

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

BETWEEN:

C.D.

CLAIMANT

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

Donald W. Yule Q.C., Arbitrator

Dates of Hearing: January 7, 8, 9 and 10, 2008

Place of Hearing: Victoria, British Columbia

Date of Award: January 30, 2008

Counsel for the Claimant

Ms. Misty N. Hillard
Hutchison, Oss-Cech & Marlatt
Barristers and Solicitors
1505 Fisgard Street
Victoria, BC V8W 1R3

Counsel for the Respondent

Mr. Alastair Burnett
Insurance Corporation of British Columbia
Litigation Department
800 – 808 Nelson Street
Vancouver, BC V6Z 2L5

INTRODUCTION

1. Pursuant to the provisions of s. 148.2(1) of the Revised Regulation (1984) under the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996 c. 231 and the *Commercial Arbitration Act*, R.S.B.C. 1996 c. 55, the parties have submitted for determination the assessment of the quantum of damages attributable to the personal injuries sustained by the Claimant, C.D. ("Mr. D.") arising out of a motor vehicle accident that occurred on April 21, 2003 in the City of Seaside, in the State of California, U.S.A. ("the Accident").
2. It is admitted that the Accident was caused solely by the operation of a motor vehicle driven by a Mrs. M. and owned by her husband, Mr. M. It is further admitted that the third party liability limits on the M. vehicle (\$25,000.00 U.S.) have been paid to Mr. D. It is further admitted that Mr. D. is an insured person for UMP purposes.
3. The purpose of the arbitration is to determine the compensation payable to Mr. D. under his own underinsured motorist protection coverage. At issue are general damages, past income loss and special damages.

BACKGROUND CIRCUMSTANCES

4. Mr. D. was born February 14, 1970 and was 33 years of age at the date of the accident. On September 19, 2004 he married L.D. who also brings her own UMP claim arising out of the Accident. (I shall refer to the Claimants respectively as Mr. and Mrs. D.). The Ds. reside at -----, V., BC. They have two sons, one almost 2 years of age and the other, one month old. Mr. D. graduated in 1996 with a Bachelor of Commerce degree from the University of V. At the time of the accident he was an investment advisor employed by ("ABC"), working on a 100% commission basis.

5. The Accident occurred in the late afternoon on April 21, 2003. The Ds. were on a 2 week motoring holiday, the destination being Santa Monica, California. Mr. D.'s 1999 Jetta motor vehicle was stopped in a line of cars at a red light and was rear-ended by the M. vehicle. Mr. D. observed the approach of the M. vehicle in his rear view mirror, apprehended a collision, shouted a warning to Mrs. D., and braced for the impact which knocked the Jetta into the vehicle in front of it. He was wearing a seatbelt and his airbag did not deploy. The cost to repair the Jetta vehicle was \$3,823.48. Mr. D. got out of his vehicle and walked back towards the M. Chevrolet pick up. The vehicle reversed and sped off. Mrs. D. was able to get its license plate number. Later that evening the Ds. attended the local police station where they identified Mrs. M. in a photo line up. Immediately after the Accident, Mr. D. noticed a sensation in his neck and the start of a headache. Both an ambulance and the police attended the scene of the Accident. Mr. D. did not recall being examined any ambulance attendant and did not see any doctor or other medical person for the injuries sustained in the Accident until he returned to V.
6. After the Accident, the Ds. returned to their hotel in Monterrey, about 10 kilometers from Seaside. By this time, Mr. D. noticed neck and upper back pain. The Ds. left Monterey the following day and continued on down the coast. They cut short their intended holiday by one day. They drove shorter distances than previously planned and restricted their physical activities somewhat.
7. During the rest of the trip, Mr. D. experienced pain in his upper back, neck and across the shoulders and had a constant headache. He felt more tentative driving and experienced a sense of "fogginess".

INJURIES

8. Mr. D. was in good health prior to the Accident. He did not have a regular family doctor and immediately, upon returning to V., attended upon Dr. Riddler, then the family physician of Mrs. D., on April 28, 2003. His symptoms were headaches, blurred vision, upper back and neck pain extending into the shoulders, low back pain and soreness of one elbow. The blurred vision subsided within a month. It never prevented Mr. D. from driving. The headache was constant for approximately one month; then headaches occurred approximately twice a week for the next few months, and then tapered off gradually. The low back symptoms were intermittent and lasted 4 to 6 months. The upper back discomfort lasted about 6 months. Regular sitting at work exacerbated this pain which could last up to a day. There was a dull pain in one elbow joint that resolved in about a month. He was able to do most activities of daily living after 2 weeks, but with significant discomfort for about 3 months. The most persistent symptoms were between the shoulders at the base of the neck. There was a constant pain and feeling of tightness for several months. These symptoms then persisted intermittently, were aggravated by general tension, sitting in an office chair and over exertion. Mr. D. estimates he was 80% recovered by August, 2004. His symptoms ultimately resolved by April 2005, ie. within two years of the Accident.

9. Mr. D. attended approximately 20 physiotherapy sessions at Mackenzie Orthopedic & Sports Physio between May 5, 2003 and March 18, 2004. He had not received any physiotherapy prior to the accident. He also attended approximately 55 sessions of massage therapy at Koi Treatment Centre Inc. between May 27, 2003 and October 20, 2005. The massage therapy was effective in relieving some tension and reducing the frequency of headaches but the benefit only lasted a few days.

10. Dr. Riddler prescribed an anti-inflammatory, Vioxx, which Mr. D. found provided limited benefit.

ACTIVITIES

11. Prior to the Accident, Mr. D. was very active physically. He worked out at the gym 3 to 4 times per week, typically doing an hour on weights and 40 minutes of cardio. Following the Accident he gave up his membership at the YMCA and about six months after the accident commenced attending the Oak Bay Rec Centre on a drop-in basis. He did stretching and used a stationery bicycle but no weights and nothing overhead and nothing that would strain his back. He returned to full work-outs about 2 years after the Accident.
12. Mr. D. was an avid golfer and a member of the -- Golf Club. He had a 3 handicap. Prior to the Accident he golfed 1 to 2 times a week. He participated in a winter league and in Club play and in competitive, amateur events. His golf was restricted as a result of his injuries. He played only about six rounds in the summer, 2003 and experienced increased soreness following each round. He played only 4 out of 16 rounds in the winter league between 2003-2004. He played half as frequently in the spring, 2004, compared to the spring, 2002, and experienced tightness after each round. The first formal tournament that he participated in post-accident was a Club Championship in September, 2004. By the late summer, 2005 he was playing golf as frequently as before. His handicap was then under 10. He had not regained his "3" handicap but that was because of home and family commitments.
13. Prior to the Accident, Mr. D. participated in the --- Race Series with Mrs. D. He ran six races in the series and had completed one-half marathon in under 2 hours. Prior to the Accident he ran 10 to 15 kilometers twice a week and longer distances

preparing for longer races. He currently does two to three, 20 to 30 minute runs per week.

14. Mr. D. hiked in local mountains 3 to 4 times per summer. He did not do any hiking in the summers of 2003 or 2004 but returned to some hiking in the summer, 2005.

MEDICAL TREATMENT AND ASSESSMENT

15. Mr. D. saw Dr. Riddler for treatment purposes on six occasions between April 28, 2003 and August 10, 2004. He did not see Dr. Riddler for treatment of accident related injuries in 2005. He last saw Dr. Riddler for the purposes of preparing a medical/legal report on April 18, 2006. Dr. Riddler's two medical/legal reports dated April 19, 2004 and June 8, 2006 were admitted in evidence as Exhibit 26 and Exhibit 27. On a number of visits a physical musculoskeletal exam was deferred on account of time constraints and the appointments consisted primarily of obtaining an updated history from the patient and visual observation of the patient. On December 1, 2003 Dr. Riddler recorded that Mr. Delorme felt overall he was about 60% of his normal self. He was still troubled predominantly by lower neck pain which radiated to the shoulder ridges and into the inter-scapular area. He was also still experiencing headaches which were quite severe, once every 2 to 3 weeks.
16. In his first report (April 19, 2004) Dr. Riddler concluded that Mr. D. had suffered a grade II WAD, a grade II lumbo-sacral strain injury and a right elbow/forearm soft tissue injury. Eleven months post-accident, having received massage and physiotherapist treatment regularly, he was still significantly symptomatic. Consideration was given to having a CT scan if there was not reasonable improvement over the next 2 to 3 months. A CT scan was not conducted.

17. On August 10, 2004 Mr. D. reported neck discomfort and a generalized stiffness in his low back which increased with recreational and mechanical activities and improved with rest and stretching. He was also still experiencing tension-type headaches. He was, however, working full-time without restriction, working out at the gym 3 days a week on a Stairmaster and using light free-weights for approximately 45 minutes. Dr. Riddler records Mr. D. reporting that he was 90% recovered as of August, 2004.
18. Mr. D. last saw Dr. Riddler on April 18, 2006, essentially for the purposes of preparing a medical/legal report. Dr. Riddler closed his private general practice in May, 2006.
19. In his second report dated June 8, 2006 Dr. Riddler confirms his previous diagnosis of a grade II whiplash associated disorder injury. He reports that Mr. D. felt essentially 100% recovered “over the preceding 6 to 12 months”. He also concludes that Mr. D. had made a gradual full recovery by 2 years post-accident.
20. In his evidence at the Hearing Dr. Riddler acknowledged that his clinical note for the August 10, 2004 appointment indicates the WAD was 90% to 95% resolved. In his clinical note for the April 16, 2006 appointment, Dr. Riddler noted that Mr. D. had felt the same for about the last year.

NON-PECUNIARY DAMAGES

21. I find that Mr. D. suffered a grade II whiplash associated disorder injury as a result of the Accident. The symptoms included neck pain radiating out to the shoulders, upper back and low back pain, a minor injury to one elbow, blurred vision, and headaches. He was treated with Vioxx briefly, a short course of physiotherapy, and massage therapy treatments. The persisting symptoms were pain between the shoulders, at the base of the neck and headaches. These injuries significantly interfered with his varied recreational activities, particularly in 2003.

He had largely recovered by August, 2004 and had fully recovered by 2 years after the Accident.

SUBMISSION OF THE CLAIMANT

22. Ms. Hillard submitted that Mr. D. was a forthright, credible witness who was determined and motivated and diligently worked on staying active and achieving a physical recovery. The injuries affected his ability to work and significantly affected his recreational activities for two years following the Accident, in addition to causing the pain, discomfort and physical symptoms that took two years to wholly resolve. She submitted that an award of \$30,000.00 was appropriate.

SUBMISSION OF THE RESPONDENT

23. Mr. Burnett noted that Mr. D. received no medical treatment until he returned to V. and the Ds. did not really cut short their trip. Even in V., the last attendance for treatment upon Dr. Riddler was in August, 2004 at which no detailed physical exam was conducted and Dr. Riddler noted Mr. D. was 90% to 95% recovered, suggesting a whiplash injury of primarily 16 months duration. Mr. Burnett suggested a range for non-pecuniary damages of between \$8,000.00 and \$14,000.00.
24. On the evidence, Mr. D. had largely recovered from the injuries sustained in the Accident by August, 2004. He participated in a Club championship tournament in September, 2004. During that period of almost 18 months, Mr. D's. physical, recreational activities were significantly affected, more so in the summer, 2003 than later as the symptoms gradually resolved, but I take note that prior to the Accident Mr. D. was very active physically and a person who participated more than the average individual in recreational activities. I assess his general damages at **\$20,000.00**.

WAGE LOSS

25. Mr. D. claims the sum of \$8,761.50 for net past wage loss. This sum is based upon his having missed 198 hours from work between the date of the accident and September 30, 2004 at an estimated hourly rate of \$50.00 per hour for time missed up to August 31, 2003 and \$73.76 per hour for time missed between September 1, 2003 – 2004. The above figures are contained in brief letters from ABC [Exhibit 24]. Mr. D. himself kept track of his missed hours in his Outlook electronic calendar on his work computer. He frankly acknowledged that the information contained in the ABC letters came solely from information provided by him to his superiors. Unfortunately, the original computer entries are no longer available, having been irretrievably lost in the course of ABC's changes to its computer system. Mr. D. did not maintain a "hard" copy of the missed work entries. Thus, the only documentation remaining of the hours missed is the letters in Exhibit 24. The time missed from work was both to attend treatment appointments and time missed because of symptoms. The time missed was split approximately equally between the two causes. The Koi Treatment Centre Inc. records and the McKenzie Physiotherapy records confirm the dates of treatment appointments although they do not indicate the time of day of appointments. Dr. Riddler, in his first report [Exhibit 26], noted on the June 13, 2003 office visit that Mr. D's. symptoms were interfering with his ability to work. Similarly, his second report [Exhibit 27] notes that around August, 2004 Mr. D. was working full time without any restriction, although still feeling some discomfort after long days and meetings.
26. As noted previously, Mr. D. was an investment advisor at ABC employed on a 100% commission basis. He represented non-institutional retail investors and, at the time of the Accident, was looking after the assets of 40 to 50 families. By 2006 he was representing approximately 150 families, although in that year he

bought the practice of another investment adviser at the same office who was leaving. Prior to the Accident, his normal work day included sitting 7 to 10 hours at a computer or in meetings with clients. He was actively pursuing “contacts” trying to increase his client base. After the Accident, particularly in the first 3 or 4 months, his symptoms created a mental “fogginess”, an interference with concentration and he did not have the same endurance as before. This would cause him to either come in late, leave early or not go in at all. Prior to the Accident he used to work 8 to 12 hour days and he estimated some reduction in his hours for the first 6 to 9 months post-accident.

27. The estimated hourly rate is based upon Mr. D’s. average actual annual commissions divided by his own estimate of average annual hours worked.
28. The Respondent submits that the letters in Exhibit 24 are simply an inadequate document base on which to support an income loss claim. The Respondent further notes that Mr. D’s. inability to identify a single lost client or lost contact should be fatal to a claim for income loss for a non-salaried worker. Moreover, Mr. D’s. gross income increased significantly from 2003 (approximately \$85,000.00) to 2004 (approximately \$136,000.00).

ANALYSIS

29. Despite the loss of the computer calendar records recording time missed from work (and I do not implicate Mr. D. in their loss), I accept Mr. D’s. evidence that he missed approximately 198 hours from work because of the Accident, either because of pain and symptoms or to attend treatment appointments. Mr. D. was a forthright witness who readily agreed that while the employer letters were signed by his superiors, all of the information in them originated with him. Moreover Mr. D. volunteered that the principal reason for the substantial increase in the number of families he represented as of 2006 was as a result of a purchase of business from a colleague. It does make sense to me that the loss of almost 200

hours would result in some financial loss to Mr. D., notwithstanding his inability to identify any specific individual client or perspective client lost. On the other hand, Mr. D. was not an hourly paid employee, and the amount of the loss is not a mathematical calculation but rather an assessment. Estimating loss by averaging yearly earnings to an hourly rate is a reasonable method of estimating an order of magnitude of loss. I note that Mr. D. appears to have been quite successful in building his practice which indicates that he would have been more, rather than less likely to have achieved financial benefit from the 198 hours of missed work. I assess his net wage loss at **\$7,500.00**.

SPECIAL DAMAGES

30. Special damages are claimed in the amount of \$1,445.96 comprising:

Deductible for the repair of the Volkswagen Jetta	\$300.00
Physiotherapy treatments	\$168.60
Massage therapy treatments	\$977.36

31. Mr. D. had extended medical insurance coverage through his employer with Sun Life. That coverage paid for 80% of treatment costs subject to an annual maximum of \$1,000.00 per mode of treatment per annual benefit period. The amounts claimed for physiotherapy and massage therapy are Mr. D's uninsured portion.

32. The Respondent takes the position that nothing is recoverable for physiotherapy or massage therapy because these expenses are payable as no-fault benefits under Part 7 and, as such, are a "deductible amount" from UMP compensation. There is no evidence that ICBC refused to pay these expenses under Part 7. The records from Koi Treatment Centre Inc. at Exhibit 23 indicate that treatment costs for 3 visits were, in fact, paid by ICBC. I agree that the physiotherapy and massage therapy expenses are not recoverable in these circumstances as part of UMP

compensation. The vehicle repair deductible is not compensable because it is a claim relating to property damage, and UMP compensation is restricted to damages for injury or death (s. 148.1(2)).

SUMMARY AND CONCLUSION

33. In summary, I have assessed Mr. D's damages as follows:

Non-pecuniary damages	\$20,000.00
Past wage loss	\$ 7,500.00
TOTAL DAMAGES	\$27,500.00

34. It is agreed that Mr. D. has already received, from the liability insurer of the M. vehicle the sum of \$25,000.00 (U.S.), being the available third party liability limits. Those limits are also a deductible amount. Mr. D. did not, in fact, receive the full amount of \$25,000.00. He had to retain a U.S. attorney to advance and ultimately achieve settlement of his tort claim. After deduction of legal fees and disbursements, Mr. D. received net settlement proceeds of \$16,054.54. ICBC, however, submits that the correct deductible amount is what the M. liability insurer was obliged to pay, namely \$25,000.00 (U.S.). The Respondent's position is supported by the Decision of Arbitrator Paul Fraser, Q.C. in *Cederberg v. ICBC* (May 18, 1995). Mr. Fraser's decision was based upon the definition of "deductible amount" in the Regulations in s. 110(1)(d) and (g). Although s. 110 of the Regulations is now s. 148.1 of the Regulations, the wording of ss. (d) and (g) has not changed. As Mr. Fraser concluded, the obligation to pay attorney's fees arose as a result of a separate and independent contract with the attorney which in no way reduced the amount paid by the tortfeasor or payable by the tortfeasor's insurer. I agree with that analysis. The full amount of the settlement with the M. liability insurer is therefore a deductible amount. The conversion rate of U.S. dollars into Canadian dollars as of the settlement date of October 12, 2005

was 1.1707. Accordingly, the Canadian dollar equivalent was \$29,267.50. The result is that Mr. D. is not entitled to any compensation under his UMP coverage because his assessed damages are less than the applicable, deductible amounts.

DATED at the City of Vancouver, this 30 day of January, 2008

Donald W. Yule, Q.C., Arbitrator