then submitted that it is absurd to require ICBC to pay different “top-up” amounts to persons with different other disability compensation and to pay nothing at all in “top-up” to those who have no other disability compensation.

The Submission of ICBC

14. ICBC submits that Section 81(2) clearly contemplates ICBC paying a “top-up” where the “other disability compensation” amounts to more than \$300. Moreover, the Claimant’s submission fails to take into account that the Corporation’s obligation under Section 81(2) is to pay the lesser of the amount of disability benefits payable under Section 80 or the weekly net lost earnings of the insured. Thus in the Claimant’s hypothetical cases, there is no “top-up” for A, and the “top-up” for both B and C is \$300. The payment obligation is mandatory, and the calculation is neither unfair nor absurd.

15. Table 2 at paragraph 13 of ICBC’s Submission sets out the calculation made with respect to [REDACTED]. It is reproduced below.

Table 2 Claimant

Table 2		Claimant
A	Weekly gross lost earnings	\$1,788.46
B	Weekly gross disability insurance	\$1,166.40
C	75% of weekly gross lost earnings (A x .75)	\$1,341.35
D	Weekly net loss earnings (“WNLE”) [C-B]	\$174.95
E	Is the weekly gross disability less than 75% of weekly gross lost earnings – Is B less than C?	Yes
F	If yes, ICBC pays the lesser of \$300 or the WNLE of the insured	\$174.95

G	Total TTD + disability benefits	\$1,341.35
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Decision

16. I agree with ICBC's analysis. I think the scheme of the Act is as follows:

- a. ICBC is to pay 75% of the insured's gross weekly earnings (Section 80(1)(b)(iii)), subject to a cap of \$300 per week (Section 80(1)(a));
- b. Where the insured is entitled to other disability compensation, ICBC may have a different obligation (Section 81(2));
- c. Where the total of other disability compensation payable to the insured exceeds 75% of the weekly gross lost earnings of the insured, ICBC makes no payment under Section 80;
- d. Where the total of other disability compensation payable to the insured is less than 75% of the weekly gross lost earnings, then ICBC has an obligation to pay benefits under Section 81(2). ICBC must pay an amount to bring the insured's benefits up to 75% of gross weekly earnings (the weekly net lost earnings as defined), but subject to a maximum payment of \$300 per week (the maximum amount payable under Section 80).

17. In my view the foregoing analysis does not result in unfairness to an insured who does not obtain other disability compensation. A claimant with no other disability compensation receives \$300 per week from ICBC. No other claimant, regardless of the amount of their other disability compensation, gets more than \$300 per week from ICBC. If the Claimant's submission were correct, then claimants who responsibly pay to obtain

their own disability insurance would be “penalized” for doing so by the loss of their ICBC entitlement. That would arguably be arbitrary and discriminatory in itself. The scheme of Subsections 80 and 81 ensures that claimants receive from all sources a minimum of what is prescribed in Section 80, but that, where there is other disability compensation, that disability compensation pays first.

18. I cannot read Section 81(2) as urged by the Claimant even taking into account Section 80 as providing that the Corporation is not required to pay any disability benefits if other disability compensation exceeds \$300 per week.

19. I conclude that ICBC’s “top-up” benefit payments have been properly made in accordance with the *Insurance (Vehicle) Regulation*.

“Donald W. Yule, Q.C.”

Arbitrator: Donald W. Yule, Q.C.