IN THE MATTER OF AN UMP ARBITRATION
PURSUANT TO Section 148.2(1) of the Revised Regulation to the *Insurance (Vehicle) Act* (B.C. Reg. 447/83) and the *Arbitration Act*, S.B.C. 2020 c.2 (the "Act"), (formerly the *Commercial Arbitration Act*, R.S.B.C., 1996, c.55)

BETWEEN

R. G.

CLAIMANT

AND

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

SUPPLEMENTARY DECISION
REGARDING PERMISSIBLE DEDUCTIONS FROM ARBITRATION AWARD

ARBITRATOR: **Vincent R. K. Orchard, K.C., C. Arb.**

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Date of Supplementary Decision: **November 8, 2023**

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I. INTRODUCTION / ISSUES / ORDER SOUGHT

1. The Respondent, Insurance Corporation of British Columbia ("ICBC"), has brought an application submitting that I make further deductions from my arbitration Award dated May 18, 2023 (my "Award"), involving an UMP claim brought by the Claimant R.G. for compensation arising out of a motor vehicle accident which occurred in Yonkers, New York on November 19, 2015 (the "Accident"). My Award dealt with the issues of liability and damages. The arbitration was brought in accordance with the Insurance (Vehicle) Act, R.S.B.C. 1996, c.231 (the "Act").

2. The parties agreed on one "deductible amount" pursuant to s.148.1(1)(g) of the Revised Regulation to the Insurance (Vehicle) Act (B.C. Reg. 447/83) (the "Revised Regulation"). Part 10, Division 2, Underinsured Motorist Protection. Accordingly, I deducted the sum of $33,500, representing a payment of $25,000 USD representing funds received by R.G. from the tort-feasor's automobile liability insurer Geico, as third party limits under a Geico policy.

3. In my Award I found liability 100 percent in favour of the Claimant.

4. I summarized my Award for compensation in paragraph 163 as follows:

> I assess damages for the following heads of damages:
>
> | | | |
> |---|---|---|
> | 1. | Non-Pecuniary Loss | $150,000 |
> | 2. | Past Net Income Loss | $95,000 |
> | 3. | Loss of Future Earning Capacity | $275,000 |
> | 4. | Cost of Future Care | $45,000 |
> | 5. | In-Trust Claim | $15,000 |
> | 6. | Special Damages | $10,000 |
> | TOTAL | | $590,000 |
> | 7. | Deductible Amount | - $33,500 |
> | NET TOTAL | | $556,500 |

5. In paragraph 162 of my Award I indicated that I was prepared to hear further submissions on any "other permissible deductions" under s.148.1(1) of the Revised Regulation which defines a number of categories of deductible amounts listed sub-paragraphs (a) to (j).

6. On its application, ICBC submits I should permit further deductions from my Award, specifically from amounts I awarded under the heads of damages for past net income loss, loss of future earning capacity and cost of future care. R.G. opposes any further deductions. Conceptually, I have trouble with ICBC's approach to deductions from specific heads of damage. In dealing with UMP arbitration awards and "deductible amounts", I am primarily engaged an exercise of statutory construction of the words of the governing legislation, specifically the UMP provisions, found at sections 148.1 to 148.4 of the Revised Regulation. It is clear under the relevant sections of the UMP provisions that an arbitrator deducts "the sum of the appliable deductible amounts" from the total award of damages made (s.148.1(5)) which is exactly what I did for the Geico third party limits. The statutory provisions which govern UMP awards do not suggest that an arbitrator considers the heads of damages individually to make deductions. The permissible or appliable deductions are defined in s.148.1(1). Furthermore, the onus is on ICBC to prove the deductions.

7. As ICBC submits that there ought to be "further deductions" from three specific heads of damages: a) past net income loss, b) loss of future earning capacity, c) cost of future care, I will address those heads of damage individually. I discussed the basis of my award for past net income loss in paragraphs 131-137 of my Award. My Award was based on the theory of an assessment of a past loss or impairment of earning capacity, a "capital asset approach", as opposed to an earnings approach. I dealt with the award for loss of future earning capacity specifically at paragraphs 138-151. Again, the approach I adopted was the "capital asset approach" assessing the loss of a future earning capacity. I also dealt with the claim for cost of future care in paragraphs 152-158 of my Award. In keeping with a like approach to that of past and future loss of earning capacity, I engaged in an "assessment" of future care costs, not a mathematical calculation, based on the concept of reasonableness supported by medial justification "to sustain or improve the mental and physical health" of the injured person.

8. I will follow the structure of the submissions of the parties to address the issues or questions as follows:

1. Should I make any further deductions to the head of damages for past net income loss?
2. Should I make any further deductions to the head of damages for loss of future earning capacity?
3. Should I make any further deductions to the head of damages for cost of future care?

II. THE STATUTORY FRAMEWORK

9. Before I turn to address the specific issues, it is important to set out the statutory framework as I am engaged primarily in an exercise of statutory construction. No exclusions were raised. As further noted in my Award, the parties proceeded to resolve their differences by arbitration under s.148.2(1). See paragraphs 12-19 and 31 of my Award. I proceeded as arbitrator under s.148.2(1) which read at the time of the Accident as follows:

> *148.2(1) Subject to subsection (1.1), the determination as to whether an insured provided underinsured motorist protection under section 148.1 is entitled to compensation and, if so entitled, the amount of compensation, must be made by agreement between the insured and the corporation, but any dispute as to whether the insured is entitled to compensation or as to the amount of compensation must be submitted to arbitration under the Commercial Arbitration Act.*

10. As discussed in my Award, ICBC accepted that the New York motorist who struck and injured R.G. in the Accident met the definition of "underinsured motorist" in section 148.1(1) of UMP provisions as an owner/operator of a vehicle "liable for the injury or death of an insured but is unable when the injury or death occurs, to pay the full amount of damages recoverable." (See para 3 Award) Nor was there any issue that R.G. was not an "insured" under UMP as defined in s.148.1(1). No other issues were raised as to entitlement to coverage.

11. I was bound by s.148.1(6) to determine liability under New York law and damages under B.C. law which I followed.

12. Section 148.1(5) is significant as it establishes the limits of ICBC's liability to pay an UMP claim. It reads as follows:

> *148.1(5) The liability of the corporation under this Division for payment under an owner's certificate or driver's certificate of all claims arising out of the same occurrence, including a claim for*
>
> *(a) prejudgment interest under the Court Order Interest Act or similar legislation* of *another jurisdiction,*
>
> *(b) post-judgment interest under the Interest Act (Canada) or similar legislation of another jurisdiction, and*
>
> *(c) costs awarded by a court or an arbitrator, must not exceed*
>
> *(d) the total amount of damages awarded in respect of the accident to all persons insured under that owner's certificate or driver's certificate,*
>
> *(e)* ***the amount determined under section 148.2 (1)****, or*
>
> *(f) the applicable amount set out in section 13 of Schedule 3,*
>
> *whichever is least, minus the sum of the applicable deductible amounts.*

In this case s.148.1(5)(e) engages my Award of damages which I determined under s.148.2(1) **"minus the sum of applicable deductible amounts."** It is the last phase that is at the core of this application.

[Emphasis added]

13. Since I am mandated to follow B.C law in awarding past loss of income, s.95 of the Act had to be considered. The definition of "net income loss" reads as follows:

> *"net income loss", in relation to a person who suffered loss of income as a result of an accident is, for any period,*
>
> *(a) if the person is a person referred to in section 2 (1) of the Income Tax Act, the gross income that the person lost in that period less the amount that would have been payable on that gross income for the following:*
>
> *(i) income tax under the Income Tax Act, as that Act read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, calculated in accordance*

with the regulations and with reference to prescribed deductions and tax credits;

(ii) income tax under the Income Tax Act (Canada) as that Act read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, calculated in accordance with the regulations under, and with reference to deductions and tax credits prescribed under, this Act;

(iii) premiums under the Employment Insurance Act (Canada), as that Act read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, or

(b) for any other person, the gross income that the person lost in that period less the following amounts calculated in accordance with the regulations under this Act:

(i) the amount that would have been payable as taxes on that gross income according to the tax laws in the jurisdiction in which the person is liable to pay tax on income, as those laws read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, calculated with reference to deductions and tax credits prescribed under this Act;

(ii) ***the premiums or other amounts, if any, that would have been payable in respect of that gross income according to the laws in the jurisdiction in which the person is liable to pay tax on income, as those laws read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, for a purpose similar or equivalent to that of the Employment Insurance Act (Canada);***

[Emphasis added]

14. Lastly, since ICBC is suggesting that I should make deductions for Part 7 benefits payable in future and/or payable under her husband's medical plan or under any medical plan R.G. may have in the future, reference to s.83 of the *Act*, *supra* is potentially engaged by the Respondent's argument. S.83 reads in part as follows:

83(1) In this section and in section 84, "benefits" means benefits

(a) within the definition of section 1.1, or

(b) that are similar to those within the definition of section 1.1, provided under vehicle insurance wherever issued and in effect, but does not include a payment made pursuant to third party liability insurance coverage.

(2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the loss on which the claim is based, is deemed to have released the claim to the extent of the benefits.

(3) Nothing in this section precludes a person who is liable to pay or provide benefits from demanding from the person referred to in subsection (2), as a condition precedent to receiving the benefits, a release to the extent of the value of the benefits.

(4) In an action in respect of bodily injury or death caused by a vehicle or the use or operation of a vehicle, the amount of benefits paid, or to which the person referred to in subsection (2) is or would have been entitled, must not be referred to or disclosed to the court or jury until the court has assessed the award of damages.

(5) After assessing the award of damages under subsection (4), the amount of benefits referred to in that subsection must be disclosed to the court, and taken into account, or, if the amount of benefits has not been ascertained, the court must estimate it and take the estimate into account, and the person referred to in subsection (2) is entitled to enter judgment for the balance only.

(5.1) In estimating, under subsection (5), an amount of benefits that has not been ascertained, the court may not consider the likelihood that the benefits will be paid or provided.

(6) If, for the purposes of this section or section 84, it is necessary to estimate the value of benefits that may or must be paid or provided, the value must be estimated according to the value on the date of the estimate of the deferred benefits, calculated for the period for which the benefits are authorized or required to be paid or provided.

(7) Despite any right of subrogation a person may have under an agreement, the common law or an enactment, but subject to section 130 of the Workers Compensation Act and section 84 of this Act, a person who pays or provides benefits, or who assumes liability to pay or provide benefits, is not subrogated to a right of recovery of the person referred to in subsection (2).

15. Of course, s.83 of the Act deals with B.C. court judgments. Where it is appliable the court often will need to consider whether benefits paid or to which the plaintiff is entitled are mandatory or discretionary. Mr. Brun suggests potential future medical treatments and expenses, as opposed to homemaking assistance, "appear to fall" under the mandatory category but no evidence was presented to support the view of counsel.

III. PAST NET INCOME LOSS OF EARNING CAPACITY

16. The essence of the Respondent's challenge to my Award of $95,000 for net past income loss is that I erred in my approach to adjusting gross past income loss to net past income loss. The Respondent's argument is conceptually an argument that I, in effect, made a reversible error by misapprehending the evidence in my attempt to apply the definition of "net income loss" in s.95(b) in considering the Claimant's income from her work in California. Mr. Brun suggests I underestimated the U.S. tax the Claimant would have paid on the income she would have earned during the approximate one year delay from 2017 to 2018 due to her injuries.

17. In my judgment, the Respondent's argument is off the mark for a number of reasons:

    1. It is not substantively a submission about a deductible amount as defined in s.148.1(1) and incorporated into s.148.1(5) by its use of the term "applicable deductible amounts." Rather it is an argument that I have made a palpable error that I should reverse;

    2. It fails to recognize the true nature of the basis of my Award for past income loss and also for future loss of earning capacity which I stressed in my decision in a number of references, i.e., that I was making an assessment of loss of capacity on a "capital asset approach" as opposed to an "earnings approach." See my Award paragraphs 43-45, 47-48, 133, 138, 139, 141, 145-148. As I

stated explicitly in paragraph 133 dealing with past income loss and in paragraph 148, dealing with future loss of capacity, I considered an assessment based on the "capital asset approach", rather than the "earnings approach" the appropriate basis to award damages for loss of income where the plaintiff is a younger person just starting out on her career and who has no history of earnings in her profession. The Respondent focuses on an overly mathematical approach based on actual earnings earned subsequent to the past period of loss that I was taxed with assessing. Of course, it is appropriate to take into account "factual mathematical anchors" as a "starting foundation" but that does not turn the exercise into a mathematical calculation (see paras 43 and 139 of my Award);

3. The Respondent submits that I adopt its calculations and reduce my assessment of past net loss of earning capacity from $95,000 to $78,000 CDN. At the hearing Mr. Brun's final submission suggested a figure of $82,000 for net past loss of earning capacity. It is submitted that the calculated difference is mainly due to my underestimation of the effect of income tax deductions in the state of California. It is also argued that the sum of $95,000 is grossly excessive and that if I looked at awarding loss based on Canadian income my net award would be lower. First, the argument that my Award is grossly excessive is really an appeal point and has nothing to do with deductible amounts under the UMP provisions. At the hearing both counsel used as "factual anchors" subsequent California income as a guide to loss; no reference was made to specific Canadian employment prospects;

4. I do not accept that my efforts to take into account s.95 of the Act as part of B.C. law applicable to the law of damages constitutes a palpable error requiring correction. The onus is on the parties to lead evidence on how to apply the provisions of s.95 of the Act (dealing with an assessment based on foreign income). As I stated in my Award the parties lead no evidence "concerning the taxation of US employment income and deductions from gross income" (para

135)[1]. By that I meant no accounting or taxation evidence on a subject of foreign statutory law was put forward. The law of evidence requires foreign law to be proved by expert evidence but none was elicited. Section 95(b) of the definition "net income loss" has rather complicated language concerning "taxes on that gross income according to the tax laws in the jurisdiction in which the person is liable to pay tax on income, as those laws read on December 31 of the calendar year before the calendar year in respect of which the net income loss is to be determined, calculated with reference to deductions and tax credits prescribed under this Act." Section 95(b)(iii) also refers to premiums payable similar or equivalent to that of the Employment Insurance Act (Canada). Without guidance from accountants, economists, or tax experts, I noted I was hesitant, without authority or evidence, to accept either the Respondent's calculations or the Claimant's estimate of a 20% deduction to achieve a net loss. I noted that the Respondent's calculations based on the Claimant's employment records and deductions for tax on her 2020 income of $85,314 US and deductions of $22,668 US included not only income tax withheld but also deductions for Social Security and Medicare. I had no evidence that such deductions as Social Security and Medicare were payable as taxes on income "calculated with reference to deductions and tax credits prescribed under this Act." I did mention other figures for income tax actually paid accordingly to federal IRS returns but not for the purpose of calculating a specific net income amount but to reflect the difficulty I was having determining net income projections based on U.S. law. For example, no opinion evidence was lead whether Social Security and Medicare deductions should be taken into account.

18. At the end of the day, it was my duty to assess a fair and reasonable amount for net past loss of earning capacity. I conclude there is no basis to adjust my award on the basis of a further "deductible amount" nor on the theory of an obvious or palpable error requiring correction.

[1] I do note a typographical error in paragraph 35 of my Award in the reference to the '2010' taxation year which should have been '2018'.

IV. FUTURE LOSS OF EARNING CAPACITY

19. The Respondent's attack on my Award on a global basis for future loss of earning capacity is based on a submission that I should have substantially reduced my award for "a real and substantial possibility" that the Claimant will receive income loss benefits under CPP, the Employment Insurance Act of Canada and benefits under LTD policies the Claimant may have in future associated with future employment. In submissions presented at the arbitration hearing the Respondent submitted a deduction from an award for future loss of earning capacity should have as a starting point a deduction of 70% based on the fact that, as part her employment benefits R.G. had disability insurance benefits as much as 70% under a California state disability insurance plan. However, the Claimant never sought such benefits during her employment with Dr. Brar, the principal of the California clinic, for whom she worked. No documentary evidence was presented about the terms and conditions of past disability insurance coverage or medical coverage. No evidence was called from the employer nor an insurance official explaining how one might qualify for such insurance and what limitations there may be on benefits such as an elimination period which is typical if indeed one meets a contractual definition of total disability. In my Award, I stated I was not persuaded that I should "take into account possible deductions for LTD benefits in assessing loss of future capacity." (para. 149). I remain unpersuaded.

20. Since the Respondent is attempting to, in effect, take a "second bite at the cherry" following my invitation to "address the matter of **other** permissible deductions," I will respond to the Respondent's further submissions based on the definition of "deductible amounts" under s.148.1(1), related to possible entitlement to EI benefits and CPP benefits and sums "payable to the insured under any benefit or right or claim to indemnity", i.e. LTD benefits.

21. First, I must stress that my Award under this head of damages was based on the capital asset approach as supported by the case law set out in my Award at various paragraphs which I have already mentioned in dealing with past loss of earning capacity. I found that, based on the uncontradicted medial evidence given by Dr. Horlick, there was overwhelming evidence that the Claimant suffered a chronic, progressive, permanent serious knee injury. I also concluded that the evidence satisfied me as the trier of fact that there was a real and substantial possibility

that the Claimant would face employment barriers and impediments as I discussed in paragraphs 146-149 of my Award, all of which support an award of damages for future loss of earning capacity based on the "capital asset" approach. The case law that I reviewed, including the BCCA 2021 "trilogy", support the "capital asset" approach in the case of a young professional with a serious, progressive, permanent injury "just getting started in her career" and who is not suffering an ongoing loss of income presently. The three-step process as discussed in paragraph 141 of my Award as set out in *Rab v. Prescott*, 2021 BCC 345 at paragraph 47 is apt and is that which I followed. In applying the third step of the *Rab* test I followed the "global approach" having regard to recent annualized earnings. See paragraphs 150-151 of my Award.

22. The Respondent cites a number of authorities including past UMP arbitration awards it suggests support deductions for future wage loss benefits such as sick pay credits (*Podovinikoff v. ICBC*, (Oct 6, 1994, Arbitrator Yule), GAIN payments (*Pham v. Sutherland* (1996) 28 BCLR (3d) 85), CPP benefits (*Hayward v. ICBC* (November 30, 2005, Arbitrator Yule), CPP benefits (*M.E. v. ICBC* (Oct 22, 2010, Arbitrator Boscovich J). However, I find all of the above authorities completely distinguishable on the facts. In those decisions the insured qualified and received, at different points in time, the benefits sought to be deducted. For example, the claimant Hayward had received CPP benefits from 1997 to 2005; the claimant M.E. had received CPP disability benefits in a substantial amount prior to her arbitration hearing; the plaintiff Pham had qualified and been paid welfare (GAIN) benefits; the claimant Podovinikoff had received sick pay credits.

23. I note Arbitrator Boscovich in *M.E. v. ICBC* found that the onus is on ICBC to prove "the applicable deductible amounts" (para. 88). I find that the Respondent has not met the onus of establishing any applicable deductible amounts under s.148.1(1). R.G. has never received any wage loss benefits, disability benefits, E.I., or similar benefits nor any CPP benefits or US equivalents. There is no evidence that she has qualified or will in future qualify for such benefits. There is no evidence before me of the prerequisites for qualification for such benefits. The Respondent, in effect, asks me to engage in pure speculation that R.G. might at some point in the future qualify for E.I, CPP and disability benefits or like benefits from US employment. I will not speculate about such matters as the terms and conditions of unknown contractual matters such as the definition of total disability in an LTD policy, nor what elimination period

will be required. The Respondent has failed to prove any such deductions based on a "real and substantial possibility." I am satisfied there is no cogent evidence to support such a finding. I have not found that the Claimant is totally disabled or will become totally disabled in the future. My duty is assessing future loss is not to engage in speculation which is really what the Respondent would have me do. I dismiss the Respondent's argument that I should reduce my award for loss of future earning capacity based on the premise of applicable deductible amounts as per s.148.1(1) of the Revised Regulation.

V. COST OF FUTURE CARE

24. I emphasized in my Award that the Claimant, at a young age, suffered a permanent, chronic, complex, progressive major joint injury that will plague her with varying levels of pain and physical disability throughout her lifetime. See my findings of fact, paragraphs 116-118 of my Award. The unrefuted medical evidence of Dr. Horlick documents the prolonged recovery and treatment, including three surgeries R.G. has already endured over the past approximately eight years and more importantly, there is no unrefuted medical opinion of prognosis which includes the likely prospect of multiple future major surgeries as her post-traumatic osteoarthritis progresses and she can no longer tolerate pain associated with restriction in functional capacity and adverse impact on her quality of life. Such chronic pain and physical limitations will also likely affect R.G.'s mood negatively intermittently (see my Award paras. 68-75; 125).

25. Given the medial evidence about R.G.'s future, it is hardly surprising that the Claimant is entitled to an award for future care costs. However, in a case such as this where the injured person is not totally disabled but faces the prospect of a progressively painful and limiting injury, periods of increased need for non-surgical therapies and also likely multiple surgeries and rehabilitation from joint replacement surgeries, which get increasingly more difficult after the first joint replacement surgery, the trier of fact is faced with the challenge of what I described as "informed crystal ball gazing" to reach ultimately a fair and reasonable award. That process is based on an assessment, not purely mathematical calculations, following the principle of attempting to "sustain or improve the mental and physical health" of the injured person. (See paras. 153-155 of my Award)

26. Given the history of this proceeding, as I described in my Award at paragraphs 1-27, I denied the Claimant's application for leave to obtain additional expert reports, but I allowed the Claimant to obtain a supplemental report from Dr. Horlick and I granted leave to the Claimant to obtain further factual evidence with respect to costing the projections of future care costs according to Dr. Horlick's considered opinion. Accordingly, I received as evidence a report dated February 22, 2023, of an experienced occupational therapist, Mr. Paul Pakulak, admitted into evidence in redacted form (Exhibit 1, Tab 4). I would also point out an error in paragraph 152 of my Award. I referred there to the costing evidence of Mr. Lakhani. I meant to say the evidence of Mr. Pakulak. Mr. Lakhani provided a report of Future Care Multipliers dated November 24, 2022. (Ex. 1, Tab 3)

27. At paragraph 156 of my Award, I referred to the type of future expenses medically justified by Dr. Horlick. Mr. Pakulak then provided projections for these items including an uploader knee brace at the cost of $1,021, to be replaced every 2 years up until the time R.G. has knee replacement surgery (the first to occur by her late 40's or early 50's, perhaps 15-20 years from today). No costs were projected for a knee brace for revision surgeries later in R.G's life but I would have expected the potential for a knee brace as R.G. approached the need for revision surgery. Future care costs were also projected for the injection of sodium hyaluronate ("viscosupplementation") into the knee 2-3 times per year at the cost of $500 to $600 per injection for management of pain and stiffness in the knee "<u>if proven to be effective</u>." Dr. Horlick's experience with his patients is that most patients find the injections beneficial. Dr. Horlick opined that R.G. should have an option to try platelet rich plasma injections ("PRP") at a cost of $1,000 to $1,500 twice per year. Dr. Horlick also mentioned stem cell treatments which are not yet part of mainstream medical options that cost about $20,000 per application. Dr. Horlick discussed the need for physiotherapy sessions pre and post knee replacement surgeries. Mr. Pakulak projected 48 to 72 sessions based on Dr. Horlick's opinion evidence at $95 per hour or $4,560 - $6,840 in total. Mr. Horlick also projected a need for a "Cryo Cuff" to apply ice to her knee at the cost of $200 to $300, to be replaced every 2-3 years. Lastly, Dr. Horlick projected the need for homemaking assistance when R.G. likely will require homemaking services in her mid-60's or later. Mr. Pakulak could not provide an estimate of hours nor a timeline for homemaking services but did mention current hourly rates between $32 to $35.75. If it was not clear from my Award, I accepted Dr. Horlick's evidence as medical justification

for the various future care services and equipment referred to. Dr. Horlick's views about stem cell therapy were interesting but were not included in the claim for future care. I also accepted Mr. Pakulak's costing evidence.

28. Both parties adopted a mathematical approach to calculate future care costs. Claimant's counsel calculated future care costs of $94,672.12 based on the evidence of Dr. Horlick, Mr. Pakulak and Mr. Lakhani. Mr. Randhawa withdrew the claim for the projected cost of stem cell treatments viewed by Dr. Horlick as currently nascent and unproven and not yet part of mainstream treatment of post traumatic osteoarthritis. It would seem one could describe such treatment currently as experimental; however, Dr. Horlick anticipated in the next 10 years stem cell treatment would become mainstream treatment for post-traumatic osteoarthritis in younger individuals trying to delay or defer knee replacement surgery. R.G.'s knee injury will require treatment and rehabilitation over several decades and I would have thought such experimental treatment could be viewed as a positive contingency to increase an award of future care. However, no specific claim was made for future stem cell therapy even as a contingency.

29. Claimant's counsel's mathematical calculations including, *inter alia*, annual costs, firstly to age 45 and then to age 75 of knee injections, vicosupplementation and PRP, equipment costs, medication costs and physiotherapy totalled $38,164.47 to age 45 and another $42,617.06 to age 75. He also projected additional costs for homecare, housekeeping, and post-surgery physiotherapy of $13,890.00. The total of these figures is the amount claimed for future costs. My impression was that this mathematical approach overstated annual costs. I also considered the claims for post-surgery care quite some distance in the future, to be excessive.

30. On the other hand, I found the mathematical approach of Respondent's counsel resulted in an inordinately low calculation of future care for a person with a serious, progressive major joint injury that will require decades of treatment that will vary and may be more episodic but will likely involve periods of time of increased costs as symptoms increase and surgeries are required. I could not accept that the Respondent's range cost of future care of $9,341 to $13,559 could be a fair and reasonable amount of compensation for someone who will have care needs for the balance of her life. Mr. Brun also made a general argument that he had factored into the calculation "many of the cost of future care items" that are the subject of deductible amounts

under s.148.1(1), a subject that Mr. Brun has returned to on this post-Award application. No evidence was lead by ICBC as to future accident benefits that would be payable and whether such benefits would be considered mandatory (s.88(1) of the Revised Regulation) and those which might be considered discretionary to be submitted to ICBC's medical advisor (s.88(2) of the Revised Regulation).

31. I determined ultimately that deciding an award of future care costs in this Arbitration should be made as an assessment of a global amount. I rejected the approach of the parties to decide the claim on a mathematical basis. There is too much uncertainty in the care requirements in the case of a young person whose needs will likely be more episodic than continual over many decades of experience with a progressive injury. Furthermore, the Claimant's projections of care costs were too fixed and inflated to be accepted. The Respondent's care cost projections seemed inordinately low given the prolonged periods of treatment and rehabilitation that will likely be required. Projections of payment from other sources were speculative at best.

32. My assessment of $45,000, as a fair and reasonable amount for future care, may actually seem modest given the Claimant's future in which she will face medical treatment and other costs likely required over several decades to sustain her health. She is an active individual, seemingly dedicated to her career and, in my view, will access all reasonable and available treatment and rehabilitation to maintain her career and activity level. My Award for future case is based on my conclusion, in the circumstances, that a lump sum assessment approach is the most rational way to arrive at an award that is fair and reasonable. I reject the premise that I am required to break down each and every item of future care claimed. No authority was cited that in assessing damages in an arbitration such as this, an arbitrator is required to give an item by item, line by line, mathematical calculation of potential future health related expenses. In my view, in a case such as the one before me, where the medical future of R.G. over many decades has a great deal of uncertainty, frankly it makes more sense to "assess" the claim globally according to the burden of proof of a real and substantial possibility.

33. I will now turn to Mr. Burn's application in which he elaborates on why I should engage in reducing my award of $45,000 by applying the "deductible amounts" defined in s.148.1(1) of the Revised Regulation.

34. Mr. Brun now argues that in applying the statutory regime under the UMP provisions which mandates an arbitrator i) to assess compensation to which the insured is entitled (s. 148.2(1), and ii) to deduct "applicable deductible amounts" such as Part 7 benefits paid or payable or benefits paid or payable under some possible medical benefits plan, I should adopt by analogy the statutory regime under s.83 of the Act which applies to court judgments, to break down my lump sum award and then presumably allow the Respondent leave to present evidence of what, for example, Part 7 benefits that the Respondent will pay. I reject the legal position that I should so conflate the specific statutory mandate under the UMP provisions relating to deductible amounts to incorporate s.83 of this Act. Section 83 relates to court judgments against a tortfeasor. Part 7 deductions reduce a trial judgment. No authority has been cited that in an UMP arbitration of an arbitrator is bound to apply s.83 to an arbitration award. Section 83 and deductible amounts under s.148.1(1) represent two different statutory regimes. It may be that the underlying principles of the two regimes is to avoid excessive recovery or no proper basis for recovery, yet in my view, the two regimes are sufficiently different to suggest that an UMP arbitrator is mandated to apply s.83 to the arbitrator's task in determining other sources of compensation, i.e. the definition of "deductible amount". It should also be kept in mind that the main object of deducting other benefits and payments under UMP is to insure a Claimant exhausts all other sources of benefits before accessing UMP which, as a first party benefit, has been described as a fund of "last resort". Section 83, on the other hand, is intended to avoid "double recovery". Nonetheless, I agree with Arbitrator Yule in *Amin Hosseini-Nejad v. ICBC* (December 21, 2000) that a common purpose of both regimes is "avoidance of both excess recovery and no proper recovery" (para. 68). I agree with Arbitrator Yule's views that neither regime guarantees the avoidance of over or under compensation; See paragraphs 67-69.

35. As I noted earlier in this decision, the onus or burden of proof, of establishing the amount, the type and amount of any applicable "deductible amounts" is on ICBC, the Respondent. In paragraph 67 of *Hosseini-Nejad*, Arbitrator Yule sets out case authority for that proposition. *Hosseini-Nejad* involved a tort judgment which included a lump sum award of $500,000 for cost of future care. The tort judgment provided no breakdown of the future care expenses. As I understand it, the total tort judgment exceeded the UMP limits of $1,000,000 found to apply by the Arbitrator. At trial, ICBC moved under s.25 of the Act, now s.83, to have some minor expenses paid by ICBC, to be deductible as Part 7 benefits. The trial judge refused to make the

deductions on the basis of estoppel. In the UMP arbitration, ICBC argued that the maximum amount of $150,000 payable as medical and rehabilitation expenses under Part 7 should be deducted from the applicable UMP limit of $1,000,000. Arbitrator Yule declined to make the deduction of $150,000.

36. The question that I must decide is whether the Respondent has met its burden of proof of establishing that I should reduce my award of future care on the basis that future Part 7 benefits or other medical benefits are payable. As noted by Arbitrator Yule, the onus is on ICBC to establish the amount and type of deductible amounts. I find that the Respondent has not met its burden of proof. In this case, the only medical expenses paid related to her injuries were payments made on behalf of the tortfeasor's US auto insurer Geico. No Part 7 benefits, nor benefits under other first party coverage, have ever been received by R.G.

37. I have not been persuaded, despite Mr. Brun's able argument, that the Respondent has met its onus to establish any further deductible amounts from my Award from damages for costs of future care nor from my entire Award as contemplated by s.148.1(5). My reasons include:

    1. It is not part of my function as UMP arbitrator to apply s.83 of the Act expressly or by analogy in determining the compensation to which the insured is entitled;
    2. There is little, if any, factual foundation to project any Part 7 benefits or any other medical or rehabilitation benefits under some prospective future policies that may insure R.G. in the future;
    3. Although Mr. Brun submits that there is a real and substantial possibility that R.G. will qualify for such benefits in future, I consider that what I am being asked to do amounts to my entering into the realm of speculation;
    4. There is too much uncertainty, given all the circumstances, to justify reducing my Award for possible benefits, where the basis of how one qualifies and what amounts would be paid are unknown;
    5. Mr. Brun's assertion that future Part 7 benefits "would appear" to be mandatory is not, with respect, evidence that overcome the inherent uncertainty that R.G. will receive Part 7 benefits;

6. No evidence has been provided by the Respondent that it accepts any potential entitlement of R.G. to Part 7 benefits;

7. At least part of the future care claim involved homemaking and household assistance which I gather would be considered discretionary and subject to the opinion of ICBC's medical advisor.

38. If I am wrong concerning the literal application of s.83 of the Act or in some analogous process to an UMP arbitration, I will expand on my award of $45,000 as a fair and reasonable assessment in view of the evidence about projection of costs:

1. I rejected the analysis on behalf of the Respondent as speculative, inordinately low and not grounded in evidence;

2. I accepted the evidence of Dr. Horlick and Mr. Pakulak supporting various components of future care and the projected costs;

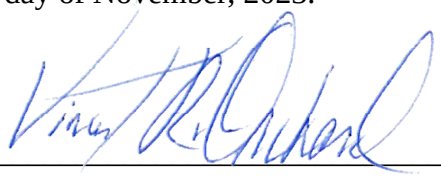
3. I accepted, in a limited manner, Mr. Randhawa's projections of the costs, but in my view, certain components of the projected costs were overstated by approximately $50,000.00. Specifically it appeared that the projection of $8,190 for post replacement surgery home care was overstated. I doubted that R.G. would require 3 months of housekeeping assistance, 2 hours per day, 3 days per week. It appeared that the projection of 6 months of housekeeping assistance at 2 hours per day, 3 days per week ($5,460) was also inflated and overstated actual needs. It appeared that the need to replace the Cyro-Cuff and the uploader brace every 2 years to be overstated. I also thought an ongoing need for knee injections to age 45 (3 per year for viscosupplementation and 2 per year for PRP) appeared to be excessive. Therefore, I considered Mr. Randhawa's calculations of $13,890 for one-time costs, $38,164.97 for annual costs to age 45 and $42,017 for annual costs going to age 75 as inflated. Had it been necessary, I would likely would have reduced the one-time costs by approximately $5,000, the annual costs to age 45 by approximately $20,000 and the annual costs to age 75 by approximately $25,000.00. However, I also might then have invited further argument concerning certain contingencies.

39. In conclusion, there is too much uncertainty and far too much speculation to conclude that the Respondent has established that I should find and deduct additional amounts under the definition of "deductible amount", specifically sub-paragraph (c) and (i), of s.148.1(1), from my Award of $45,000 for cost of future care. I stress that that the Respondent did not put forward evidence, either at the arbitration or on this application, that any of the items of future care, as projected by the Claimant, are payable as Part 7 benefits or are payable as a benefit or right or claim to indemnity, despite making essentially the same submissions on both occasions.

VI. CONCLUSION

40. For the foregoing reasons I decline to reduce my Award. The questions posed in paragraph 8 are answered in the negative. If the parties wish to address costs, it may be done solely in writing or in oral submissions as well. I thank counsel for their able submissions.

Dated at Burnaby, British Columbia this 8th day of November, 2023.



Vincent R.K. Orchard, K.C., C. Arb.
Arbitrator