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

BETWEEN:

KG

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

AWARD

Counsel for the Claimant, KG	Nathan McQuarrie
Counsel for the Respondent, Insurance Corporation of British Columbia	Giles Deshon Sarah Lundy
Date of Hearing:	July 2 - 5, 8 and 9, 2024
Place of Hearing:	Vancouver, BC
Date of Award:	August 9, 2024
Arbitrator:	Dennis C. Quinlan, K.C.

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I. INTRODUCTION

[1] On September 14, 2018 the Claimant KG (the "Claimant") was a passenger in a Honda CR-V operated by her friend KV that first collided with a median barrier ("First Impact") and was then forcefully hit from behind by a Dodge Ram ("Second Impact") leading to a chain reaction collision (collectively the "2018 Accident").

[2] The Accident occurred on Highway I-5 near Dupont, Washington.

[3] The Dodge Ram was operated by a Washington State resident SH, who maintained third party liability insurance with $25,000 USD limits.

[4] A court action was commenced by the Claimant in Washington State against SH and eventually settled for the policy limits (the "Washington State Action).

[5] The Claimant did not sue KV in the Washington State Action.

[6] With the consent of the Respondent, the Claimant submitted her claim for underinsured motorist protection ("UMP") compensation to arbitration pursuant to section 148.2 (1) of the ***Insurance Vehicle Regulation*** B.C. Reg. 447/83 (the "Regulation") and the ***Arbitration Act*** [SBC 2020] c.2.

[7] This arbitration involves quantification of the UMP compensation to which the Claimant is entitled resulting from the legal liability of SH in the 2018 Accident, and any applicable deductible amounts.

[8] An added layer of complexity arises from the Claimant's involvement and resulting injury in a motor vehicle accident of September 29, 2015 (the "2015 Accident") in Surrey, B.C.

[9] The Claimant settled her claim arising from the 2015 Accident by acceptance of an agreed monetary amount in consideration of a covenant not to sue and indemnity, which terms were collectively incorporated into an agreement dated July 8, 2022 (the "Settlement Agreement").

[10] The Settlement Agreement raises issues of divisible and indivisible injury, and how to treat payment of the earlier settlement amount.

[11] Finally there is the question of whether KV was negligent and if so, whether there should be a deduction for any injury or loss caused by her negligence, given she was not sued in the Washington State Action.

II. THE CLAIMANT AS A WITNESS

[12] The party advancing a personal injury claim is usually the most important witness in determining the outcome, requiring close scrutiny of that party's evidence: *Sharma v. Bhullar*, 2020 BCSC 379 at paras 57, 58

[13] This claim is no different. It was a central theme of the Respondent that the Claimant's evidence was not reliable and in some cases not credible.

[14] Credibility and reliability are different concepts. As described by Justice Skolrood as he then was in *Radacina v. Quino*, 2020 BCSC 1143 at paras. 94 and 95, credibility refers to the veracity of a witness's testimony whereas reliability is concerned with the accuracy of the testimony.

[15] Credibility and reliability are not all or nothing propositions:

> A trier of fact may believe all, part of or none of a witness's evidence and may attach different weight to different parts of a witness's evidence (*Radacina* at para. 96)

[16] I agree with the Respondent that the Claimant was not a particularly good witness. Her evidence was vague and difficult to follow. It jumped back and forth between topics, without maintaining a chronological flow.

[17] The Claimant generally appeared to be doing the best she could, but unless her evidence was corroborated by other independent evidence, I was cautious in relying upon it, particularly as to dates when particular events occurred.

[18] It was also of concern that on several occasions which I will discuss later, the Claimant appeared to shade her evidence towards a result which tended to

favour her case. Different versions of events were offered by the Claimant, depending upon the context for which the evidence was given.

[19] It should be said that the Claimant's husband and two friends who testified were good witnesses who I found to be credible and reliable.

III. THE 2018 ACCIDENT

[20] At the time of the 2018 Accident, the Claimant was 24 years old and resided in Surrey.

[21] She and KV had a few days off work and decided to drive down to Cannon Beach to see the Oregon coast. They each described being happy, excited and having fun.

[22] On the drive home, the Claimant testified KV was driving northbound in the far left lane of I-5 closest to the median, when the car in front suddenly slowed down and moved at least partially into the middle lane.

[23] At that point it became evident another vehicle had come to a stop in the lane KV was travelling, forcing her to brake and aim for an opening between the stopped vehicle and median to the left.

[24] The Claimant testified how the driver's side of KV's vehicle collided with the barrier and perhaps the vehicle in front. She described the impact variously as "a hard braking… a jostle… a scratch" and rated it 7 ½ to 8 out of 10.

[25] After coming to a stop and as the Claimant was catching her breath, they were suddenly rammed from behind in what felt like an explosion and being hit by a "brick wall". The Claimant rated this impact as 9 ½ to 10 out of 10.

[26] It is notable the respective ratings for the First and Second Impacts were given by the Claimant in response to questions from her own counsel during a pre-trial examination in the Washington State Action on March 15, 2022.

[27] The Claimant later clarified her evidence both in an examination for discovery conducted April 25, 2024 and at arbitration, to say she rated the First Impact as a 4 to 5 out of 10. The explanation for the change was that she had

recently reviewed documents and now better understood how the collisions occurred.

[28] Such modest adjustment would in most cases be of little consequence. A rating out of ten as to the force of impact is subjective to the extreme and more often than not of questionable value.

[29] The question arises as to why the Claimant would feel the need to reduce the force of the First Impact on what would seem a trivial matter?

[30] The answer is likely found within the backdrop of the Respondent on December 18, 2023 filing a Response to Statement of Claim within this arbitration, alleging that the Claimant ought to have commenced a tort action against KV in respect to the First Impact.

[31] The Claimant in her testimony before me denied suffering any injury in the First Impact.

[32] KV described the accident similar to the Claimant saying she was following a gold car and travelling with the flow of traffic which she estimated to be 70 to 80 miles an hour.

[33] Suddenly the gold car veered to the right to avoid another car which had come to a stop in the left lane. KV saw a pocket of space, braked hard and steered to the left. In coming to a stop, she collided with the median barrier. She too rated the force of the impact as 4 to 5 out of 10.

[34] KV described how initially she and the Claimant felt a sense of relief in that all was good. Suddenly without warning, they were hit from behind by an "incredibly jarring" impact, which pushed them through the pocket of space sideswiping three other vehicles on the way by.

[35] KV testified it was a terrifying experience which she could not believe had happened. As they waited for assistance, KV recalled the Claimant crying and stating she did not want to be moved because she could not feel her legs.

[36] There was no evidence tendered from witnesses to the accident or police who may have attended. Three photographs and a video from the accident scene were introduced.

IV. INJURIES AND LIFE FOLLOWING THE 2018 ACCIDENT

[37] The Claimant was taken by ambulance to a local hospital where the main areas of concern were to her neck, upper, mid and lower back, and shoulder. She described feeling psychologically dazed, dizzy, and not all there. Everything was very painful and she was barely able to walk.

[38] The Claimant spent five to six hours in hospital and was then taken home to Surrey by her mother and sister. The next day the Claimant went to Royal Columbian Hospital for a check up and CT scan.

[39] The Claimant underwent physio, massage and chiropractic therapy one to two times a week for the first six months. However she felt her treating therapists did not appreciate the depth of her condition as she was not seeing improvement in her symptoms.

[40] In October, 2019 the Claimant fell and sustained a concussion which she said did not impact her 2018 Accident injuries.

[41] Yoga was a very important part of the Claimant's treatment regime. She started yoga as a hobby when she was fifteen or sixteen and became a certified instructor in 2019. TikTok and Instagram videos of the Claimant performing yoga after 2020 were introduced into evidence.

[42] In addition to physical complaints, the Claimant found her mood was affected and she struggled with anxiety, depression and post traumatic stress disorder.

[43] Over time she saw a psychologist and clinical counsellor, first in Vancouver and then in Calgary where she moved in September 2020 to be with her boyfriend MN who she had met twelve days before the 2018 Accident.

[44] The sessions with the clinical counsellor NT starting in 2021 covered issues of motherhood, alcohol use by family members, relationship issues with her

husband, her father's alcoholism and homelessness, and his attendance at her wedding.

[45] NT did not testify but her records were referred to.

[46] In June 2021 the Claimant followed MN to Manitoba where he was sent for a job rotation. He was away a lot for work and the Claimant found it difficult. She had limited treatment because she was concerned about cost.

[47] In June 2022 they moved back to Calgary, bought a home and soon married.

[48] Throughout this time the Claimant testified she continued to experience headaches, migraines, sharp dull pain in her neck and shoulder, felt anxious and had difficulty sleeping.

[49] The Claimant described how when they lived in Manitoba, she did 70% of the household duties and MN did 30%. However once they moved into their new home in Calgary she was only able to do 30% due to the toll those duties were taking on her mental health.

[50] In April 2023 the Claimant became pregnant and her daughter was born January 24, 2024.

[51] Caring for her daughter has been a shock to her body as she is experiencing shooting pain in her neck, upper and mid back, shoulders, and her sleep is poor. At present the Claimant is on maternity leave.

[52] Special damage receipts show a modest number of physio and massage treatments from 2019 to 2021 and then a significant increase to 20 treatments in each of 2022 and 2023.

V. SCHOOLING AND EMPLOYMENT

[53] The Claimant graduated from high school in 2012 from Falkland Park in Surrey. She then moved to Calgary where she attended Bow Valley College. The Claimant was working full time and everything piled up on her such that she did not finish the program.

[54] In 2013 the Claimant enrolled in the General Business program at Douglas College and attended at least part-time through until the fall of 2017.

[55] Her transcript shows that initially she did quite well but starting in the 2015 winter semester, she was regularly withdrawing or failing the courses she was registered in. She attributed her drop in performance to the 2015 Accident.

[56] The Claimant's work history up until the 2018 Accident involved security, banquet hall serving and retail clothing sales including at LL. At the time of the accident the Claimant was about to start work at KA, a luxury clothing store in Gastown.

[57] The Claimant took a couple of weeks off after the 2018 Accident and then worked full time before reducing to 32 hours a week due to pain and doctor's advice.

[58] The Claimant asserted she could not get ahead at KA because of her reduced hours and in September, 2020 she left and went to work for GA as a sales representative.

[59] The work at GA was not to her liking and in June 2021 she returned to LL in the role of educator. The Claimant was able to work remotely and in September, 2021 she was provided with a sit stand desk which she described as a "game changer".

[60] The Claimant worked steadily in this position until going on maternity leave at the beginning of January, 2024. The Claimant testified she likes the work at LL and is receiving positive job reviews as she advances. Once her maternity leave ends, the Claimant plans on returning to LL.

[61] The Claimant's tax returns show increasing earnings for the years 2016 to 2023:

2016	$12,296
2017	$16,829
2018	$27,868
2019	$25,519
2020	$32,679

2021	$32,691
2022	$45,755
2023	$48,900

VI. THE 2015 ACCIDENT AND RESULTING SETTLEMENT AGREEMENT

[62] The Claimant testified the 2015 Accident occurred when she was t-boned while driving in Surrey. The impact briefly knocked her unconscious but once she woke up she was able to drive to the side of the road.

[63] She was not hospitalized but went to a walk in clinic. Her pain was dull and centered on her neck, shoulder, arm and left lower back. The Claimant testified that as compared to the 2018 Accident, the symptoms were quite minimal in that the pain was not consuming.

[64] Leading up to the 2018 Accident, the Claimant stated she was "mentally stable, in good health and pretty much back to normal". Her neck and shoulder symptoms had resolved and she was backpacking, camping, biking, swimming and playing indoor volleyball and flag football.

[65] The Claimant summarized by stating she was leading a very active lifestyle prior to the 2018 Accident.

[66] On June 27, 2017 the Claimant commenced an action in the Supreme Court of British Columbia against YY in respect to the 2015 Accident.

[67] As described in paragraph 9 herein, the Claimant settled her action against YY, the terms of which were fully described in the defined Settlement Agreement of July 8, 2022.

[68] It is noted for context that the Settlement Agreement was the subject of the Respondent's application brought at the outset of the arbitration, which ultimately lead to my oral ruling of July 2, 2024.

[69] In short the Settlement Agreement provided that the Claimant was resolving her claim against YY in respect to the 2015 Accident but continuing her claim against SH arising from the 2018 Accident.

[70] In continuing her claim arising from the 2018 Accident, the Claimant agreed not to seek damages flowing from the 2015 Accident as against SH.

[71] The operative wording as employed in the Settlement Agreement was as follows:

> 4. *The Plaintiff retains the right to continue to pursue the claims advanced against the Remaining Defendants in the Actions. The Plaintiff in continuing the Actions . . . will limit her recovery to the several extent of the liability of the Remaining Defendants. . . and will not seek to recover from the Remaining Defendants . . . any amount of the claim for recovery attributed or apportioned by the Court to the Settling Defendant.*
>
> . . . .
>
> *6. With respect to the Actions, the Plaintiff hereby covenants that she . . . is not seeking damages from the [2015 Accident] from the defendant in the [2018 Accident]. She hereby waives any such claim, and abandons them by this settlement agreement.*

[72] Although the Settlement Agreement was signed only by the Claimant, the parties took no issue as to its enforceability as it was agreed the Claimant received her settlement payment.

[73] In the normal course, the amount of the settlement payment would not be made known until the arbitration award was delivered. However through inadvertence, the settlement amount of $108,840 was disclosed in the course of the arbitration process. The parties took no objection to my learning of that fact.

VII. EXPERT EVIDENCE

[74] The Claimant tendered expert evidence from Dr. Waseem, physiatrist and Dr. Pachet, neuropsychologist. Both doctors were excellent witnesses and helpful to me in my role as decision maker.

[75] The Respondent did not tender any expert evidence.

DR WASEEM, PHYSIATRIST

[76] Dr. Waseem was qualified as a medical doctor with specific expertise in the field of physical medicine and rehabilitation. He assessed the Claimant in person on September 20, 2020 and April 28, 2023 respectively and then prepared two reports.

[77] Dr. Waseem's first report of October 6, 2020 focussed on the 2015 Accident, whereas the second report of June 1, 2023 addressed the 2018 Accident.

[78] At the time of Dr. Waseem's first assessment, the Claimant presented with symptoms of neck and lower back pain which had persisted continuously since onset in 2015. There were additional symptoms to the mid back and shoulder but those were attributable to the 2018 Accident

[79] It was Dr. Waseem's opinion that the 2015 Accident caused sprain/strain soft tissue injuries of the cervical and lumbar spines resulting in chronic myofascial pain of the affected regions.

[80] Given five years had passed since the 2015 Accident, Dr. Waseem opined that the prognosis for full symptomatic recovery was poor. He felt the Claimant was capable of full time work but not without pain. There was the risk that more strenuous tasks would likely lead to worsening pain and intolerable symptoms.

[81] Interestingly given the earlier evidence of the Claimant, Dr. Waseem recorded that following the 2015 Accident, the Claimant said she had "relinquished working out at the gymn and curtailed hiking due to her injuries" although she had "resumed yoga normally".

[82] On the second assessment of April 28, 2023 addressing the 2018 Accident, Dr. Waseem recorded the Claimant's then symptoms to be neck, lower back and right shoulder/upper back pain, together with generalized anxiety and worsening sleep disturbance secondary to pain.

[83] In respect to causation, he concisely stated that within the backdrop of pre-existing neck and lower back pain, the 2018 Accident caused sprain/strain soft tissue injuries to the cervical, thoracic and lumbar spines together with a right shoulder injury.

[84] Dr. Waseem opined that the 2018 Accident temporarily worsened the 2015 Accident related lower back pain, permanently worsened her 2015 Accident related neck pain and caused the new injuries to the right shoulder and thoracic spine.

[85] The prognosis remained poor for full symptomatic recovery.

[86] As to vocational capacity, Dr. Waseem stated the Claimant could meet the demands of her current sedentary employment provided she was able to take breaks and use a height adjusted desk.

DR. PACHET, NEUROPSYCHOLOGIST

[87] Dr. Pachet was qualified as a registered psychologist having expertise in the areas of psychology and clinical neuropsychology, and able to provide opinion evidence on diagnoses and treatment of emotional and neurocognitive conditions.

[88] Dr. Pachet conducted a clinical interview, physical symptom report and neuropsychological testing on May 16 and 17, 2023 and prepared an expert report dated June 14, 2023.

[89] Initially Dr. Pachet had no concerns about the Claimant exaggerating or over-reporting because the test results appeared consistent with her clinical presentation and self-report.

[90] In psychological function testing, the Claimant revealed brooding and ruminative tendencies over her symptoms, and a high number of somatic and pain complaints. Those findings led Dr. Pachet to diagnose Major Depressive Disorder with anxious distress, Adjustment Disorder with anxiety, and Somatic Symptom Disorder, moderate.

[91] Dr. Pachet explained that a person with Somatic Symptom Disorder has bona fide pain with a psychological component.

[92] In terms of causation, Dr. Pachet opined it was more probable than not that had the 2018 Accident not occurred, the Claimant would not have experienced her mental health struggles or present with the previously mentioned diagnoses.

[93] Vocationally Dr. Pachet opined that it appeared the Claimant's vocational outlook and ability to return to school had been altered by her persistent pain and fatigue.

[94] Once cross examination began, Dr. Pachet immediately retreated from the certainty and strength of the opinions set out in his report.

[95] Prior to giving his evidence, Dr. Pachet was provided with videos taken by the Claimant in the years following the 2018 Accident that showed her performing a variety of yoga poses and workouts.

[96] Dr. Pachet was told by the Claimant she had a long standing interest in yoga but that after the 2018 Accident, she was only able to do "gentle yoga" which he took to mean nothing strenuous with focus on typical poses and stretching.

[97] Even to the untrained eye, the movements appearing in the videos were anything but gentle.

[98] Dr. Pachet stated the following on cross examination:

- the yoga observed on the videos was challenging and very hard
- five videos in particular were contrary and absolutely inconsistent to her self reports and pain inventory
- her reported fatigue did not jive with what he saw
- the videos were inconsistent with the vast majority of what he was told
- her reported household abilities were not consistent with the videos
- the severity of how she described shoulder pain was hard to understand and did not make sense given the poses performed

- the statement that her legs were weak was inconsistent with the videos which showed her to have a very strong core
- her overall veracity was placed into issue

[99] It was clear Dr. Pachet felt he had been mislead by the Claimant such that he found himself questioning the opinions expressed in his report.

[100] Dr. Pachet testified the Claimant told him she had made a full recovery from the 2015 Accident by the time of the 2018 Accident. This evidence was in conflict with what the Claimant told Dr. Waseem when she saw him in 2020 and the pre 2018 Accident observations of her friend BA mentioned below.

[101] Dr. Pachet stated that if the statement as to her recovery from the 2015 Accident was not true, his opinion as to the difficulties caused by the 2018 Accident would be impacted.

[102] Dr. Pachet agreed the reference in the clinical records to the Claimant sustaining a concussion after a fall in October, 2019 leading to neck pain and headaches made worse by bright lights, could in view of the temporal relationship, be an explanation for her later developing emotional and cognitive complaints as opposed to the 2018 Accident.

[103] Finally Dr. Pachet noted the issues discussed with NT seemed on their face to be unrelated to the 2018 Accident, but might well explain her developing depression and anxiety.

[104] As he commented, life events such as relationship turmoil "can throw curve balls at you".

VIII. LAY WITNESSES

MN (HUSBAND)

[105] MN and the Claimant met on September 2, 2018 at a gathering through a mutual friend. They immediately bonded through their common interest in camping, hiking and spin classes. He was active in most sports, having been a competitive soccer player and she was an avid hiker.

[106] MN was living in Calgary at the time completing his chemical engineering degree at the University of Calgary. The Claimant was living in Surrey working full time at KA.

[107] They maintained contact and MN learned about the 2018 Accident the day after it happened. She came to Calgary at the end of October but seemed on edge and not as enthusiastic about going for a hike. She was complaining about her back hurting and her sexual interest seemed less.

[108] MN was from a traditional Muslim home whereas the Claimant was raised Catholic. Eventually both because of the differences in religion and the long distance relationship, they broke up although they remained in contact as friends.

[109] In 2020 after Covid started, the Claimant mentioned she had converted to Muslim leading them to decide they wanted to be together long term. The Claimant then moved to Calgary although they lived separately.

[110] MN observed the Claimant not able to lift much, grimacing and complaining about pain. She was working sporadically because there was limited work in part due to Covid.

[111] In 2021 MN was transferred for work to Manitoba. The Claimant went with him and they moved in together. She expressed how she wanted to be a strong independent woman and would take on 70% of the household work. It soon became evident however that she was having difficulty, resulting in MN doing more of the chores as time went on.

[112] The couple moved back to Calgary in 2022, bought a house and married. The house was larger than what they were used to in Manitoba and MN noticed the housework was not being done and the Claimant appeared moody, anxious and fatigued.

[113] In 2023 the Claimant became pregnant and after the baby was born in January 2024, she suffered from post partum depression. Their initial plan had been to have four children as they both came from large families, but MN said they are reconsidering whether that will be possible.

KV (FRIEND)

[114] KV who is thirty years old testified she met the Claimant in grade 8 when they were on the same dance team and played basketball and volleyball together. Their friendship has remained close since the 2018 Accident and KV saw the Claimant in February to meet the new baby. The Claimant seemed very happy to be a new mother.

[115] Before the 2018 Accident, the Claimant was active and fit, and the two of them hiked together. The Claimant did not speak much about the 2015 Accident although there would be the odd complaint about feeling tired and having back discomfort. Generally the Claimant's mental state was always happy and positive.

BA (FRIEND)

[116] BA met the Claimant in February 2015 through her partner who is the Claimant's brother.

[117] BA was aware the Claimant was involved in the 2015 Accident but did not know the details. From the time BA first met the Claimant, she always had pain issues and was not able to do everything that others could.

[118] BA gave birth to her first child in early 2018. The Claimant would come over and watch the baby for several hours so BA could run errands. It was a few months later that BA learned the Claimant had been involved in the 2018 Accident.

[119] After the accident, the Claimant appeared in a lot of pain and not as social or bubbly. She would go to her room when everyone else was playing games.

[120] BA said she is still close with the Claimant and they talk two or three times a week and their children face time.

IX. LEGAL FRAMEWORK AND FINDINGS OF FACT

[121] The unique facts of this arbitration raise issues of causation, divisible and indivisible injury, and pre-existing condition which collectively lead into the assessment of damages.

[122] I will set forth the legal principles which I view as governing my analysis.

[123] The Claimant must establish on the balance of probabilities that the tortfeasor's negligence caused or materially contributed to her injuries. The primary test for causation is the "but for" test which requires the Claimant to show that the injury would not have occurred but for the negligence of the tortfeasor: *Athey v. Leonati*, [1996 3 SCR 458 at paras. 13-17.

[124] Once causation is established, the role of damages is to place the Claimant in the same position she would have been had the accident not occurred – no better, no worse.

[125] This objective is accomplished by determining not only what the Claimant's position is after the 2018 Accident (the "injured position") but also what the Claimant's positon was before the 2018 Accident (the "original position"). The difference between these positions represents her loss: *Athey,* para. 32, *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

[126] In circumstances where there are multiple causes, it is necessary to determine whether the injuries are divisible or indivisible. In *Sediqi v. Simpson*, 2015 BCSC 214, Justice Fisher described the difference between the two types of injury at para. 36:

> Divisible injuries are those that can be separated so that their damages can be assessed independently. Indivisible injuries are those that cannot be separated: *Bradley v. Groves*, 2010 BCCA 361 at para. 20

[127] The question of whether an injury is divisible or indivisible impacts both causation and the assessment of damages: *Schnurr v. Insurance Corporation of British Columbia*, 2015 BCSC 1630 at paras. 155, 156.

[128] First the causation analysis determines whether a party is liable for an injury. Each defendant is separately liable for the divisible injuries they have caused, and jointly liable for indivisible injuries they caused together with other defendants.

[129] The damages analysis then determines what compensation a plaintiff is entitled to receive from a defendant. Once again individual defendants must

compensate for divisible injuries and indivisible injuries are compensated by the defendants jointly.

[130] When the situation involves a pre-existing condition, it is important to recognize that such condition is inherent in the Claimant's original position.

[131] *Athey* at para. 35 crystallized the correct analysis:

> The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. <u>The defendant is liable for the additional damage but not the pre-existing damage.</u>
>
> Emphasis added

[132] It is this framework which I will now follow.

[133] The concepts of divisible/indivisible injury and a pre-existing condition intertwined with a previous accident claim that was settled can make for a thorny analysis.

[134] Fortunately the *Athey* principles provide the necessary guidance.

[135] The unchallenged evidence of Dr. Waseem was particularly helpful.

[136] First he clearly identified the injuries sustained in the 2015 Accident which had developed into a chronic condition with poor prognosis by the time of the 2018 Accident.

[137] This evidence enables me to determine the Claimant's "original position".

[138] Second Dr. Waseem went on to describe the extent to which the 2018 Accident impacted the 2015 Accident injuries and caused new injury.

[139] From this evidence I am able to determine the Claimant's "injured position".

[140] As stated by the court in *Schnurr* at para. 171:

> ....the medical evidence in this case provides a clear picture of her position immediately before the first of the subject accidents in this action. It is possible to accurately determine her original position notwithstanding its relationship to the prior accidents.

[141] Accordingly I conclude that the injuries caused by the 2018 Accident "should be characterized as divisible injuries inflicted on someone who suffered from chronic, pre-existing conditions": *Schnurr* at para. 172.

[142] Such approach fits within the terms of the Settlement Agreement arrived at in respect to the 2015 Accident. Reduced to its plain meaning, the Settlement Agreement provides that the Claimant in continuing her claim in respect to the 2018 Accident, "will limit her recovery to the several extent of the liability…" of the 2018 tortfeasor SH.

[143] The use of the word "several" clearly contemplates divisibility as between the 2015 and 2018 Accidents.

[144] I note that initially both parties urged me to find that the injuries caused by the two accidents were indivisible such that I should assess quantum globally for the 2015 and 2018 Accidents and then deduct the settlement amount of $108,840 as set out in the Settlement Agreement.

[145] Given my finding of divisibility, it is not necessary to conduct a global assessment. The damages caused by the 2015 Accident have already been determined by agreement between the parties.

[146] In the words of *Athey,* SH is only responsible "for the additional damage but not the pre-existing damage".

[147] It is this additional damage which I will assess.

[148] In that regard, I make the following findings of fact:

(a) as a result of the 2015 Accident, the Claimant sustained sprain/strain soft tissue injuries of the cervical and lumbar spines resulting in chronic myofascial pain of the affected areas;

(b) leading up to the 2018 Accident the Claimant was experiencing constant neck and back pain at mild to moderate intensity together with some vehicle anxiety and sleep disturbance;

(c) the Claimant was capable of full time work but not without pain. There was the risk that more strenuous tasks such as sustained static positions could lead to worsening pain and potentially intolerable symptoms.

(d) at the time of the 2018 Accident the Claimant's prognosis for full symptomatic recovery from the 2015 Accident related injuries was poor;

(e) the 2018 Accident temporarily worsened the 2015 Accident related lower back pain, permanently worsened the 2015 Accident neck pain and caused new soft tissue injury to the right shoulder and thoracic spine resulting in chronic myofascial pain of the affected areas.

(f) at the time of the April 28, 2023 assessment, the Claimant was able to meet the demands of her current sedentary employment with accommodations and was planning on continuing in that position.

(g) the risk of worsening pain with more strenuous activity continued and the Claimant's prognosis for a full symptomatic recovery remained poor.

X. ASSESSMENT OF DAMAGES

NON-PECUNIARY

[149] Non-pecuniary damages compensate for pain, suffering and loss of enjoyment of life and amenities. Comparison to other cases of similar injury can

be helpful but the award in each case will depend on its own facts: *Debruyn v. Kim*, 2021 BCSC 620 at paras. 120-121.

[150] The Court of Appeal in *Stapeley v. Hejslet*, 2006 BCCA at para. 46 outlined the non-exhaustive factors to be considered in awarding non-pecuniary damages.

[151] The factors related to the Claimant which I view as important are her young age, nature, severity, and duration of her injury, impairment of family and social relationships, and impairment of physical abilities and loss of lifestyle.

[152] The parties differed significantly in their suggested amounts to be awarded. The Claimant relied on the decision of *Zenone v. Knight*, 2022 BCSC 99, appeal dismissed, to support an award of $200,000, whereas the Respondent advanced three decisions of *Sharma v. Bhullar*, 2020 BCSC 379, *Hoque v. Howard Carter Lease Ltd*., 2020 BCSC 160 and *Bhumrah v. McLeary*, 2021 BCSC 285 which ranged between $45,000 and $55,000.

[153] The decision of *Zenone* involves a plaintiff who sustained much more serious injuries than those of the Claimant.

[154] *Zenone* was an assessment of two accidents where post second accident the plaintiff could "barely function" and her injuries were described as having a "profound affect on her life" such that "she has a long life ahead of her which will involve dealing with pain". The accidents were found to have caused shoulder, upper back, mid-back and low back injuries, disc herniation resulting in surgery, a concussion, development of opioid addiction, anxiety, depression and modest PTSD.

[155] The cases cited by the Respondent are much more in line with the injuries sustained by the Claimant in the 2018 Accident, namely soft tissue injury of the cervical, thoracic and lumbar spines and right shoulder, all within the backdrop of chronic neck and lower back pain for which the Claimant has already been compensated.

[156] I accept the Claimant likely sustained some emotional upset as a result of the 2018 Accident. This was a significant accident which would have been frightening. However the extent to which any ongoing emotional difficulties are

as a result of the 2018 Accident is open to debate. The Claimant of course carries the burden of proof.

[157] As reflected in the reaction of Dr. Pachet, the person shown in the yoga videos did not equate to the picture of physical disability and pain portrayed by the Claimant.

[158] I award $65,000 for non-pecuniary damages.

PAST LOSS OF EARNING CAPACITY

[159] Compensation for past loss of earning capacity is based on what the Claimant would have, not could have, earned but for the injuries sustained in the accident: *Rowe v. Bobell Express Ltd*., 2005 BCCA 141 at para. 30.

[160] The test is whether on the balance of probabilities, there was a real and substantial possibility that the Claimant but for the 2018 Accident would have worked more hours or sought different opportunities: *Malakoe v. Harris*, 2024 BCSC 1178 at para. 129.

[161] If so the task is to then make an assessment of the loss including an allowance for the chance that the assumptions upon which the award is based, may prove to be wrong: *Debruyn v. Kim*, 2021 BCSC 620 at para. 133.

[162] The Claimant sought compensation in the amount of $1,190 for the two weeks of work lost following the accident, based upon 35 hours per week at $17 per hour. The Respondent agreed to this loss.

[163] The parties diverge on whether there is any further loss.

[164] The Claimant seeks an award of $95,000 based upon the premise that her 2023 income of $48,900 reflected the attainable without accident income for each of the years 2019 to 2023. Alternatively the Claimant advanced a claim for an award of approximately $20,000.

[165] The Respondent submits the Claimant gave conflicting evidence such that it is impossible to determine any further amount for alleged loss.

[166] The theory of the Claimant in my view is flawed. It is not appropriate to take the last year of income, being the year with the highest earnings, and retroactively without some evidence in support, apply that level of income to the earlier years and assume that would have been the without accident income.

[167] I agree with the Respondent that the evidence of the Claimant was unclear. From what I could discern, the Claimant's alleged loss arose from only being able to work 32 hours per week as opposed to full time work. There was no clear evidence as to what was meant by full time work, be it 35 hours a week as recommended by her doctor, 37 1/2 hours or 40 hours. There was also no evidence as to what hours were actually available for the Claimant to work.

[168] Doing the best I can with the evidence available, I find the loss per week was five hours (one hour per day), which extrapolated over an entire year and factoring in periodic rate increases, would amount to an annual loss of $4,000. I note there was some evidence of the Claimant's hourly rate at LL increasing over time.

[169] However I also conclude the Claimant's reduced income capacity was limited to 3 years, being the end of 2021. Her evidence was that the sit stand desk provided by LL in September, 2021 was a game changer and that with accommodations she could work full time hours, if she wished to do so.

[170] Therefore in addition to the amount set out in paragraph 162 herein, I award the sum of $12,000 which takes into account any time that would have been lost due to Covid even without the accident, and is net of income tax.

[171] The total award for past loss of earning capacity is $13,190.

LOSS OF FUTURE EARNING CAPACITY

[172] An award for loss of earning capacity involves a comparison between the likely future of the Claimant's working life if the 2018 Accident had not happened with the Claimant's likely future working life after the 2018 Accident has occurred: *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at para. 32.

[173] The decision of *Rab v. Prescott*, 2021 BCCA 345 at para. 47 sets out the three-step pathway for considering such claims:

> (a) assess whether the evidence discloses a potential future event that could lead to a loss of capacity;
>
> (b) if so, assess whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss;
>
> (c) if so, assess the value of that possible future loss, including the relative likelihood of the possibility occurring.

[174] The Claimant seeks an award under this head of damage of $623,000 based upon the assumption the Claimant would have expected higher paying roles later in her career that would have earned her between $80,000 and $100,000 annually for 15 years.

[175] Leaving aside for the moment the question of whether the evidence disclosed a potential future event leading to a loss of capacity, there was no evidence to support the assertion of higher paying roles and I dismiss it as no more than speculation.

[176] Alternatively the Claimant asserts a net present valued loss of $124,000 premised on an annual reduced working capacity of $6,000 for 35 years. The Respondent submits there was not sufficient evidence to satisfy the *Rab* requirements.

[177] The first step in the *Rab* analysis only requires the Claimant to prove there is the potential of a future event leading to a loss of capacity: *Davies v. Penner*, 2023 BCCA 300 at para. 42.

[178] As examples of three such potential events, Justice Grauer in *Rab* identified chronic injury, future surgery and risk of arthritis. However the court in *Davies*, at para. 44 cautioned that the mere fact a person experiences chronic pain does not on its own satisfy the first step in *Rab.*

[179] Any inference which is to be drawn must be based on "all of the medical and lay evidence about the nature and extent of the [C]laimant's injuries, the [C]laimant's circumstances and the impact that work has on their ability to function": *Davies*, at para. 44.

[180] As detailed earlier, Dr. Waseem diagnosed chronic myofascial pain, first to the neck and lower back as a result of the 2015 Accident and then to the right shoulder and thoracic spine due to the 2018 Accident. In each case, Dr. Waseem felt the Claimant could meet the full time demands of her current employment so long as she was accommodated with breaks and a height adjusted desk.

[181] Importantly however, Dr. Waseem added the cautionary statement in both of his reports that more strenuous tasks such as those involving sustained static postures, lifting and bending/stooping were "…likely to lead to worsening pain and intolerable symptoms."

[182] It is accepted as a matter of common sense that continuous pain can take its toll over time, and have a detrimental effect on a person's ability to work: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41.

[183] In my view the evidence of Dr. Waseem raises the potential for a future event leading to a loss of capacity as contemplated by *Morlan*. I conclude therefore that the Claimant has satisfied the first step in the *Rab* pathway.

[184] I recognize that as a result of Dr. Waseem's diagnosis, chronic myofascial pain was inherent in the Claimant's original pre 2018 Accident position. However the 2018 Accident added to that "original position" thereby raising the spectre of a pecuniary loss of earning capacity arising from the 2018 Accident.

[185] The second step as to whether there was a real and substantial possibility of a pecuniary loss arising from that potential event is more difficult. The evidence in support of such conclusion was not strong.

[186] *Rab* and subsequent cases make it clear that a finding of diminished capacity at step one does not necessarily mean there is a real and substantial possibility of a pecuniary loss so as to satisfy step two. The inquiry must take into account the particular circumstances of the Claimant and the evidence as a whole: *Davies* at para. 27; *Bains v. Cheema*, 2022 BCCA 430 at para. 22.

[187] The Claimant on her own evidence is capable of working full time if she wishes to do so and Dr. Waseem confirmed that to be the case so long as she was accommodated.

[188] I have already found there was no loss of income occurring beyond the beginning of 2022. However the question is not whether the Claimant is presently able to work full time but rather will she be able to do so into the future to the same extent she would have but for the 2018 Accident

[189] Absent expert evidence to the contrary, I am left with Dr. Waseem's diagnosis of chronic pain related in part to the 2018 Accident and the risk of pain worsening with more strenuous activity. Based upon that evidence, I conclude there is a real and substantial possibility that the future event I have identified will lead to a pecuniary loss.

[190] I should note that Dr. Waseem's reaction to the yoga videos was not nearly as dramatic as that of Dr. Pachet. He would only go so far as to say that different people have different levels of pain tolerance. His opinion in respect to the yoga videos is important given physical medicine is his area of expertise.

[191] Turning to quantification, I view the pecuniary loss as modest at best.

[192] Given my finding that at present the Claimant is earning what she would have earned absent the 2018 Accident, I view the "rougher and readier" annual income approach first articulated in *Pallos v. Insurance Corp of British Columbia* (1995), 100 BCLR (2d) 260 (CA) as the best way of assessing the Claimant's loss.

[193] As directed by *Rab,* I am to consider the relative likelihood of the loss and the reasonableness of the award. It is necessary that the factors I consider are tied to the evidence.

[194] At the risk of repeating myself, I am principally taking into account the opinion evidence of Dr. Waseem as to future risk, my view that the Claimant is on a career path with LL that she would have followed even had the 2018 Accident not occurred, and the uncertainty as to her work capacity given the abilities she displayed in the yoga videos.

[195] In conclusion it is my view that the sum of $30,000, representing slightly more than six months of income is a fair and reasonable award for loss of earning capacity.

COST OF FUTURE CARE

[196] Costs awarded for future care should encompass treatments or items that are linked to accident-related injuries, reasonable and that the Claimant will likely use and benefit from: *Malakoe v. Harris*, 2024 BCSC 1178 at para. 149.

[197] There was limited evidence as to future care. Given the distancing by Dr. Pachet from his opinions, I forego consideration of his recommendations.

[198] Dr. Waseem in his report recommended trigger point injections, self directed exercises, medications as per the Claimant's current regimen and intermittent pain-relieving modalities 6-8 times per year for pain management.

[199] On cross examination and after reviewing the yoga videos, Dr. Waseem agreed the Claimant did not require self directed exercise, passive therapy or trigger point injections (provided her pain level was mild). Any ongoing medication arose at least in part from the 2015 Accident.

[200] As Dr. Waseem stated, the Claimant "is excelling in self directed exercise."

[201] I award $3,000 for future care to cover medication and intermittent therapy requirements.

XI. DEDUCTION FOR ANY LOSS CAUSED BY NEGLIGENCE OF KV

[202] The Respondent submits that pursuant to section 148.1 (1) (j) of the Regulation, it is entitled to the benefit of an amount "paid or able to be paid by any other person who is legally liable for the insured's damages."

[203] The thrust of the Respondent's argument is that KV was liable for the First Impact in that she was following at a distance and travelling at a speed which were unsafe for the circumstances, and was therefore unable to avoid colliding with the median barrier and possibly the vehicle in front.

[204] It is alleged the Claimant sustained injury in the First Impact and therefore she should have advanced a claim against KV. In not doing so and given the

wording of subsection (j), the amount of the Claimant's damages arising from KV's negligence should be a deductible amount.

[205] For the reasons set out below, I do not agree.

[206] Section 148.2 (6) (a) provides that the law of the place where the insured suffered the injury is to be applied to determine if the insured is legally entitled to recover damages and if so the degree to which the insured is entitled.

[207] Section 148.2 (6) (b) provides that the law of the Province must be applied to determine the measure of damages.

[208] No expert evidence was tendered as to proof of the law of Washington state. As such the law of Washington is assumed to be the same as the law of the forum in which the arbitration was heard, namely British Columbia: Al-*Marzouq v. Nafissah*, 2022 BCSC 1670 at paras. 33, 34.

[209] I agree with the Respondent that KV was legally liable for the First Impact. KV's evidence was that she was travelling with the flow of traffic which she estimated to be 70 to 80 miles per hour. Seeing the vehicle in front slow and move at least partially into the lane to the right, KV herself slowed and steered to the left but could not avoid colliding with the barrier and possibly another car that was stopped in front.

[210] There was no evidence led as to any other vehicle that might have been liable for the First Impact.

[211] Where I differ from the Respondent is the assertion that the Claimant sustained injury in the First Impact (as distinct from the Second Impact).

[212] The Respondent's main point in asserting the Claimant sustained injury in the First Impact was the following evidence given by the Claimant at a deposition conducted in the Washington State Action on March 15, 2022:

> Q. Going back to the first collision, did your body move at all within the vehicle when that occurred, so the barricade and the other car?
> A. Yes.

Q. Okay. Did you experience any pain after the first collision?
A. I recall feeling a shooting pain in my left side of my back going upward towards my spine.

Q. Okay?
A. I do not recall.

[213] On cross examination in the arbitration, the Claimant was confronted with her previous deposition evidence. Initially she was only referred to the first two questions. She agreed she gave those answers but did not agree they were accurate.

[214] Counsel was asked to refer the Claimant to the third question and answer where she indicated she did not recall. She indicated the answer of feeling a shooting pain was in respect to the Second Impact.

[215] The Claimant maintained in her cross examination that she was not injured in the First Impact and the reference to shooting pain was in respect to the Second Impact. Having observed her, I accept her evidence in that regard.

[216] It was also asserted that any emotional issues were indivisible injuries arising from both the First and Second Impacts. There was no expert evidence to that effect and the Claimant was effectively inviting me to make my own medical diagnosis, which I cannot do: *Grabovac v. Fazio*, 2021 BCSC 2362 at para. 272.

[217] As the Claimant did not sustain injury in the First Impact or at least more than de minimus, there was no loss sustained as a result of the negligence of KV.

[218] Accordingly there is no deductible amount pursuant to section 148.1 (1) (j) of the Regulation in respect to the actions of KV.

XII. CONCLUSION

[219] The parties indicated they would resolve the issues of special damages and deductible amounts after delivery of my award. Subject to those remaining issues, I award the Claimant the following:

Non Pecuniary Damages	$65,000
Past Loss of Earning Capacity	$13,190
Future Loss of Earning Capacity	$30,000
Cost of Future Care	$3,000
Total	$111,190

[220] The Claimant is entitled to her costs unless there are considerations of which I am not aware.

[221] If the parties wish to make submissions on deductible amounts, special damages, or costs, a telephone call can be arranged to discuss how best to proceed.

Dated: August 9, 2024

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Arbitrator – Dennis C. Quinlan, KC