In the matter of an Arbitration pursuant to s.148.2(1) of the Revised *Regulation* under the *Insurance (Vehicle) Regulation Act* BC Reg. 447/83
and the *Commercial Arbitration Act* RSBC 1996 c.555

BETWEEN

AMS

CLAIMANT

AND

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

Arbitrator: Donald W. Yule, Q.C.
Dates of Hearing: October 2, 3 4, 5, 9 and 10, 2012
Place of Hearing: Vancouver, BC
Date of Award: November 5, 2012

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INTRODUCTION

1. This Arbitration is to determine underinsured motorist protection (UMP) compensation pursuant to the provisions of s.148.2(1) of the Revised *Regulation* (1984) under the *Insurance (Vehicle) Act* RSBC 1996 c.231 and of the *Commercial Arbitration Act* RSBC 1996 c.55. It is agreed that the Claimant is an insured person for UMP purposes; that another party was solely liable for the accident giving rise to this claim, and that the party responsible is an "underinsured motorist". The issues to be determined are an assessment of the Claimant's damages and the determination of applicable deductible amounts. In dispute are non-pecuniary damages, loss of future earning capacity, cost of future care and special damages. There is no claim advanced for past loss of earning capacity from the date of the accident to the date of the arbitration.

CIRCUMSTANCES OF THE ACCIDENT

2. The accident occurred at approximately 5:00pm on August 15, 2007 (the "Accident"). The Claimant was driving her 2004 Toyota Camry motor vehicle eastbound on the Fraser Highway approaching the intersection of Fraser Highway and 64th Avenue. She was stopped at a stop light behind four or five other cars. She turned her head slightly to the right and observed in the rear-view mirror a pickup truck approaching from behind, quite fast. She anticipated a collision, gripped hard on the steering wheel and pressed down hard on the brake. The pickup truck struck the left rear part of her car and then veered left towards a median and subsequently struck other cars and came to a stop having passed through the intersection. The Claimant did not hear any sound of brakes. The damage to her vehicle was severe and the vehicle was written off.

THE CLAIMANT'S CIRCUMSTANCES

3. The Claimant, age 46 at the date of the Accident, lives in her own home in Surrey, BC. She was and remains in a relationship with who resides in , Manitoba. The Claimant left school at Grade 10, then worked in a retail hobby store, at London Drugs, and as a waitress and bar tender at the Tudor Inn. She worked 11 to 12 years at the Tutor Inn, leaving their employment in 1989. Shortly thereafter, she commenced to work for the (the Company). She commenced working at the comparatively unskilled position on the front counter, progressed into becoming a

salesperson and, at the time of the Accident, was the general manager. The Company has over the ensuing years expanded and become very successful. From very modest beginnings selling equipment manufactured in California, the Company now has its own large manufacturing facility and an international network of dealers. Along with the two owners of the Company, the Claimant was one of the original employees and has remained as a core employee, well regarded by , one of the owners. Prior to the Accident, the Claimant among other duties trained sales staff, trained dealers who came to the Company's head office for the purpose, attended and assisted at opening new dealerships in various parts of the country, attended annual dealer meetings at which new products were displayed, attended industry trade shows, both in Canada and abroad, wrote a thick manual for dealers and sales staff, including both product information and sales procedure and acted as an effective sales "closer" at the store where she worked. Part of her job involved heavy, physical work in setting up or changing the set-up of the store showroom, in setting up displays at trade shows, including the PNE Homeshow, and physically assisting in moving , and other heavy products sold by the Company.

4. She was paid a commission guaranteed at $85,000.00 per annum and capped at $106,000.00 per annum, plus fringe benefits including the use of a car. Based on income tax returns, the Claimant's total income in the years 2000 to 2006 ranged between $104,656.00 and $126,202.00.

5. The Claimant prided herself on both her fitness and appearance. She worked out regularly at a gym before work. She had purchased a home gym with weights. She wore business suits and high heels at work both as an example to younger staff and to raise the dress standard at the Company above that of its competitors. She worked 7 days per week. Sales were better on the weekends than through the week. She was the Company's National Training Manager. She was well known and respected in the industry. She travelled on a Company cruise in the Caribbean, went on rewards trips with dealers to Belize and Costa Rica. On these or other recreational trips, she participated in snorkeling, zip lines, body surfing, horseback riding, and cliff diving.

6. She was a central organizer and entertainer of family events. She engaged the assistance of her parents in yard work and gardening. Because of her work schedule, she had a housekeeper every two weeks.

7. She took holidays with her boyfriend which usually involved at least one long annual trip of about 7-10 days. They also visited back and forth on a regular basis during the year.

PRE-ACCIDENT MEDICAL HISTORY

8. Dr. Glen Anderson has been the Claimant's family doctor since 1984. He was not primarily involved in the post-Accident treatment, and was not asked to provide any opinion. He was produced for cross-examination at the hearing. His post-Accident clinical records were admitted into evidence as business records (Exhibit 1, Tab 6). His evidence dealt primarily with the Claimant's pre-Accident medical history. It may be summarized as follows. The Claimant was seen in 1984 with a complaint of a sore back and right shoulder. She had been working long hours waitressing. In 1985 there is a note of tiredness, associated with working a lot of overtime. On December 17, 1986 there is a note of muscle contraction headaches connected with tension at work. No treatment was prescribed. In March, 1987, the Claimant was injured in a motor vehicle accident but was back to work and fine shortly thereafter. In May, 1987, the Claimant was "still" having headaches and dizziness although there were several events at the time causing stress, including a divorce and house sale. Dr. Anderson considered these headaches to be stress related. On November 23, 1989, the Claimant was diagnosed with tension headaches. On August 26, 1992 the Claimant reported pain in the back and both shoulders. She was tender in the mid-thoracic spine area. She was referred to Dr. Frobb for a short period of treatment. The cause of these symptoms is not identified. There was no complaint of neck pain. Dr. Frobb's consultation letter to Dr. Anderson, dated August 27, 1992 (Exhibit 3), notes that the Claimant had been experiencing problems with back pain dating back some 12 years, attributable to her occupation as a waitress. In August, 1992, Dr. Frobb provided treatment for generalized pain of the cervical thoracic and lumbar-sacral spine for about 2 months and discharged the patient as asymptomatic.

9. On April 5, 1995, the Claimant was seen for chronic headaches attributed to her intense job. Between 1996 and 1998, there was one relevant attendance for stress issues. On

August 17, 1999 the Claimant was seen for a routine physical exam. During the course of the exam, Dr. Anderson recorded headaches and neck and shoulder pain. He did not identify a cause. It is important to note that this attendance was not for the purpose of seeking treatment.

10. In November, 1999, the Claimant presented with strange neurological left leg symptoms. Dr. Anderson was concerned that the cause might be multiple sclerosis. He arranged an immediate referral to a neurologist, Dr. Sadowski. Investigation of these symptoms continued on and off until March, 2002. A head CT scan, taken November 1, 1999, was normal. A MRI of the cervical thoracic and lumbar spine, taken in May, 2000, was essentially normal. The Claimant was referred to another neurologist, Dr. Hashimoto. His examination in July, 2000, was not definitive. By that time, the Claimant was reportedly almost back to normal. Dr. Hashimoto recorded a complaint of headaches "90% of the time" which according to the Claimant seemed to be a stress, tension type problem in her neck which spread into the head. In March, 2002, Dr. Hashimoto again saw the Claimant in follow-up. The doctor noted a recent migraine headache with a starburst effect in her visual field, as well as some left leg numbness. He also recorded a report of headaches associated with stress and pressure at work in January, 2002. The neurological exam however was essentially normal. The Claimant was able to function normally and Dr. Hashimoto did not recommend any further investigation. Dr. Hashimoto's consultation letters to Dr. Anderson dated July 6, 2000 and March 28, 2002 are Exhibits 4 and 5.

11. On January 5, 2005, the Claimant reported tingling and coldness in the left leg together with headache secondary to muscle tension. She had reportedly fallen down on December 25, 2004 but sustained no obvious injury.

12. On October 19, 2005, the Claimant was seen with a complaint of a sprained ankle having fallen down stairs. There was tenderness at C5-6 and T5-6 in the back for which ice and an x-ray were prescribed. The Claimant was noted a week later to be much better. On February 15, 2006 neurological symptoms from 6 months' earlier were reported to have resolved within 24 hours of onset. There is a note of occasional headaches but the physical exam was normal.

13. The next relevant chart note is on August 17, 2007 respecting the Accident.

14. Dr. Anderson has no record of prescribing massage therapy in 2005/2006. The Claimant agrees that she did receive massage therapy at least once prior to the Accident. She does not agree that it was necessarily for treatment of stress related symptoms; it could possibly have been to "treat herself" after a strenuous time at work, such as after the PNE. The Claimant does acknowledge having pre-Accident tension headaches, especially during the time when she was new in a management role.

MOTOR VEHICLE ACCIDENT INJURIES

15. In the accident, the Claimant sustained a cut to the back of her head. She was wearing a hairclip and her head struck the headrest. The cut resolved uneventfully without treatment. She sustained bruising on her upper left chest and her left arm caused presumably by the seatbelt. These injuries also resolved uneventfully without treatment. The pleadings allege minor concussion. There is no evidence to support sequelae of a head injury. The remaining alleged injuries involve the upper and lower back, neck, shoulders and headaches.

TREATMENT

16. Dr. Anderson saw the Claimant on August 17, 2007, the day after the Accident. He provided treatment in August and September, before referring the Claimant to Dr. Frobb at the beginning of October, 2007. Dr. Anderson recorded complaints of headache, sore head, sore right clavicle, sore left chest wall, bruised upper left arm, sore neck muscles, sore left forearm, right leg. He observed bruising of the upper left forearm. The range of motion of the spine was normal. There was muscle tenderness. He prescribed range of motion exercises and pain medication. Dr. Anderson saw the Claimant 5 times prior to the referral to Dr. Frobb. On August 22 he recommended massage therapy. On September 17 the thoracic spine area was still sore and there was spasm in the right trapezius muscle. On October 3, there were continuing complaints of headache, inter-scapular soreness, stiff and sore neck, tenderness in the thoracic spine and tight inter-scapular muscles. The cervical spine showed moderate tenderness with spasm in the trapezius muscle. Dr. Anderson prescribed Flexeril and made the referral to Dr. Frobb. Dr. Anderson completed a CL19 form medical report for the Respondent on December 5, 2007. He diagnosed a Grade II musculoskeletal injury to the neck, upper back and low back. Dr. Anderson

continued to see the Claimant from time to time. In March, 2011, he continued to find objective symptoms in the cervical and thoracic spine. The Claimant was continuing to report a really sore neck and back and soreness in the left inter-scapular and rib region together with headaches stemming from the spine/neck. She was continuing to see Dr. Frobb and take physiotherapy. The treatment plan was to continue with physiotherapy and massage long term, combined with stretching exercises and Advil as necessary. In June, 2011, Dr. Anderson recorded some headaches from the Accident, muscle tension headaches, inter-scapular pain and some work stress. Range of motion in the neck and back were normal. There was tenderness at T4-5-6-7 and in the left inter-scapular muscle. His treatment recommendations included losing weight and using a personal trainer. He gave evidence that he did not know whether the Claimant actually hired a personal trainer. Dr. Anderson gave evidence that the musculoskeletal and headache symptoms were not particularly related to any possible perimenopausal condition. He expressed the opinion that the Claimant worked too hard. He has not considered referral of the Claimant to any other medical specialist.

17. Dr. Frobb is a licensed medical doctor with a certification from the College of Family Physicians of Canada and from the Acupuncture Foundation Institute of Canada. He has been in private practice in Surrey, BC, since 1979. He has a special interest and focus in pain management and the rehabilitation and management of chronic back pain and whiplash associated disorder. His expert report dated August 5, 2011 was filed as an Exhibit (Exhibit 1, Tab 1). He treated the Claimant from October 5, 2007 until June 30, 2009 and then, after a gap, he provided treatment again from April 23, 2010 until September 30, 2010. On October 5, 2007 the Claimant completed a patient history questionnaire noting the complaints as pain in the spine between shoulder blades, lower back, shoulder, neck, headaches. Dr. Frobb's treatment consisted primarily of neural-acupuncture and manipulation of the back using a "muscle energy" technique. Dr. Frobb has training in osteopathic medicine. Dr. Frobb also referred the Claimant to an associated kinesiologist, Pedro Sem. The Claimant saw Mr. Sem on 11 occasions between October 24, 2007 and October 30, 2008. The primary purpose of the kinesiology referral was to receive instruction and assistance in exercises to improve core muscle strength, regarded as an essential part of a successful, overall, treatment plan for recovery. Dr.

Frobb considered 11 sessions to be more than adequate to provide a patient with the knowledge to carry on with prescribed exercises at home.

18. Dr. Frobb performed acupuncture on 25 occasions between October 5, 2007 and July 14, 2010. The Claimant paid $3,750.00 for these treatments. This amount is claimed as a Special Damage. Dr. Frobb's other treatment (97 visits) was covered by MSP.

19. The Claimant received massage therapy from Andrew Vowles on 31 occasions from November 7, 2008 until June 5, 2009. The Claimant has paid $2,635.00 for these treatments. This amount is claimed as a Special Damage.

20. The Claimant has received approximately 104 physiotherapy treatments from Jodi Wiebe/Barry Bereziak. She has paid $4168.30 for these treatments. This amount is claimed as a Special Damage.

21. The Claimant claims $363.00 as a Special Damage for the kinesiology sessions with Mr. Sem.

22. The Claimant received 3 treatments of massage therapy between September 6 and October 1, 2007 from Holly Morgan. She paid $225.00 for these treatments. This amount is claimed as a Special Damage.

THE CLAIMANT'S EVIDENCE

23. With respect to injuries, when the Claimant saw Dr. Anderson on the day after the Accident, she had headache, soreness in the left shoulder, bruising on the left shoulder and around the waist, tingling in her left leg, a cut on the head and was generally really sore. In the few times she saw Dr. Anderson, she recalls having a really sore upper back, being sent for x-rays, being prescribed Flexeril, and having some massage before she was referred to Dr. Frobb at the beginning of October, 2007.

24. When she first saw Dr. Frobb she was optimistic of an eventual recovery. He initially gave her acupuncture treatment, injecting Lidocaine into her spine, neck and shoulders and then performing manipulation whilst the area was frozen. The treatments provided good relief for a couple of days but did not last. On a bad day, she experienced muscle tightness and soreness resulting in a headache and was in so much pain that she could not focus. On a good day, the headache was a dull ache that was not debilitating. Initially,

she used a lot of ice. Now she uses heat. She had deep manipulation to pressure points and was taught stretching exercises. She saw the kinesiologist, Mr. Sem, a few times. He prescribed stretching exercises that caused her neck and back to really flare up and she stopped doing them. The massage therapy from Andrew Vowles, four 1 hour long appointments, was aggressive massage but it relieved the pain so that she could use her brain at work and function. Currently, she has physiotherapy for ½ hour to 1 hour on Friday mornings before work. There is always pressure in her upper back at the base of her head, sometimes into her left shoulder. There is a "spot" in her mid-back where it feels like there is a needle. The physiotherapy helps her to function. By Monday, her headache is returned to a state where she cannot function properly. She attends massage therapy first thing on Wednesday mornings with Mr. Bereziak. She is attempting to have massage therapy every second week.

25. She has tried some strengthening exercises to improve core strength. She has used an exercise ball. She has tried yoga. She has tried exercise bands. She used to be able to arm curl 20lb. dumbbells. She can now arm curl 2lb. dumbbells. She has tried going to 3lb. dumbbells but that increase exacerbates symptoms. She can do a 6 minute flat walk on her treadmill at home. If she does that for more than 6 days, then her neck and shoulder symptoms flare up.

26. She has generally not taken prescription pain or anti-flammatory medication. She does use a lot of Advil.

27. On cross-examination, the Claimant's principal recollection of the investigation in 2000-2002 of neurological symptoms was left leg atrophy. Although it was scary, she took a few days off work but then was able to return to work. She subsequently had some left leg tingling but learned to control it.

28. With respect to the statement in Dr. Hashimoto's consultation report dated July 6, 2000, that she had headaches "90% of the time", the Claimant neither agreed nor denied that she had made the statement. She did have a migraine headache with starbursts and she did have tension headaches that she attributes to job stress when she was new and inexperienced at management functions. She also acknowledged some counseling from Dr. Anderson respecting how to manage work stress. She adopted a statement recorded

by Dr. Horlick in his report (Exhibit 8) that she had headache initially, daily, for about 3 years post-Accident. The Claimant asserts that the headaches that she suffered before the Accident are different from the headaches that she has suffered since the Accident. Prior to the Accident, if she felt a headache coming on, she took two Aspirin and the headache was resolved. Currently, she wakes up with a headache every day. It usually gets progressively worse by the end of the day. Physiotherapy and massage therapy provide short term relief. She takes Advil for pain relief, at times up to 8 pills in one day. In September, 2011, when she saw Dr. Horlick, she was having headaches two to three times per week affecting her work and behavior. She recently had a relapse when she did some extra exercises. This has resulted in an increase in physiotherapy and massage therapy treatments in the last six months.

29. There has only been one short period of time since the Accident when she did not wake up with a headache. She recalls phoning Mr. because it was so unusual. She does not recall when this occurred.

30. The Claimant agreed that her low back complaint resolved within a month after the Accident.

31. The Claimant agreed with her discovery evidence that she describes the symptom in her neck and shoulder as "tightness" rather than "pain". It is the tightness that in her view causes headache.

32. When asked if her symptoms were getting worse, the Claimant responded that she was frustrated. She previously felt that she could make her symptoms resolve and it is hard not having control. She feels she is in pain more often and is exhausted. Lately, she has experienced sleep disturbance. She acknowledged that the arbitration process and hearing was stressful.

33. She has not seen Dr. Anderson in the last 15 months because she has confidence in Dr. Frobb's expertise. She persists with the few small exercises that she does. She feels she has followed Dr. Frobb's advice.

34. Dr. Frobb frequently asked her to rate her discomfort level on a scale of 1 to 9, with 9 being "perfect". The Claimant in 2010 mostly recorded her level as 7, 8 or 8 ½ (once) out

of 9. The Claimant agreed that that was a pretty good rating, although she added that she is a person who "lives in the moment", is a "half full" person and can wake up and feel good (and give a high score at 8am) but feel much worse at 4pm when she would have given a lower score.

35. Although the Claimant has not suffered any past income loss as a result of the Accident and has missed a minimal amount of time from work, she nevertheless asserts that, because of the injuries she has sustained, what she now does at work and is capable of doing at work has changed drastically. She used to be first into work at between 7:30am and 8:00am and last to leave work between 5:30pm to 7:00pm. Now she tries to get in by 9:00am, except on days when she is receiving treatment, when she arrives at between 10:00-10:30am. She leaves with the rest of the staff at 5:00pm.

36. She used to engage in physical work, helping to move hot tubs and other heavy recreational furniture items around the showroom. Similarly, she participated in the physical set up and take down of the Company's displays at trade shows and home shows. She is now not able to do this physical work but must ask staff to do it. Before the Accident she was a management person who 'mucked in' and led by example. Her inability to continue to perform as before is a source of frustration to her.

37. She was well liked by the staff, some of whom were relatively young. She was known as "mum" to them and provided advice on work as well as personal issues. She was instrumental in the organization of a wedding for one of the current sales staff, . The Claimant held barbeques at her home for staff and was instrumental in organizing other work events.

38. She used to be the principal "closer" of sales in which preliminary work with the customer had been done by one of the sales staff. The sales person would bring particulars of the customer's interests and concerns to the Claimant with possible pricing and the Claimant, with her superior product knowledge and sales experience, would usually be successful in confirming a sale. The Claimant is no longer on the sales floor or closing deals nearly as much as before. She is either too tired or in pain with a headache and does not have the upbeat enthusiastic demeanor required for sales. As a result, the sales staff are either closing their own deals or they go to one of the owners.

39. The Claimant used to go abroad to all of the industry trade shows and was heavily involved in display set up and meeting and entertaining other dealers. She no longer travels abroad for trade shows.

40. The Claimant was also responsible for training sales staff and for dealer training prior to the Accident. Other Company employees have now taken over these responsibilities.

41. The Claimant is no longer involved at all in product development. The Company has created a separate marketing department for its factory.

42. Prior to the Accident, the Claimant used to pride herself upon her appearance. She wore high heels and a business suit. Her aim was to raise the dress standard of the Company above the prevailing industry standard. Since the Accident, she cannot wear high heels and uses flat shoes and wears dress pants and a top. She considers that she has had to lower her personal standard, and the Company's dress standard has also declined, although it is still better than the competition.

43. Prior to the Accident, the Claimant was an optimistic, energetic "glass half full" person. She now has become cranky and irritable with staff (who sometimes avoid her). She is exhausted at the end of a day, often with a headache, and she does little but have dinner and go to bed. During the workday she has to take breaks and either lies down on a couch in Mr. office or else lies on the floor of his office to do stretches. She does stretching exercises at work in doorways.

44. She is worried about her future work prospects. She is not the same person as she was. She is not capable of performing the same functions as she previously did. She does not have the same energy. She is regularly receiving physiotherapy and massage treatments, twice a week, which impinge on the workday. She is worried that the current owners of the Company, who have been very tolerant of her circumstances, and with whom she has worked to build up the business of the Company since its inception, may sell the Company and new owners would have no reason to be so accommodating. Alternatively, she worries that the current owners may let her go although that has never been suggested.

45. The Claimant agreed that she is working on average 45 to 60 hours per week and 7 days per week just as she did before the Accident. She travelled to a trade show in Barcelona,

Spain, in October, 2007 and to another trade show in the United Kingdom in 2008. She has been to Las Vegas for trade shows about 4 times since the Accident, including one probably in November, 2007. She has travelled to Winnipeg to be with Mr. on average 3 to 4 times per year since the Accident. Since the Accident she has travelled with Mr. to Hawaii, Arizona, Victoria and Osoyoos for holidays.

46. The Claimant agreed that as General Manager she is able to stand – sit – and walk at her option throughout the day. She is able to take small breaks. She is not required to do any medium or heavy work. She has a sitting tolerance of 30 to 40 minutes. She has a standing tolerance of between 11/2 to 2 hours. She has never taken any prescription pain medication. As General Manager she is still responsible for 18 to 20 staff, is the head of 4 departments of the Company and runs the large retail store. The main retail store is being relocated as its premises were expropriated. The owners are overseeing that move.

47. With respect to recreation and family life, prior to the Accident the Claimant was very active on the vacation trips. In addition to activities on a dealers' reward trips and Company events she played golf 8 to 10 times per year for business purposes. On a vacation to Arizona and Las Vegas in November, 2011, with Mr. , he drove high-performance cars on a race track and did circles and stunts in an airplane while she watched. On another vacation with Mr. to Victoria they went in an "old people's" boat to whale watch rather than in a Zodiac.

48. The Claimant lives alone in a 3,000 sq ft home on an 8500 sq ft lot. She has always had a house cleaner whom she pays $100 to do housework for 4 hours, twice per month. She cannot say if would have done all of her own housework upon retirement although she was brought up to do her own work.

49. She used to do her own pool maintenance but now a friend does it for free.

50. Her parents used to help her with yard work including cutting the lawn and trimming hedges. Her father who is now in his mid-70s is no longer able to assist and the Claimant has hired a gardener.

51. The Claimant was instrumental in organizing family events with her parents and siblings and their children. She would help with cooking and organizing and participating in games for the children. She now sits back and watches.

52. She has put on about 25lbs since the Accident. She is no longer able to use her "home gym" as she used to.

53. She acknowledged two non-work sources of stress since the Accident. Very shortly after the Accident the Canada Revenue Agency audited her. The process lasted more than two years and ultimately resulted in an additional payment of about $34,000.00. Also, her sister was diagnosed with cancer in 2008. She went through treatment and is now cancer-free.

MEDICAL EVIDENCE

Dr. Anderson

54. Dr. Anderson did not provide any report. Any opinions were elicited in cross-examination. On his examination of the Claimant in the fall 2007 he found objective signs to confirm the Claimant's subjective complaints of headache, neck, and shoulder pain. After he received the results of a MRI of the Claimant's cervical spine, he would have recommended that she avoid jarring activities.

55. In his discussions with the Claimant he did recommend exercise and the use of a personal trainer. He agreed on the need for both active and passive therapy in order to achieve the best possible recovery from soft-tissue injuries. The patient needed to have some "ownership" of the process. This could be achieved by stretching exercises, yoga or active physiotherapy.

Dr. Frobb

56. In his medical/legal report (Exhibit 1, Tab 1), Dr. Frobb made the following diagnoses:

    1) *Moderately severe degenerative osteoarthritic spondylosis and facet osteoarthritis of the cervical spine.*

    2) *Chronic myofascial pain syndrome affecting supporting musculature of the upper thoracic and cervical spine.*

3) *Chronic persistent cervicogenic headache.*

4) *Chronic pain disorder.*

With respect to prognosis, he thought it was unlikely that any specific therapeutic intervention would result in further advancement of the Claimant's rehabilitation. It was likely that the Claimant would require continuation of therapies in order to maintain her level of comfort. It was not probable that functional capacity would improve. The Claimant should however be encouraged to continue with core exercise programing as this would be likely to improve but not resolve her presenting chronic pain disorder. Finally, Dr. Frobb considered that it was probable that the degenerative osteoarthritic changes of the cervical spine would progress over time and the advancement would be significantly affected by the injuries sustained in the Accident.

57. In cross-examination, Dr. Frobb stated that because the Claimant did not show steady improvement, but rather improvement followed by periods of exacerbation and remission, it was obvious within 6 to 8 months that the treatment was "palliative". The Claimant's progress was "typical of non-responsive treatment". This was "an acute case gone chronic". In order to determine if an injury was resolved, it was necessary to wean the patient from treatment and have them last 6 months without pain. Because he had not seen the Claimant for years (since 1992) Dr. Frobb agreed that 7 to 8 out of 9 on his pain scale in 2010 could have been normal for the Claimant. All passive therapies require supplementary therapies to improve core strength. That was the purpose of the referral to the kinesiologist. Patients often complain that the core strength exercises hurt too much. His advice is to start at a level that the patient knows will not aggravate them and increase either strength or duration by 10%. He would have told the Claimant that she must maintain her physical exercises. He always found objective evidence to support the Claimant's complaint of muscle tension or pain. At the end of June, 2009, the Claimant stopped treatment from Dr. Frobb as she was getting equal benefit from massage and physiotherapy. At that point, Dr. Frobb thought that so long as she continued doing her exercises, the passage of time was the best hope for improvement. While acknowledging that massage treatment once or twice a month for years was "palliative", Dr. Frobb also maintained that it was "therapeutic" if it allowed the Claimant to be active and perform

her work. Dr. Frobb did however assume that the Claimant was doing active therapy. If there was no other choice, passive therapy was acceptable if it avoided prescription pain medication, muscle relaxants and anti-inflammatories. Dr. Frobb acknowledged that he routinely recorded the Claimant's complaint as "tightness" rather than "pain", but he attributed that to individual patient pain tolerances. Dr. Frobb acknowledged that the Claimant was susceptible to headaches caused by stress and that since the Accident, occipital headache was a big issue.

58. Dr. Frobb agreed that degenerative changes will occur with age. He cited two articles to support his opinion that soft-tissue injuries will accelerate the degeneration of the spine. He agreed that there was no "direct evidence" that this Claimant's injury will affect the degeneration of her cervical spine.

Gerald Kerr

59. Gerard Kerr, a consultant occupational therapist and certified work capacity evaluator assessed the Claimant on September 23, 2011. His report was filed as an Exhibit (Exhibit 1, Tab 2). The Claimant was assessed over the course of a full day. Mr. Kerr was satisfied that the Claimant used high levels of effort and his results were accordingly reliable. The Claimant was assessed as capable of work in the sedentary and light strength categories. She was not suited to tasks requiring sustained neck flexion or extension or of tasks reaching overhead for more than short duration. She had a sitting tolerance of 30 to 40 minutes. She had a standing tolerance of 1.5 to 2 hours. She was not suited to sustained static standing postures. Mr. Kerr detected a steady worsening of reported symptoms over the course of the day. In Mr. Kerr's view, because of the accommodations that the Claimant's employer has permitted, the Claimant is able to continue to work full time. However, she is clearly less competitive in the open labour market given her functional limitations, chronic pain and overall reduced endurance for work activity.

Dr. Horlick

60. Dr. Simon Horlick (Dr. Horlick) is an orthopedic specialist. He examined the Claimant on behalf of the Respondent on September 7, 2011. His two reports dated September 7, 2011 and July 31, 2012 were admitted into evidence as Exhibits 8 and 9. In his initial report, Dr. Horlick recorded the Claimant's current complaints as headache and pain and stiffness

in the cervical, thoracic, and lumbar spine region. The headaches were initially daily for about three years but were two to three times per week at the time of the exam. The Claimant was taking on average 4 tables per day (Advil or Tylenol) for headache relief. The pain and stiffness in the back were described as an ache, exacerbated with activity. There was one area of focal tenderness at the T7 level causing very sharp discomfort radiating towards the left rib cage. The Claimant denied any pre-existing history of cervical, thoracic, or lumbar spine complaints. The Claimant was at the time engaging in a cardio type program for fitness, walking on a treadmill and using light weights. She had been making progress until a relapse three months earlier.

61. On examination there was full range of motion in the cervical spine. Palpation at the T7 level elicited tenderness. Both shoulders exhibited a full range of motion, normal stability and normal strength.

62. Dr. Horlick's diagnosis was chronic myofascial pain related syndrome. Given the history of no significant headache related complaints pre-Accident, it was likely the Accident was partly responsible for the headache complaint although the cause of the radiographic changes noted on x-ray clearly pre-dated the Accident. Dr. Horlick thought there was some prospect of still further improvement; he recommended a more active therapy program invoking core muscle strengthening; he considered the current impairment to be mild to moderate in severity. It was unlikely there would be significant disability in the future.

63. In his second report, Dr. Horlick disagreed with Dr. Frobb's opinion concerning the effect of the soft tissue injuries on the rate of degenerative osteoarthritic changes affecting the facet joints. Dr. Horlick did not think the Accident had altered the natural history of the Claimant's osteoarthritis.

64. Dr. Horlick also commented further respecting the diagnosis and treatment of headaches, noting that it was generally outside the scope of his practice. Nevertheless, he thought that the Claimant does suffer from cervicogenic headache and since she had not experienced this type of headache prior to the Accident, he concluded that the Accident had a role to play in the development of the Claimant's headache complaints.

65. In his evidence, Dr. Horlick indicated that one of the articles relied on by Dr. Frobb did not in fact support Dr. Frobb's conclusion. Dr. Horlick referred to a more recent article in 2010 in the publication *Spine* which Dr. Horlick said indicated that there was no necessary relationship between patients with whiplash injuries and asymptomatic individuals and MRI changes in the cervical spine over a 10 year period.

66. In cross examination, Dr. Horlick said it was impossible to tell whether the Claimant's symptoms were caused by the osteoarthritic changes or from something else. He agreed that from the description of the Accident, it was not an insignificant sounding accident. He agreed that the Accident was the cause of the Claimant's chronic myofascial pain disorder and the Accident was the cause of the Claimant's cervicogenic headaches. He did not find any weakness in the Claimant's upper arms. He agreed that long term myofascial pain can penetrate the psyche rendering the patient less focused and less motivated. The majority of the time, there is no correlation between symptoms and radiographic changes.

RADIOGRAPHIC EVIDENCE

67. An x-ray of the Claimant's thoracic spine was taken September 17, 2007. It showed normal vertebral alignment, no acute bony injuries and normal soft tissues.

68. X-rays of the cervical, thoracic and lumbar spine were taken on August 15, 2008. The cervical spine showed moderately advanced degenerative disc change at C5/6, facet joint degenerative change, bilaterally, between C2-3 to C5-6 inclusive most marked on the right side at C2-3. The thoracic spine showed normal alignment, no fractures, and no para-spinal soft tissue abnormalities.

69. A MRI of the cervical spine was taken on June 19, 2009. It showed focal, moderate to severe, facet osteoarthritis on the right at C2-3. There was moderate bilateral facet osteoarthritis at C3-4, C4-5, C5-6 and C6-7. The impression was of multi-level changes of moderate to severe facet osteoarthritis with focal moderate to severe facet osteoarthritis on the right at C2-3.

LAY WITNESSES

70. Evidence was given by three of the Claimant's co-workers at the Company, by her parents and by her boyfriend, Mr. .

71. is an 18 year employee with the Company and currently Assistant Manager. She began as a counterperson and progressed to a salesperson and now to Assistant Manager. She was trained by the Claimant. is an 8 to 9 year employee of the Company and currently a salesperson. She also began on the counter and was trained by the Claimant as a salesperson. Both these witnesses gave generally similar evidence regarding the changes both in function and demeanor of the Claimant since the Accident. Before the Accident the Claimant was enthusiastic and bubbly; she dressed smartly; she led by example, helping with physical movement of heavy items such as . She was hardly ever in her office. She was responsible for the appearance of the showroom. She trained and gave advice to the sales staff and closed deals for them. Since the Accident, the sales staff either close their own deals or go to the Assistant Manager or to Mr. if they are available. The Claimant appears angry and tired. She does not have the same passion. She arrives on time, except when she is late from medical appointment and leaves with the rest of the staff. She stays in her office a lot more. She wears flat shoes and pants and has put on weight. She uses Advil during the day. She is seen to be using icepacks, and doing stretching exercises and lying on the floor in an office. She has a short temper. She no longer trains the sales staff and has little involvement with dealers.

72. is one of the owners of the Company. In his view, the Claimant got to know everything about every aspect of the business of the Company. She excelled at any position and would tackle anything. She was fashion conscious and physically hands on, even operating a forklift. Her greatest asset to the Company was as a deal closer. She was always on the sales floor but since the Accident, her time has decreased rapidly. The Claimant and Mr. have adjoining offices separated by a glass partition. He sometimes has to tell the Claimant to go out on the floor and close a deal rather than merely giving advice to the salesperson. Mr. himself now takes over some closings. At one time before the Accident the Claimant "was running the Company". Mr.

is 60 years old and was planning to work less. That is not possible now partly because of the Claimant's restricted work capacity. She appears to be in pain daily. She can see her resting her head on the desk, changing positions or stretching in doorjambs and lying on the floor of his office. He did not disclose any plans that the owners may have for the Company. Prior to the Accident, the Claimant would join in Company activities for employees. Now she declines most of the time as she appears exhausted.

73. In cross examination Mr. estimated that he saw the Claimant taking a break by resting on her desk or lying on the couch or floor approximately 20 times per month in 2012 based on a 5 day week. He has noticed a decline in the Claimant's condition over the last 2 years and has wondered how much mental stress she can take.

74. The Claimant's parents, gave evidence of the assistance that they used to provide and of the Claimant's participation in family events and of the change they have noticed in her activities, demeanor and personality.

75. Mr. is a co-owner of a retail store in Winnipeg in the same business as the Company. He met the Claimant in the mid-1990s at an industry event and has been in a boyfriend/girlfriend relationship since about 2005/2006. Prior to the Accident the Claimant was energetic, bubbly, smiling and active. She was fun to be around. She dressed to impress and was very knowledgeable about the business of the Company. They went on regular trips and visited each other several times per year. Since the Accident, the Claimant's demeanor has changed. She has lost some of her spark and can be a bit short. She always appears to be in some measure of pain. She takes Advil constantly to stay ahead of the pain. She is more moody. When they travel, Mr. carries the luggage. He described in terms similar to the Claimant their trip in December, 2011 to Arizona and Las Vegas. In cross examination he recounted as best his memory allowed the various trips, commencing in October, 2007 that he and the Claimant have taken together. In October, 2007 they met in Toronto (from Vancouver and Winnipeg) and drove to Niagara Falls and stayed 5 to 6 days. The Claimant flew to Winnipeg for Valentine's Day in February, 2008 for a few days. She flew to Winnipeg in March for 4 to 5 days for the

Winnipeg Homeshow. They took a summer trip for 7 to 8 days to either Calgary or Kelowna. They have also visited Hawaii and Mexico since the Accident.

SUBMISSION OF THE CLAIMANT

76. The Claimant submits that the Accident involved a significant impact. The Claimant saw it coming and was braced for it with her head turned slightly to the right which could aggravate the consequence. The Respondent's expert, Dr. Horlick, agrees that the Claimant has chronic myofascial pain syndrome and cervicogenic headaches both caused by the Accident. Dr. Frobb, who has had the greatest opportunity to observe the Claimant over the longest period of time says that the prognosis is poor and the restrictions are likely permanent. His opinion should be accepted. Mr. Kerr's work capacity evaluation confirms that the Claimant is physically compromised. She is doing what she can, and his testing confirmed high effort. Dr. Frobb has approved the Claimant carrying on with her current physiotherapy/massage treatments. They are necessary for the Claimant to be able to continue to work as she has. Mr. Kerr in the cost of future care portion of his report at pgs.6/7 has costed out expenses for physiotherapy, massage therapy, homemaker services, seasonal cleaning, yard work, and medications. Mr. Carson's report (Exhibit 1, Tab 3) has calculated the present value of all those items at approximately $147,000.00 which is the sum sought for cost of future care.

77. With respect to loss of future earning capacity, the Claimant submits that she probably would have worked to age 70. She loves to work and is an extremely hard worker. The Claimant seeks an award in the order of $700,000.00. It is premised upon the prospect that at some time during her remaining working life, the Claimant will lose her job at the Company and will be forced onto the general labour market where her competitiveness is restricted. She would likely continue to find some work but not at the same income level. At some point she will likely not be able to find work at all. Most of her working life to date has been in the one industry; she is exceedingly knowledgeable in that industry but cannot now do sales.

78. The Claimant seeks recovery of approximately $32,700.00 in special damages for treatment to date by Dr. Frobb, physiotherapists, massage therapists, the kinesiologist and

a MRI together with the costs of landscaping and housekeeping services and other miscellaneous items.

79. The evidence from co-workers, Mr. , and family is all consistent that the Claimant is a completely different person. She has undergone a lot of treatment, which she has paid for herself, but "hit a wall". Her life since the Accident has been focused on doing enough to keep her job.

80. With respect to the legal principles on which an award for cost of future care should be made, the Claimant relies upon *Milina v Bartsch* (1985) CanLII 179 (BCSC).

81. The Claimant also relies upon *Shapiro v Dailey* (2012 BCCA 128); *Morlan v Barett* (2012 BCCA 66) regarding the claim for loss of earning capacity.

82. The Claimant seeks non-pecuniary damages of $120,000.00.

SUBMISSION OF THE RESPONDENT

83. The Respondent submits that since the Accident, the Claimant has continued to demonstrate a very high degree of function. She has continued in full time employment with the Company working on average 45 to 60 hours per week in a 7 day work week. She travelled extensively both for work and pleasure purposes in the year following the Accident, and has continued to travel extensively, by plane and by car in Canada and the US since the Accident. If the Claimant is no longer engaging in vigorous recreational activities, it is because of the moderate to severe degeneration in her cervical spine and the advice to avoid jarring activities, rather than Accident related symptoms. If the Claimant has fewer responsibilities at work, it is because the Company has made business decisions to create specialized departments that are appropriate with the increased size and international scope of the Company's business. There is no clear direct evidence that the Claimant's reduced responsibilities were because of her disability nor as to when she commenced 9am – 5pm hours. There is no clear, direct, evidence as to when the Claimant apparently lost her motivation to go out on the floor and close sales nor is there evidence documenting the extent of any reduction in closings.

84. The Respondent questions the nature and extent of the Claimant's injury. She has consistently described her symptoms as "tightness" or "stiffness" and that is the language

recorded by the doctors. Over time, and as the previous Supreme Court trial date in January, 2012 approached, the Claimant described her symptoms as "pain" and her doctors adopted that description. "Tightness", "stiffness" or "soreness" connote a lesser degree of discomfort than "pain" and do not connote even partial disability. The Claimant's own self-assessment on Dr. Frobb's pain scale was pretty good, which the Respondent says was likely the Claimant's pre-Accident condition.

85. Chronic headache is a major part of the Claimant's claim. It is thus necessary for the Claimant to establish the frequency and severity of her headaches as well as the temporal relationship between the headaches and the Accident. If there is a long period of time without headache complaints after the Accident, then there is a causation issue as to whether future headaches are attributable to some new cause. The Claimant has not provided that kind of continuity of complaint in her own evidence nor is it established in the clinical records. The Respondent disavows Dr. Horlick's opinion that the Claimant's cervicogenic headaches were caused by the Accident. That opinion was based on two assumptions which were erroneous. The first incorrect assumption was that the Claimant has no significant pre-existent history of headache related problems. The evidence establishes a pre-Accident history of likely stress related headache. The second incorrect assumption was the history provided by the Claimant of daily headaches for about three years post-Accident. That history is not supported either by the Claimant's own evidence or by the clinical evidence records.

86. The Respondent asks that the Claimant's failure to acknowledge relevant, pre-Accident, medical history warrants an inference of significant pre-Accident symptomology. The Claimant's evidence regarding headache symptoms is internally inconsistent and inconsistent with symptoms recorded (in this case not recorded) in the medical records. The recorded complaints of the headache are inconsistent with the history given to Dr. Horlick of daily headaches for 3 years post-Accident. If headaches have become a focal issue only recently or in the last year, then there is doubt as to whether they are caused by the Accident.

87. The Claimant's current pattern of treatment is clearly inappropriate and counterproductive. All of the medical experts (Dr. Anderson, Dr. Frobb and Dr. Horlick) agree that active

rather than only passive therapies are necessary in order to improve core strength and achieve maximum recovery. The home exercises that the Claimant is doing are not "active" therapy. Neither Dr. Anderson nor Dr. Frobb have followed the Claimant sufficiently closely to be aware that she is not following the recommended reconditioning program. Dr. Frobb is defensive of his own treatment which he recognized early on was "palliative" and yet he continued to provide this treatment for an extended time thereafter, which the Claimant was paying for. The treatment only ended apparently at the initiative of the Claimant.

88. The evidence of the Claimant's co-workers must be approached with care. Their evidence of the Claimant having significant problems with pain and headache, almost daily since the accident is inconsistent with the Claimant's own evidence and with the medical records. These witnesses have mistakenly concluded that the Claimant's current condition has been the same ever since the Accident. None of the lay witnesses provided convincing chronology of their observations of the Claimant's symptoms. Their evidence was essentially a comparison between the Claimant's pre-Accident condition and her current condition. Mr. was in unique position to provide this kind of continuity but did not give it.

89. The Respondent submits that the Claimant is perimenopausal and that symptoms such as moodiness, crankiness, irritability and fatigue, observed by the lay witnesses in the Claimant are commonly associated with that condition.

90. The Claimant's changed attire is attributable to the Claimant now wearing age appropriate clothes.

91. The CRA audit and her sister's illness probably caused a physiological reaction to stress. The Claimant's symptoms appear to have worsened in the recent past, as the trial date in the underlying litigation approached.

92. The Claimant has a credibility issue with respect to her low back complaint. She acknowledged that her low back symptoms resolved within months of the Accident. Yet, the records of Dr. Frobb and Dr. Horlick record a history of much later lumbar complaint. The Claimant's explanation as to where her low back complaint was is not credible.

93. Dr. Horlick's opinion that the Accident will not affect the degeneration of the Claimant's cervical spine should be preferred over Dr. Frobb's contrary opinion.

94. Dr. Horlick's prognosis that there is a good likelihood of some further improvement if the Claimant pursues active physical therapy should be preferred to Dr. Frobb's opinion that the Claimant's current condition is likely permanent.

95. The Respondent submits that non-pecuniary damages should be assessed in the range of $50,000.00 to $60,000.00. It relies upon the following cases: *Iliopoulous v Abbinante* (2008 BCSC 336); *Boyle v Prentice* (2010 BCSC 1212); *Smith v Moshrefzadeh* (2012 BCSC 1458); *Day v Nicolau* (2011 BCSC 490); *Klein v Dowhy* (2007 BCSC 1151).

96. With respect to loss of future earning capacity, the Respondent relies on *Perren v Lalari* (2010 BCCA 140). In this case, the Respondent submits that the Claimant has failed to establish a real and substantial possibility of any future loss of income. There is no evidence of the owners' retiring or selling the Company. The Claimant described Mr. as like her brother. Based upon the Claimant's past contribution to the development of the Company, the owners have good reason to be as accommodating as they have been to the Claimant. The Claimant continues to be devoted to the Company. She has no intention of leaving it. She is settled in her career. The reasonable inference is that she is secure in her current job.

97. Alternatively, if the Claimant does establish a substantial possibility of income loss in the future, then the commencement of any such loss must be well into the future. Strong, positive contingencies must be considered. These include the possibility that the Claimant remains employed by the Company for the rest of her working life and that with a proper core reconditioning program, her symptoms will improve, reducing or eliminating any impairment. If the Claimant's work capacity is impaired, it is essentially because she has lost the motivation to get out onto the floor and close sales. The loss of motivation may be for reasons other than injuries sustained in the Accident. The functional capacity evaluation of Mr. Kerr confirms that the Claimant is physically capable of doing her job in the light to sedentary category. There is no direct evidence of what the Claimant might earn elsewhere if she ceased to work for the Company.

98. The Respondent submits that the claim for loss of future earning capacity should be assessed in the range of 0 to $75,000.00 relying upon the cases of *Perrin,* supra, *Jurasky v Beak* 2011 BCSC 982, *Smith* supra, *Ippeopolis* supra, *Boyle* supra, *Day* supra.

99. With respect to special damages and cost of future care, the Respondent submits that there should be no allowance for housekeeping, yard work, lawn mowing, or pool care. The Claimant employed a housekeeper prior to the Accident and there is no evidence that she would have assumed these duties ultimately upon her retirement. The yard work and lawn mowing have been done by the Claimant's parents. They have reached the age when they no longer can or should do this work. The Claimant would have employed gardeners whenever that time was reached. Pool maintenance has been performed by a neighbor for free. The Claimant would have had this done by someone else in any event. The Claimant was working and continues to work full time. Before the Accident she did not have time for these types of domestic chores.

100. With respect to cost of future care, the Respondent ought not to have to pay for past or future passive massage and physiotherapy that is palliative and not therapeutic. The Respondent should be responsible for massage and physiotherapy treatment to the end of September, 2010, when the Claimant ceased to be a patient of Dr. Frobb. It is reasonable to consider funding an active therapy program in the future.

101. With respect to deductible amounts, in addition to the tort payment of $162,000.00, if there are awards for cost of future care, or special damages, then they should be reduced by the amount of the entitlement under the Empire Life policy, including the amount of the acupuncture claim that was declined by Empire Life.

DISCUSSION AND ANALYSIS

Credibility of the Claimant

102. The Respondent challenges the credibility of the Claimant, or more particularly the reliability of some of her evidence. It relies upon five separate issues for its position. The five issues are: (1) non-disclosure of relevant prior medical history; (2) continued complaint of low back pain; (3) inconsistent meaning of "occasional" headache; (4)

inconsistency between stated and recorded headache symptoms; and (5) a "gap" in evidence regarding continuity of post-accident symptoms.

103. The Respondent points to two instances in which the Claimant was not forthcoming about her past medical history. The first relates to the 2000-2002 ongoing investigation of potentially serious neurological left leg symptoms. The Claimant initially did not recall much about this investigation. She described having left leg atrophy and suggested that the explanation ultimately was protein deficiency. After hearing Dr. Anderson's evidence regarding this investigation, she maintained that, although the incident was scary, because her left leg was cold, numb, and not moving properly the symptoms lasted for only a few days, she took a few days off work and then carried on. I accept the Claimant's explanation. While her initial description of the episode may not have been as fulsome as it might have been, it was after all in relation to left leg symptoms and her present injury involves primarily her upper back, neck, shoulders and headaches.

104. The Claimant has agreed that her lower back symptoms resolved within one month of the Accident. At the time of his IME, Dr. Horlick recorded as a current complaint "pain and stiffness in the cervical, thoracic and lumbar spine region". The Claimant attempted to explain this contradiction in two ways. The first involved a questionable description of where the lumbar spine was. The second referred to occasional symptoms running down into her left leg. I have reviewed Dr. Frobb's clinical records. There is a note on December 11, 2007 that the Claimant was aware of some lumbo-sacral junction discomfort. Otherwise, his records overwhelmingly record complaints of para-vertebral muscle soreness or tightness of the upper dorsal cervical segments. A physician conducting an IME would be remiss if he did not record every region of the body in which there was any stated complaint. Dr. Horlick does not elsewhere refer to any lumbar symptoms. The Claimant in my view has been consistent overall in identifying her upper back, shoulders, neck and headaches as her primary areas of injury and symptoms. I would not draw any inference adverse to the Claimant respecting her complaint of low back injury.

105. It is clear on the evidence, and acknowledged by the Claimant, that she did have headaches both before and after the Accident. She described her pre-Accident headaches

as "occasional" meaning that they occurred for a week or so, went away with Aspirin, and she was then symptoms free for 6 months or so. Some of the post-Accident clinical records record the Claimant's report of "occasional" headache. In this context it is suggested that the Claimant means daily headache that worsens through the course of the day and is relieved only temporarily by the physiotherapy or massage treatment twice a week. I accept as accurate the Claimant's description of her occasional pre-Accident headaches. I do have a reservation respecting the Claimant's evidence of her post-Accident headaches, which I will address in more detail when discussing the extent of the Claimant's injury. I do not however accept the proposition that the Claimant was deliberately attempting to mislead.

106. The Respondent also asserts that there is an inconsistency between the Claimant's stated headache symptoms and what is recorded in the clinical records. I will also address this issue in discussing the extent of the injury.

107. Finally, the Respondent asserts that there is a "gap" in the Claimant's evidence. She has not adopted generally the stated complaints recorded in the clinical records nor otherwise given direct evidence of the continuation of symptoms from the date of the Accident to the present. Much of the Claimant's evidence and that of the lay witnesses focused on a comparison between how the Claimant was prior to the Accident and how the Claimant is currently. In light of the Claimant's self-report to Dr. Frobb between April and September 2010, of being 7, 8 or 8 ½ out of 9 on pain scale, the Respondent asserts this evidentiary gap raises the prospect that the Claimant is masking a period of recovery followed by some other event accounting for her current symptoms. Claimant's counsel submits there is no evidentiary gap. What happened in this case is just the way the evidence came out. I do not conclude that the Claimant gave her evidence in a manner intended to obscure the truth. Generally speaking, I find the Claimant to be a credible witness. I note that she has spent over $32,000.00 from her own pocket primarily for treatment not covered by MSP. Drs. Anderson and Frobb consistently found objective symptoms consistent with the Claimant's subjective complaints. The work capacity evaluation conducted by Mr. Kerr showed participation in the testing with high levels of effort. In giving her evidence, particularly on the first day of the hearing, the Claimant was noticeably experiencing some

discomfort, frequently shift in her seated position and occasionally standing. She subsequently gave evidence that she had taken 8 Advil that day.

PRE-ACCIDENT MEDICAL CONDITION

108. Dr. Horlick at p. 8 of his report, under "Assessment" recites that the Claimant denies "any significant pre-existent history of headache related problems" (emphasis added). I find this statement to be accurate. It clear from Dr. Anderson's evidence and from the Claimant's admission that she did have periodic apparently stress related headaches prior to the Accident. However, apart from some counseling in stress management, the Claimant never received treatment for the headaches. On some occasions when a complaint of headache is recorded, the appointment was for another purpose and the symptom was recorded as a matter of record rather than for treatment. In the five years between 2002 and the accident in 2007, there are only 2 references to headache, one on January 5, 2005 (headache secondary to muscle tension) and the other on February 15, 2006 (only occasional headaches).

109. I conclude that prior to the Accident, the Claimant was susceptible to muscle tension headaches during periods of stress. There were work related events, such as the PNE or home shows which did sometimes cause heightened stress. I find however that these pre-Accident stress-related headaches were infrequent, did not require treatment other than occasional counseling for stress management, and did not interfere with the Claimant's ability to work full time as a high energy, highly productive employee of the Company.

EXTENT OF THE INJURY SUSTAINED

110. Generally speaking, the Claimant asserts that the Accident has had a major permanent effect on almost every aspect of her life. She has had to drastically reduce her functions at work. She is constantly tired. She requires twice weekly physiotherapy and massage treatments in order to be able simply to carry on. She cannot engage in any heavy physical activity either at work or in recreation. Her personality has changed.

111. The Respondent identifies a number of factors which it says militate against the severity of the injury claimed. First, the Respondent correctly notes that the Claimant has been able to continue full time employment, averaging 7 days per week and averaging the same

number of hours per week as she did before the Accident. Second, the Respondent notes that the Claimant has engaged in a lot of travel since the Accident including multiple air trips both within Canada and abroad in the year immediately following the Accident, when symptoms would be expected to be worse.

112. Third, the Respondent notes that the Claimant self-describes her symptom as "tension" rather "pain". Dr. Frobb's clinical records persistently record muscle "tightness" and occasionally muscle soreness, but not pain. This is not an anomaly in the way Dr. Frobb records complaints as the Claimant on her Examination for Discovery, which she adopted at the hearing, herself preferred the description of "tightness" over "pain" (Examination for Discovery, April 7, 2010, Q. 140, 145, 146, 152-156, 158).

113. I think there is merit in all of these submissions.

114. The Respondent also submits that the reduction in work duties of the Claimant is not because of the Claimant's disability but rather because of the Company's business decisions to set up for example a formal marketing department and to have others assume the Claimant's prior responsibilities for training sales staff and assisting dealers. The Respondent argues that these changes are commensurate with the Company's growth and expansion. The problem with this submission is that the proposition was never put directly to Mr. , one of the owners, when he gave evidence. Mr. did say that there was a "rift" between the Claimant and himself over her reduced role as sales closer. He described her as being drained and without energy and appearing every day to be in pain. He believes that she is trying and has to watch how hard he pushes her. He has opted not to send the Claimant to overseas trade shows. He wonders how much mental stress she can take. In the face of this direct evidence I cannot infer that the Company regards the Claimant as being perfectly capable of carrying out all her pre-Accident job functions, and has simply elected to cut her out of many of her previous functions for the goal of modernization. Such evidence is completely contrary to the whole thrust of Mr. evidence.

115. The Respondent also submits that the Claimant is not incapable of carrying out her pre-Accident job functions but has at some point suffered a "loss of motivation" "for some reason". Dr. Anderson agreed that symptoms such as irritability, fatigue and mood swings

are perimenopausal symptoms but disagreed that headaches and musculoskeletal symptoms are typical perimenopausal complaints. There is no medical evidence to support a conclusion that the Claimant's current symptoms are perimenopausal. The Respondent's expert does not make that diagnosis. There is no discernible "other reason" for any alleged loss of motivation other than the effect of chronic myofacial pain and chronic cervicogenic headache. In any event, I accept Mr. evidence that the Claimant is a very strong willed person who refuses to "let go" and is trying as best she can.

HEADACHE COMPLAINTS

116. The Claimant asserts that the principal disabling symptom arising from the Accident are headaches caused by muscle tightness or tension primarily in the upper back. She says that she did have headache daily for about three years following the accident, as reported to Dr. Horlick. In September, 2011, these headaches were 2 to 3 times per week. At the hearing she described her current condition as having headaches daily, worsening towards the end of the day requiring twice weekly massage or physiotherapy in order to be able to function.

117. The Respondent submits that this level of frequency and intensity of headache symptoms is simply incompatible with the complaint of headache recorded in clinical records.

118. Dr. Anderson consistently records a headache complaint in August and September, 2007. The principal treatment records however are those of Dr. Frobb. In the first 6 months of treatment, between October, 2007 and March 31, 2008, there were 33 visits. On 7 of those visits there is a reference to headaches. In the last 5 months of Dr. Frobb's treatment, from April, 2010 to September, 2010 there were 25 visits. There is a reference to headaches on 4 of those visits. Neither the Claimant nor Dr. Frobb was questioned about the recording of headache complaints in the patient chart. I conclude that generally speaking, when the Claimant reported a headache complaint, Dr. Frobb recorded it. First, it was his professional obligation to do so. Second, it is a conclusion I draw based on other references to headache in his records. For example, on November 2, 2007, he records "slight headache following yesterday's visit, with resolution". On November 29, 2007 Dr. Frobb notes "Problems with paravertebral muscle soreness inter-scapular

segments, progressing superiorly to involve headache pattern – C segments". On February 12, 2008 Dr. Frobb recorded "Presents with problems of paravertebral muscle soreness, upper dorsal, cervical segments, predominately left-sided, associated with sub-occipital headache". On March 25 and March 27, 2008, Dr. Frobb records paravertebral muscle soreness or tightness associated with sub-occipital headache. On April 22, 2008, Dr. Frobb notes "Has also been aware of some left sub-occipital headaches". On April 23, 2008 Dr. Frobb notes "Persistent sub-occipital headache". On May 23, 2008 Dr. Frobb notes "Continuing to show improvement. Approaching 7 ½ to 8 status. No problems relating to headache on awakening". On May 29, 2008 Dr. Frobb notes "Had one episode of marked headache described as existing from the sub-occipital inter-scapular area moving over the vertex".

119. Dr. Frobb's records of headache complaint are not consistent with the Claimant's report to Dr. Horlick of headache "initially daily for about three years". What the records show from October, 2007 through June, 2009 are persistent report of headache of varying length and intensity on mostly a monthly basis. The recorded reports persist through to July 15, 2010 but do not appear in Dr. Frobb's records thereafter. Dr. Frobb's records end in September 2010.

120. The only other clinical records in evidence are those of Dr. Anderson. Dr. Anderson's note for July 29, 2008 records "Still getting h'aches off and on from her MVA last August". This is consistent with the report of headache recorded by Dr. Frobb in 2008.There are two entries in 2011 respecting headache. On March 10, 2011 Dr. Anderson notes "still has really sore back/neck. …gets very sore in the L inter-scap and rib region. It is an ongoing never ending pain. Still uses lots of Advil. H'aches stem from the spine/neck." On June 16, 2011 Dr. Anderson noted, inter alia, "Some h'aches from the Accident. Muscle tension h'aches. Still has pain inter-scap from the accident. Still gets some spasms."

121. Dr. Anderson's clinical records (Exhibit 1, Tab 6) include a section for the records from July 8, 2010 to October 5, 2011. At that section, however, there are no records for 2010 and only 4 entries for 2011, and only the 2 entries noted above make any reference to Accident symptoms. Dr. Frobb discharged the Claimant as a patient effective September

30, 2010. Although the Claimant has continued to receive physiotherapy and massage therapy treatment up to the date of hearing, there are no clinical records in evidence respecting that treatment, nor any evidence from those treatment providers. The result is that for the last 2 years, since the end of September, 2010, the Claimant has really been without medical oversight of her ongoing symptoms and treatment.

122. I nevertheless accept the Claimant's evidence that she has continued to experience mid to upper back, neck and shoulder tightness and soreness precipitating recurrent chronic headache which is at times disabling.

123. The Respondent's counsel disavowed Dr. Horlick's opinion regarding causation on the basis that two of his assumptions were incorrect. I do not think the assumptions were significantly incorrect and I accept Dr. Horlick's written opinion as accurate. As noted earlier, the Claimant did not have a significant pre-Accident history of headache. With respect to post-Accident headache, while I have concluded that the Claimant did not have daily headaches for three years post-Accident, she did have steady persistent headache complaint commencing immediately following the Accident and continuing up to the present at least on a periodic basis. A fair comparison of the pre-Accident and post-Accident headache complaint shows that they are simply not on the same scale of either frequency or intensity.

ACTIVE VS PASSIVE TREATMENT

124. All of the doctors agree that to attain the maximum level of recovery, passive physiotherapy and massage should be accompanied by an active core exercise program. Dr. Frobb, who does not believe that any therapeutic intervention is now likely to advance the Claimant's rehabilitation, nevertheless somewhat contrarily agrees that she should be encouraged to continue with core exercise programing as it is likely to "improve but not resolve" her chronic pain disorder. He absolutely advised the Claimant that she should maintain a physical exercise regime. Patients who do not follow that advice have sometimes "paid the price". Dr. Frobb also said that patients receiving passive therapy "will never fire you". The Claimant said that if she had the choice, she would go to physiotherapy or massage every day. Dr. Frobb has not treated the Claimant since

September, 2010. He agreed in cross-examination that he was assuming that the Claimant was continuing to do active therapy.

125. The Claimant acknowledged that she stopped doing the exercises prescribed by the kinesiologist, Pedro Sem, because her symptoms flared up. At the hearing, the Claimant described the stretching exercise and use of light weights and the occasional use of a treadmill for 6 minutes, which collectively she described as the "few small exercises I do". I do not think that the Claimant's current exercise and treatment regime is the "more active therapy type program invoking core muscle strengthening" recommended for example by Dr. Horlick. For this reason I agree with Dr. Horlick's opinion that the Claimant may not have reached her maximum medical improvement. Dr. Frobb thinks that the Claimant's recovery has plateaued to its current permanent level, but I do not think Dr. Frobb is aware of the extent to which the Claimant has been relying on passive therapy modalities. The extent of any further recovery that might result from implementation of a core muscle strengthening regime is unclear. Based on Dr. Frobb's evidence, there are obviously patients who are "non-responsive to treatment". By her own admission, since the Accident the Claimant's main focus has been maintaining her ability to work. In retrospect, this otherwise laudable approach may have resulted in the Claimant not taking the time and steps necessary to achieve her best possible level of recovery. Even Mr. advised her that what she was doing regarding treatment did not seem to be working and perhaps she should try something different or seek another opinion.

Effect of Injuries on Degenerative Osteoarthritis

126. On this issue I prefer the opinion of Dr. Horlick to that of Dr. Frobb. I agree that the conclusion in the article by Kirpalani and Mitra "*Cervical Facet Joint Dysfunction: A Review*" does not support the position asserted by Dr. Frobb. The second article by Gargan and Bannister "*The Comparative Effects of Whiplash Injuries"* does support Dr. Frobb's opinion but I accept the criticism by Dr. Horlick of that article in that it is a single study, involves too small a group to be statistically valid, and its results have not been replicated. I accept that the generally accepted medical opinion is that there is no necessary relationship between patients with whiplash and asymptomatic individuals in

comparing MRI changes in the cervical spine over a 10 year period. The more recent article in the *Journal of Spine* (Vol 35 No. 18, pps. 1684 – 1690, 2010) by Matsumoto et al supports this conclusion. Thus, with respect to prognosis, I conclude that the Accident has not altered the natural history of the Claimant's osteoarthritis.

CONCLUSION

127. I find that in the Accident the Claimant sustained soft tissue injuries affecting her mid to upper back, neck and shoulders which have resulted in a chronic myofascial pain disorder and chronic persistent cervicogenic headaches. She has suffered fatigue, altered mood and interference with recreational and family activities. The symptoms have not been severely disabling as the Claimant has been able to continue to work, full time, 7 days per week, albeit with significant job modifications. She has also been able to travel extensively, by air and car, both for work and recreational purposes. She had a non-significant pre-Accident history of tension or stress related periodic headaches and was susceptible to stress related headache. She has acknowledged that the arbitration process and hearing is stressful for her and I do conclude that the underlying proceedings and this proceeding have contributed to a recent worsening of symptoms. The Claimant has not been following the recommendation of an active core strengthening exercise regime that provides the best basis for the maximum achievable recovery. With the institution of such a program, there is some prospect of some further improvement but that prognosis is guarded.

General Damages

128. I have considered all of the cases referred to by counsel. The Claimant seeks $120,000.00 for general damages; the Respondent suggests the range is between $50,000.00 to $60,000.00.

129. In *Stapley v Hejslet* (2006 BCCA 34) Kirkpatrick, J.A. provided a non-exhaustive list of common factors to be considered in assessing non-pecuniary damages. They are:

a) age of the plaintiff;

b) nature of the injury;

c) severity and duration of pain

d) disability;

e) emotional suffering;

f) loss or impairment of life;

g) impairment of family, marital and social relationships;

h) impairment of physical and mental abilities;

i) loss of lifestyle; and

j) the plaintiff's stoicism.

130. I refer to two of the cases cited by the Claimant. The first is *Morlin v Barrett* (2012 BCCA 66). The trial judge awarded $125,000.00 to the Plaintiff who was 50years old at the time of trial. The award was upheld by the Court of Appeal but described as "generous". Like the Claimant, Ms. Morlin was able to continue to work after the accident and did not advance a claim for past wage loss. She did however suffer from fibromyalgia which resulted in constant pain made endurable by the ingestion of vast amounts of medication, principally Gabapentin and Flexoril. The trial judge found her to be a different woman post-accident with an energy level that was miniscule compared to the pre-accident level. The prognosis was guarded on the basis that the Plaintiff had plateaued or even slightly worsened in the year prior to trial. In my view Ms. Morlin's resulting condition is more severe than that of the Claimant. In *Shapiro v Dailey* (2012 BCCA 128) the trial judge awarded $110,000.00 in non-pecuniary damages to a 29year old Plaintiff. She also recovered about $128,000.00 for past loss of income. The general damage award was not appealed. The significantly younger Plaintiff however was left with disabling cervicogenic headaches and periodic headaches of a migraine nature, myofascial pain syndrome and post-traumatic fibromyalgia syndrome, depressive symptoms falling short of a depressive disorder, mood disorder including resolving post-traumatic stress disorder, anxiety disorder and panic attacks, and mild but not insignificant cognitive difficulties in concentration and memory. The prognosis although not hopeless was extremely guarded. In my view, Ms. Shapiro's injuries were also more serious than those of the Claimant.

131. Of the cases cited by the Respondent, *Smith v Moshrefzadeh* (2012 BCSC 1458) bears the closest similarities. The Court awarded $80,000.00 to a 54year old Plaintiff at a trial 5 years after the accident. She sustained soft-tissue injuries involving her neck and upper back and resulting headaches. She received physiotherapy, chiropractic and massage treatment and injections from a pain specialist. She took a structured exercise program but

could not tolerate it. She had neck and upper back pain on a daily basis and persistent and daily headaches for which she took Advil and prescription medication. Further medical management might possibly reduce the symptom significantly but would unlikely lead to full resolution.

132. The other cases relied upon by the Respondent are in my view distinguishable on one ground or another. In *Boyle v Prentice* (2010 BCSC 1212) although the Plaintiff did sustain a permanent and partially disabling injury, she was 80% recovered on 8/10 days within 7 weeks of the accident.

133. I assess general damages in this case at $85,000.00.

Loss of Future Earning Capacity

LEGAL PRINCIPLES

134. The first question to be determined is whether the Claimant's earning capacity has been impaired to any degree by her injuries (*Earnshaw v. Despins* (1990) 45 BCLR (2nd) 380 (CA) at p. 399; *Sobolik v. Waters* (2010) BCCA 523 at paras. 16-20).

135. The next question is whether there is a "real and substantial possibility of a future event leading to an income loss." In *Perren v. Lalari* (2010) BCCA 140, Garson, J.A. in a judgment of the court stated at paragraphs 30-32 as follows:

> *30. Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in Athey v Leonati [1996] 3 S.C.R. 458, and Andrews v Grand & Toy Alberta Ltd. [1978] 2 S.C.R. 229. These principles are:*
>
> *1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation (Athey at para.27], and*
>
> *2. It is not loss of earning but, rather, loss of earning capacity for which compensation must be made [Andrews at 251].*

> *31. Furthermore, I conclude that there is no conflict between Steward and the earlier judgment in Pallos. As mentioned earlier, Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.
>
> *32. A plaintiff must always prove, as was noted by Donald J.A. in Steward, by Bauman J. in Chang, and by Tysoe J.A. in Romanchych, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in Steenblock or a capital asset approach, as in Brown. The former approach will be more useful when the loss is more easily measurable, as it was in Steenblock. The latter approach will be more useful when the loss is not as easily measurable, as in Pallos and Romanchych. A plaintiff may indeed be able to prove that there is a substantial possibility of future loss of income despite having returned to his or her usual employment. That was the case in both Pallos and Parypa. But, as Donald J.A. said in Steward, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.*

136. Finally, there is the quantification of any loss of earning capacity either on an earnings approach or capital asset approach. The factors to be taken into account on the capital asset approach were set out by Finch J (as he then was) in *Brown v. Golaiy* (1985) 26 BCLR (3rd) 353, as adopted by the Court of Appeal in *Kwei v. Boisclair* (1991) 60 BCLR (2nd) 393 (CA). In *Perren*, supra, at paragraph 11 the Court set out the *Brown* factors as follows:

> "The means by which the value of the lost or impaired asset is to be assessed varies of course from case to case. Some of the

considerations to take into account in making that assessment include whether:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;

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

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

4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labor market.

137. While actuarial evidence is useful in providing a framework to assess lost earning capacity over an injured person's expected working life, the determination of compensable loss is an assessment, and not a mathematical calculation (*Tom v Truong* 2003 BCCA 387).

HAS THE CLAIMANT'S EARNING CAPACITY BEEN IMPAIRED TO ANY DEGREE BY HER INJURIES?

138. I conclude that the Claimant's earning capacity has been impaired by her injuries.

139. Both Drs. Frobb and Horlick concur that the Claimant suffers from chronic myofacial pain related symptoms and cervicogenic headaches caused by the Accident. While Dr. Horlick considered the degree of impairment at the time of his exam to be mild-moderate, he did not conclude that there would be a full recovery, even with the institution of a proper reconditioning program. Mr. Kerr, in his report, has identified the specific limitations on the Claimant's work capacity respecting sustained neck postures, overhead reaching, sedentary or light strength categories, sustained static or full time standing, regular postural changes and work endurance. The evidence confirms that the Claimant has had to modify her existing job duties. I conclude that these modifications will be necessary to a greater or lesser degree on a permanent basis.

IS THERE A REAL AND SUBSTANTIAL POSSIBILITY OF A FUTURE EVENT LEADING TO AN INCOME LOSS

140. The Claimant has continued to work fulltime for the Company for the 5 years since the Accident. From her point of view, I accept that she would like to stay with the Company for the rest of her working career. She has worked in the Company's business for 20 years. It is the only business that she knows. She is working with people whom she likes and who also appreciate her. She speaks of the Company as "my company".

141. From the Company's point of view, it has been very supportive of this longtime employee who has contributed a great deal to the growth and success of the Company. One question is whether the Claimant is at risk of being let go or terminated by the Company? Another question is whether the Claimant is at risk of being let go following a sale by the Company to new owners who would not have the same accommodating approach to the Claimant's work restrictions.

142. There is no direct evidence that the Claimant is at risk of being let go by the current owners. Mr. did say that he has declined the Claimant's post-accident requests for a salary increase, presumably because the Claimant is now less productive. Mr. also referred to the "rift" between the Claimant and himself regarding her reduced time on the floor closing sales. However, Mr. was not asked whether the Company had given consideration or was giving consideration to terminating the Claimant's employment. Nor was he asked about any future intention of the Company in this regard.

143. With respect to the prospect of new owners terminating the Claimant's employment, there is no evidence that the current owners are considering a sale of the business. They have been forced by an expropriation to relocate their main showroom to newly renovated premises on three acres of land. The current owners are actively involved in the overseeing this move. Mr. is 60 years old. He gave evidence that he had planned to work less, but has not done so partly because of the Claimant's reduced workload. The age of the other co-owner is not known. The Claimant is presently age 52. If she continued to work to age 65, then by the time of her retirement, Mr. would be 73. Mr. is clearly appreciative of the Claimant's contribution to the

prosperity of his business over the years. The Claimant has given evidence that she regards him "as a brother". Although there is a possibility that the Claimant might yet be let go by the Company, I conclude that so long as Mr. remains an owner, the possibility is very small. On the other hand, I also conclude that it is quite likely that Mr. will have retired from the Company prior to the end of the Claimant's normal working life expectancy. At that point, there is a serious prospect that the Claimant's employment would be in jeopardy.

144. I find that the risk of loss of the current employment is not an immediate risk but is nonetheless a real and substantial risk that may occur at some time during the balance of the Claimant's remaining normal working life, likely towards the last half of her remaining working life.

ASSESSMENT OF LOSS OF FUTURE EARNING CAPACITY

145. The Claimant seeks an award of $700,000.00 under this head of damages. Both parties agree that at the assessment stage, the capital asset approach is the correct one.

146. The Claimant relies on two recent BC Appellate decisions. The first is *Shapiro v Dailey* (2012 BCCA 128). The Plaintiff was injured in a motor vehicle accident on March 2, 2005. The trial judge awarded $900,000.00 for loss of future earning capacity, which was upheld on appeal. The Plaintiff was 29 years old at trial. She was a high school graduate who was working at her father's law firm as a "girl Friday" and taking courses at Capilano College at the time of the accident. She was considering a career in real estate, law or business but had not yet made any decision about her future. Post-accident, the Plaintiff continued to work for her father's firm for a time, and then worked as a recruiter with a recruitment and placement business. She reduced her work week to 4 days but the physical demands of her job made it hard to be productive. At the time of trial, she was working in sales for the Yellow Pages Group and had earned $86,000.00 in 7 months. She was able to work at home, and control her own schedule but pain still limited her performance and she had to work long hours to meet her targets. She had a strong commitment to remain in the workforce. Her total past loss of income was about $128,000.00. In assessing damages the Court took into account the following factors:

a) The Plaintiff had a strong attachment to the workforce;

b) She was pushing herself to the limit and was unlikely to be able to keep that up;

c) There would likely be a modest improvement in her condition but she would be unlikely to be able to work at pre-accident, full time, capability;

d) A number of careers including law and real estate that would have been open offered potential earnings that would be significantly impacted by her impairment;

e) The Claimant was best suited to sales, but her earning ability in this highly incentivized field was compromised.

147. The Court found that although the Plaintiff was capable of earning a good income, unimpaired she would be doing better and would have much greater security. The Plaintiff was at risk of being unable to meet the employer's requirements in which case she would be hard pressed to replace even the lower level of income she had been earning. Actuarial evidence indicated that the Plaintiff had a lifetime earning capacity in the range of $3.0 million - $5.0 million on up. The trial judge awarded $900,000.00 which the Court of Appeal upheld noting that it was at the high end of the spectrum.

148. The second case relied on by the Claimant is *Morlan v Barrett* (2012 BCCA 66) The Plaintiff was involved in two motor vehicle in quick succession on January 6, 2007. The trial judge awarded $425,000.00 for loss of future income earning capacity which was reduced on appeal by $150,000.00 to $275,000.00. The Plaintiff was 50 years old at the time of trial. She was an executive secretary to the president of the BC Federation of Labor and described as a person of high energy and a workaholic. Prior to the accident she commuted to work a total of 3 hours a day. After the accident, because of her injuries, she changed jobs and worked as a program coordinator for the Electrical Industry Training Institute. This job involved a commute of only 40 minutes. Because she was able to work longer hours, because of reduced commute time, her annual income increased post-accident and she did not advance a claim for past wage loss. The trial judge concluded that the Plaintiff was a different person post-accident with a miniscule energy level and fibromyalgia resulting in constant pain made endurable by the ingestion of large amounts

of prescription medications. A major factor in the trial judge's award was the loss of an opportunity "to perhaps move up in the hierarchy of the BC Fed to the point of becoming a director" with enhanced salary and benefits. The trial judge also found as a matter of "common experience" that a person with a stable but persistent energy draining condition would find it more difficult to continue to work as he or she grows older. The Court of Appeal agreed with that conclusion, regardless of what accommodations an employer was prepared to make. The award was reduced by the Court of Appeal because it found a lack of evidence as to the availability and the level of competition for the position of director. Thus the prospect of promotion did not arise above the level of speculation.

149. The Claimant advances her claim for loss of future earning capacity on a similar basis as was advanced in *Shapiro*, supra ie. working back from mathematical calculations of lifetime earning capacity. In the this case, the calculations are based upon the multipliers provided by Mr. Carson in his report dated October 19, 2011 (Exhibit 1, Tab 4). Using those multipliers, and on the assumptions that the Claimant is now permanently unable to work at all, and assuming she would have worked to age 70, and assuming she would have earned $125,000.00 per year, her remaining loss of earnings would be approximately $1.8 million. If the Claimant were able to continue to work at her current job for the next 5 years, before becoming unable to work at all, the loss of future earnings would be about $1.1 million. If one assumes that the Claimant loses her current job, after 5 years, but obtains some other employment at half her current income, then her loss of future earnings is about $555,000.00.

150. The Respondent says that the Claimant has lost no income to date; she has no intention of leaving her current employment; she is secure in her job; there is no evidence of the Company being sold; there is a prognosis for improvement of all symptoms, and any loss of income would be well into the future. Moreover, the Claimant is physically capable of doing her job, in the light to sedentary category, as demonstrated by Mr. Kerr in his functional capacity evaluation. The Respondent relies upon the cases of *Juraski*, supra, *Smith*, supra, *Iliopoulous*, supra, *Boyle*, supra and *Day*, supra.

151. In *Juraski*, supra, the 46 year old Plaintiff who sustained chronic shoulder and low back pain was awarded $50,000.00 primarily for an ongoing loss of competitive energy. She

gave up working as a realtor for reasons found not to be related to the accident and at the time of trial was selling insurance. Whether she chose to return to real estate or seek another clerical job, she would continue to have the same competitive disadvantage. In *Smith*, supra, the 54 year old Plaintiff was awarded $37,000.00. She suffered chronic headache and neck and upper back pain which interfered with her ability to perform the heavier, physical aspects of working in the fishing industry. She nevertheless continued to be employed by her husband with some accommodation. The risk of future income loss could arise if she were unable to work for her husband because of marital discord, economic factors or other vagaries of life. In *Iliopoulous*, supra, a 45 year old Plaintiff received $35,000.00. She continued to be employed as a medical office assistant and on the evidence, there was a very high probability that she would continue in this occupation. In *Boyle*, supra, a 32 year old Plaintiff was awarded $175,000.00 arising from her inability to work full time as an elementary school teacher. In *Day,* supra, a 28 year old Plaintiff was awarded $45,000.00 on the basis that a career in aquatics was foreclosed because of her injuries. Her current work in administrative/managerial office type work provided comparable income but the scope of future employment possibilities was narrowed and her marketability to future employers was diminished.

152. The assessment of loss of future earning capacity is very fact dependent. The *Boyle* case represents an award to a much younger Plaintiff with a permanent inability to work full time. Cases like *Smith, Iliopoulous* and *Day* reflect assessments where the likelihood of future job loss necessitating the search for new employment was small. Differing pre-accident earning levels is obviously a critical factor. The Respondent essentially asserts that the Claimant is unlikely to lose her present job. She is capable of working in light, sedentary occupations. Her work experience over the last 20 years has been in a light, sedentary occupation. An inability to perform an occupation that is not a realistic alternative occupation is not proof a future loss (*Steward v Berezan* (2007 BCCA 150 per Donald JA)).

DISCUSSION AND ANALYSIS

153. In assessing the Claimant's loss of earning capacity I have taken into account the following factors which I find are established by the evidence:

a) The Claimant has a strong attachment to the workforce. She is a "workaholic". She worked 7 days per week prior to the Accident and has continued to work 7 days per week since the Accident. In continuing to work fulltime since the Accident, she has put work first, perhaps to the determent of her maximum recovery. I agree with the Claimant's submission that if she were to lose her current job, she would find some other employment that she could do;

b) There is no direct evidence that supports the Claimant's submission that, but for the accident, she would have worked to age 70. There is no evidence of her personal financial circumstances that might have mandated working to age 70. What is clear in the evidence, as noted above, is that the Claimant is a committed worker. In these circumstances I find that the Claimant would likely have retired between the ages of 60 and 65. There is no support in the medical evidence for a reduction in working life expectancy as a result of the Accident;

c) There is some prospect of some improvement in the Claimant's symptoms if she commits to a core strengthening program under medical supervision but she will still be left with some residual disability;

d) I also find that the Claimant's symptoms have been recently exacerbated by the acknowledged stress of the underlying action and the arbitration proceedings. The conclusion of these proceedings will remove one source of stress;

e) The Claimant will continue to suffer from periodic neck, shoulder, upper back and headache symptoms, on an episodic basis, particularly where she is exposed to stressful circumstances. She will continue to have the mobility restrictions identified in Mr. Kerr's functional capacity assessment as well as reduced energy and stamina;

f) The Claimant has satisfied all of the factors in the *Brown*, supra, case;

g) The Claimant will continue to require periodic physiotherapy or massage treatment during periods of symptom exacerbation;

h) There is little likelihood that she will lose her current employment so long as Mr. remains an owner of the Company or active in the Company's affairs;

i) The Claimant is at greatest risk for loss of her job with the Company once Mr. reaches age 65. It is reasonable to assume that by that time Mr. may, not must, have relinquished his interest in the Company. On this question, the task is to weigh the risk rather than to look for proof on a balance of probability;

j) If loss of her current job were to occur, it would be particularly harsh on the Claimant. She would be approaching her 60s, having worked the bulk of her working life in one industry, and having excelled as a salesperson which is a type of employment in which she is now compromised. But for the Accident, if the Claimant were to lose her current job, her best alternative would likely have been to find employment in the same industry that she knows very well with a competitor in either a sales or even management position. Her ability to make that kind of transfer now is clearly compromised. The evidence demonstrates that to be a successful salesperson in the business, one needs to be both energetic and optimistic and to be able physically to move around heavy product items; and

k) If the Claimant were to lose her job, she would be looking to replace annual income in the order of $125,000.00.

154. Taking into account all of the foregoing factors, I assess the Claimant's loss of future earning capacity at $200,000.00.

COST OF FUTURE CARE

155. The Claimant seeks $147,000.00 which is the present value based on Mr. Carson's report (Exhibit 1, Tab 3) of the services recommended by Mr. Kerr (Exhibit 1, Tab 2). The claim for physiotherapy on a weekly basis and massage therapy on a bi-weekly basis to age 65 is approximately $43,000.00. The claim for seasonal house cleaning at 20 hours per year at $25.00 per hour from age 65 onward is $10,000.00. The claim for yard work based on the monthly charge of $487.00 charged by the current landscaping company in 8 months per year totals approximately $74,500.00 over the Claimant's estimated remaining lifetime. The claim for non-prescription (Advil) medication assuming daily use of between 4 – 10 Advil for life is just under $5,000.00.

156. The legal test for the recovery of the cost of future care is that there must be medical justification for claims for cost of future care and the claims must be reasonable (*Milina v Bartsch* (1985) 49 BCLR (2^{nd}) 33 (SC) affirmed (1987) 49 BCLR 2^{nd} 99 (CA)). The general principles of assessment of damages laid down in the trilogy emphasize the fundamental governing precept of the *restitutio in integrum*. The injured person is to be restored to the position that she would have been in had the accident not occurred, insofar as this can be done with money.

157. The issue in this case is not on the legal test but rather on the evidence which the Respondent asserts does not support the claims advanced.

158. With respect to physiotherapy and massage therapy, I have concluded that the current treatment is not the core muscle strengthening regime that all of the medical doctors recommend. Although Dr. Frobb defended the current treatment as "therapeutic" in a particular sense, he also agreed that the treatment was essentially palliative. I also conclude that Dr. Frobb's support is undermined by his being unaware of the absence of any "active" therapy or exercise program at all. In any event, I find that there is not medical justification for continuation of passive therapy to age 65. I do however conclude that some award for physiotherapy is warranted for two reasons. First, I have concluded that the Claimant should follow the unanimous medical advice and engage in an active physiotherapy program promoting core strength. Second, I have concluded that the Claimant will likely have exacerbation of her symptoms on a periodic basis especially if exposed to stressful circumstances. For those periodic exacerbations, short term physiotherapy or massage therapy program may also be therapeutic. I accordingly award $10,000.00 with respect to these services.

159. With respect to seasonal household cleaning, the evidence of Mr. Kerr does support the Claimant's inability to do heavy work or tasks involving prolonged bending or overhead work. As noted, the claim is for services after the Claimant reaches age 65. She employs a housekeeper at present. I would allow some modest amount for future housekeeping expense. I take into account that the Claimant may have elected to continue to use housekeeping services after age 65 had the Accident not occurred and also that in

retirement years people may be unable or disinclined to perform their own heavy seasonal housekeeping for usual health reasons. I award $2,000.00 on this account.

160. With respect to the claim for yard work, I find that the Claimant has not retained professional gardeners because of the injuries she has sustained in the Accident. This work was being done largely by her parents who have reached an age and condition when they are not able to perform this service any longer. The Claimant does not have the time to devote to yard work as she has been fully devoted to her work. I accept Mr. Kerr's opinion that the Claimant is restricted from doing heavy yard work. The question is whether she would have done her own yard work in retirement or hired a professional gardener. I think it is unlikely that the Claimant would have done her own yard work upon retirement, or if so for very long. I award $5,000.00 for yard work expense.

161. Finally, with respect to medication, I conclude that the Claimant will continue to require Advil on a periodic but not daily basis. I award $2,500.00 for future medication expense.

SPECIAL DAMAGES

162. The Claimant claims special damages of $32,766.18. There is a claim of approximately $15,000.00 for treatment by Dr. Frobb, physiotherapy, massage therapy, kinesiology services and a MRI. There is claim for housekeeping services, without receipts, of $10,900.00. There is a claim for gardening services of $3,231.00. Finally, there is a miscellaneous category which includes prescription expense, mileage, taxi, new linen etc. of $3674.20. All of these amounts of have been actually paid by the Claimant.

163. The Respondent submits that nothing is recoverable for either housecleaning or yardwork expense because those expenses were not incurred because of the injuries sustained in the Accident. I agree. The Claimant used housekeepers prior to the Accident and she has simply continued with that practice after the Accident. The Claimant used the assistance of her parents, particularly her father, for yard work, prior to the Accident and continued with that practice until he was unable to carry on. As with the housekeeping work, the Claimant did not have time to do it herself because of her work schedule. The Respondent does not dispute recovery of the cost of Dr. Frobb's services. I also conclude that the cost of the kinesiology services and the MRI were reasonably incurred and are recoverable.

The massage therapy of Holly Morgan was provided in September/October, 2007 at the recommendation of Dr. Anderson. Those expenses are reasonable and recoverable.

164. The Respondent challenges a portion of the ongoing physiotherapy/massage therapy expense after the conclusion of Dr. Frobb's services at the end of September, 2010. Thereafter, the Respondent says that the services were not truly therapeutic but palliative and as treatment to the exclusion of active therapy was continued contrary to medical advice. I agree with that submission. I have commented previously about the absence of medical oversight of these continuing passive therapies after Dr. Frobb's treatment ended in September, 2010. On this basis, on my calculation, the recoverable amount for physiotherapy is all of the Andrew Vowles charges of $2390.00, $2682.30 of Jody Wiebe's charges and none of the charges in 2012 of Mr. Dumont.

165. With respect to the claim for miscellaneous expenses, the amount of $467.43 is claimed for medication (primarily Advil, Tylenol and ibuprofen). This amount is allowed. The amount of $18.00 is claimed for taxi expense. The receipt indicates it was a trip from Dr. Anderson's office to the Company. This amount is allowed. The claim for dumbbell expense of $19.49 is allowed. The Claimant was encouraged to exercise at home; hence it was reasonable to purchase dumbbells even if ultimately the Claimant did not persevere with their use. There is no evidence to support the purpose of the fax expense of $7.95 which is disallowed. The unquantified claim for a new bed and the quantified claim in the amount of $519.97 for new bed linen to fit the new mattress are disallowed. The old mattress was 20 years old and would likely have been replaced in any event.

166. The remaining miscellaneous claim is for mileage to and from doctor and therapy appointments in the amount of $2,641.36. The Respondent objects to this claim to the extent it involves travel to passive therapy appointments after September, 2010. I agree with that submission in principle. The majority of the treatment visits were prior to the end of September, 2010. I allow 2/3 of the mileage claim in the amount of $1,760.90.

167. In summary, the special damages are awarded in the amount of $12,051.10 comprised as follows:

Dr. Frobb	$3,750.00

Andrew Vowles	$2,390.00
Jody Wiebe	$2,682.30
Pedro Sem	$363.00
Holly Morgan	$225.00
MRI	$375.00
Medication Expense	$467.43
Taxi	$18.00
Dumbbells	$19.47
Mileage	$1,760.90
TOTAL	$12,051.10

DEDUCTIBLE AMOUNTS

168. It is agreed that $162,000.00 being the Claimant's share of the tortfeasor's liability insurance limits is a deductible amount.

169. The Claimant had extended health benefit coverage under a group insurance plan between the Company and Empire Life. It provided limited coverage for treatment by acupuncturists, massage therapists and physiotherapists. The coverage was a maximum of $500.00 per benefit period with 100% co-insurance. Based upon the example in the plan, 80% co-insurance means that Empire Life pays 80% of the expense, up to the policy limits. The benefit period is the calendar year. The Claimant submitted a claim for Dr. Frobb's acupuncture treatments but the claim was rejected for a reason not disclosed in the evidence. The rejection has not been challenged to date by the Claimant. Massage therapy expense in the amount of $500.00 was paid by Empire Life for treatment in 2009. Similarly, $500.00 for physiotherapy expense was paid by Empire Life in both 2009 and 2010.

170. There are some restrictions on entitlement to reimbursement, although it is not necessary to establish any particular cause of injury for which the treatment is utilized. The expenses must be ordered by a qualified doctor; must be submitted within 365 days after

the expense was incurred, or within 90 days of termination of insurance. The entitlement to expenses does end if the Claimant ceased to be an employee of the Company.

171. The Empire Life policy also provides coverage for drugs to an unlimited amount, with 100% co-insurance and a deductible of $5.00 per prescription.

172. In seeking to have the Claimant's entitlement to benefits deducted from the assessment of damages, the Respondent relies upon the definition of 'deductible amount' in the *Insurance (Vehicle) Regulation*, s.148.1 (1) which defines 'deductible amount' to mean an amount:

    i. paid or payable to the insured under any benefit or right or claim to indemnity.

173. Without doubt benefits to which the Claimant is entitled or was entitled under the Empire Life plan fall within this definition. With respect to Dr. Frobb's acupuncture treatment, where the claim was submitted but denied for an unknown reason, I find that the Respondent has not established an entitlement to payment of this benefit. Without knowing the reason for the denial, I cannot simply conclude that it was wrongful.

174. The Claimant agreed that the Empire Life plan applied, but noted that coverage would end if the Claimant's employment were terminated. The special damages assessed include: massage therapy from Holly Morgan in 2007 of $225.00, physiotherapy from Andrew Vowles in 2008 exceeding $500.00 and medication expense of $467.43. All of these amounts were evidently payable under the Empire Life policy and given counsel's agreement that the policy applied, I find that the total of $1,192.43 is deductible.

175. With respect to the assessment of $10,000.00 for future physiotherapy/massage therapy, there are two circumstances in which the Empire Life benefit will not apply. The first is when the Claimant's employment with the Company ends, either by termination or retirement. The second circumstance is if the annual expense exceeds the annual limit of $500.00. Taking these two factors into account, I reduce the assessment for future physiotherapy/massage therapy by $2,500.00 based on future entitlement under the policy.

176. With respect to the assessment of $2,500.00 for future medication expense, although there is no dollar limit on coverage, the entitlement will end when the Claimant's employment with the Company ends. I would reduce the assessment by $500.00 to take into account this future entitlement.

SUMMARY AND CONCLUSION

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

Non-pecuniary	$85,000.00
Loss of future earning capacity	200,000.00
Cost of future care	19,500.00
Special damages	12,051.10
TOTAL	$316,551.10

178. I find the following to be the applicable deductible amounts:

Share of tortfeasor's liability insurance	$162,000.00
Empire Life entitlement for past treatment and medication expense	1,192.43
Empire Life entitlement for future treatment and medication expense	3,000.00
TOTAL	$166,192.43

AWARD

179. I accordingly award the total sum of $150,358.67 as the Claimant's UMP compensation.

Donald W. Yule, Q.C., Arbitrator