CAMP FIORANTE MATTHEWS

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File Ref: 09011-001

May 9, 2011

BY MAIL

Insurance Corporation of BC
151 West Esplanade
North Vancouver, B.C. V7M 3H9

Attention: Jason McDaniel

Dear Mr. McDaniel:

Re: UMP Arbitration

Pursuant to section 148.2 (2.1) of the *Insurance (Vehicle) Regulation* of the Province of British Columbia, enclosed is a redacted copy of the Arbitration Determination on Costs Issues for publication on the ICBC UMP arbitration decisions website..

Yours truly,

CAMP FIORANTE MATTHEWS

By:
J.J. Camp, Q.C.

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IN THE MATTER OF AN ARBITRATION
PURSUANT TO SECTION 148.2(1) OF THE REVISED REGULATIONS TO THE
INSURANCE (MOTOR VEHICLE) ACT
BC REG. 447/83
and
THE COMMERCIAL ARBITRATION ACT,
R.S.B.C. 1996, C. 55

BETWEEN:

[redacted]

CLAIMANTS

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION DETERMINATION OF CERTAIN COSTS ISSUES

DATE OF HEARING: **March 1, 2011**
PLACE OF HEARING: **Camp Fiorante Matthews**

J.J. CAMP, Q.C. **Arbitrator**
Camp Fiorante Matthews
400-856 Homer Street
Vancouver, BC V6B 2W5

GREGORY L. SAMUELS **Counsel for the Claimants**
Cross Border Law
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AVON M. MERSEY **Counsel for the Respondent**
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ISSUE TO BE ARBITRATED

1. The parties have agreed, pursuant to s. 148.2 of the Insurance (Vehicle) Regulation B.C. Reg. 447/83 (the "*Regulation*") of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "*Act*"), and the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 to submit this matter to arbitration.

2. The parties have agreed that I have jurisdiction to determine certain issues pertaining to costs.

FACTS

3. The parties have agreed that each of the claimants are entitled to underinsured motorist protection ("UMP") coverage of up to $1 million less all appropriate deductions.

4. The single vehicle accident that is the subject of this arbitration occurred on October 27, 1996 near Chehalis, Washington (the "MVA"). The British Columbia vehicle involved in the MVA was being driven by Mr. [redacted], the patriarch of the [redacted] family. He had six family members with him. One of the tires on the vehicle rapidly deflated causing Mr. [redacted] to lose control of the vehicle. It rolled over several times causing injuries to the claimants.

5. At the time of the accident, Mr. [redacted] was a resident of British Columbia and was insured under a third party liability policy with a limit of $200,000 issued by the Insurance Corporation of British Columbia ("ICBC"). Mr. [redacted] did not have any excess third party liability insurance on the vehicle. It was conceded that the $200,000 third-party liability coverage would not be sufficient to satisfy the claims emanating from the MVA.

6. At the time of the MVA, each claimant was a resident of British Columbia and a member of the same household as Mr. [redacted] and, as such, each had UMP first party coverage pursuant to Part 10, s. 148.1 of the *Regulation* to the *Act*. Hence, each of the claimants have UMP coverage of up to $1 million less appropriate deductions.

7. On October 26, 1999, the claimants filed a Complaint for Damages For Negligence and Product Liability in the Superior Court of Washington for Lewis County against Uniroyal Goodrich Tire Company, Uniroyal Goodrich Tire Company Inc., Michelin North America and

[redacted] (the "Complaint"). The Complaint alleged that the defendant [redacted] negligently maintained and operated his motor vehicle. The claim against the remaining defendants was for defective design or defective manufacture of the tires on the vehicle.

8. The tort trial before a jury commenced in March, 2004 and lasted approximately 45 days. On April 23, 2004, the jury delivered a verdict, dismissing the product liability case. The jury found that, although the defendant [redacted] was not negligent in his operation of the vehicle, he was negligent in failing to maintain the tire in proper working order and in this regard his negligence was the proximate cause of the plaintiffs' injuries. The jury awarded damages of approximately $9.1 Million (U.S.) to the plaintiffs as follows:

- [redacted]: (nee [redacted]): US $1,497,266
- [redacted]: US $1,129,271
- [redacted]: US $1,553,921
- [redacted]: US $3,605,832
- [redacted]: US $1,179,991
- [redacted] (nee [redacted]:) US $136,798.

9. On September 17, 2009, I handed down my ruling on a motion by the claimants that the law of Washington state should govern the quantum of damages on the facts of this case. I determined that the issues pertaining to the quantum of damages must be determined by the law of British Columbia.

10. On January 19, 2010, I handed down my ruling on a motion by ICBC to have one of the claimants, [redacted], attend an independent medical examination by an orthopedic specialist, a functional capacity specialist and a vocational specialist. I found that I did not have jurisdiction to order such examinations.

11. On May 13, 2010 I handed down my arbitration determination of the claims of [redacted], [redacted] and [redacted]. I was later informed that the parties had come to terms with respect to the claim of [redacted]. The claims of [redacted] and [redacted] remain to be determined.

12. I pause to note that before I was appointed by the court to arbitrate this matter, an earlier arbitrator selected by the parties, Mr. Joe Boskovich, made a determination in this matter pertaining to governing law. Like me, he determined that the issues pertaining to the quantum of damages must be determined by the law of British Columbia. Counsel for the claimants brought a petition to remove Mr. Boskovich based on allegations of bias. This petition was granted by a judge of the Supreme Court of British Columbia and an appeal from that outcome was dismissed by the British Columbia Court of Appeal.

ANALYSIS

13. The UMP provisions are found in section 148.1 the *Regulation*. The salient provisions pertaining to costs are found in section 148.2 of the *Regulation*. Subsections (2) and (3) read as follows:

> **Section 148.2(2)** Notwithstanding subsection (1), section 11 (1) (c) of the *Commercial Arbitration Act* does not apply in respect of an order for costs of an arbitration.
>
> **Section 148.2(3)** An arbitrator may make an order as to costs of an arbitration only on a party and party basis.

14. Section 11 of the *Commercial Arbitration Act* reads as follows:

> **Section 11(1)** The costs of an arbitration are in the discretion of the arbitrator who, in making an order for costs, may specify any or all of the following:
>
> > **(a)** the persons entitled to costs;
> >
> > **(b)** the persons who must pay the costs;
> >
> > **(c)** the amount of the costs or how that amount is to be determined;
> >
> > **(d)** how all or part of the costs must be paid.
>
> **Section 11(2)** In specifying the amount of costs under subsection (1)(c), the arbitrator may specify that the costs include
>
> > **(a)** actual reasonable legal fees, and

> **(b)** disbursements, including the arbitrator's fees, expert witness fees and the expenses incurred for holding the hearing.

15. Section 41 of the *Commercial Arbitration Act* reads as follows:

> **Section 41** An order under this Act may be made on terms, as to costs or otherwise, that the authority making the order thinks just.

16. I also refer to the Rules of Procedure for Domestic Commercial Arbitration formulated by the British Columbia International Commercial Arbitration Center. Rule 19 (2) reads as follows:

> **Rule 19(2)** The arbitration tribunal shall strive to achieve a just, speedy and economical determination of the proceeding on its merits.

17. Rule 38 of the Rules of Procedure for Domestic Commercial Arbitration reads as follows:

> **Rule 38(1)** The arbitration tribunal shall determine liability for costs and may apportion costs between the parties.
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> **Rule 38(2)** In awarding costs, the arbitration tribunal shall take into account the principles set out in Rule 19(2), and the failure of any party to comply with these Rules or the orders of the tribunal. The tribunal shall provide reasons in the event it departs from the principle that costs follow the event.
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> **Rule 38(3)** In the event the arbitration tribunal awards costs, it shall specify the amounts of the fees and expenses so awarded or the method for the determination of those amounts.
>
> **Rule 38(4)** Costs include:
>
> > **(a)** the fees of the arbitration tribunal which shall be separately determined and stated for each member of the tribunal, together with reasonable travel and other expenses incurred by the tribunal;
> >
> > **(b)** the fees of any expert appointed by the arbitration tribunal, including travel and other reasonable expenses incurred;

> **(c)** the legal and other expenses reasonably incurred in relation to the arbitration by a party determined by the arbitration tribunal to be entitled to recover such costs; and
>
> **(d)** the commencement fee, administration fees, and the expenses incurred by the Centre.
>
> **Rule 38(5)** The liability of parties for the tribunal's fees and expenses is joint and several between the arbitration tribunal and the parties.

18. I understand that the matter of costs associated with the removal of Mr. Boskovich is outstanding but, as I understand it, these costs are governed by the *Supreme Court Civil Rules* ("*Rules*") and as they pertain to a matter over which I have no authority, I leave it to the parties to determine those costs.

19. Dealing first with the issue of the nature of costs that I can properly award, I find that as a result of section 148.2(2) and section 148.2(3) of the *Regulation*, I am constrained to only award party and party costs and I am not permitted to award actual reasonable legal fees as specified in section 11(2)(a) of the *Commercial Arbitration Act*. The parties agreed that the jurisprudence stemming from the *Rules* pertaining to costs (now Rule 14) ought to be applied *mutatis mutandus* to the UMP arbitration process. In this regard disbursements are subject to a two-pronged test. First it must be shown that they have been necessarily or properly incurred. Second it must be shown that the amount of the disbursement is reasonable.

20. Dealing next with the issue of who is entitled to costs, I find that costs of the various determinations/awards made by me should follow the event unless there are good and valid reasons to depart from this principle. In this determination of costs, I will identify which parties are entitled to costs pertaining to the various determinations. I invite the parties to come to terms with respect to the magnitude of those costs. I understand that the parties have already made some agreements in this respect, the details of which I do not know. It is possible that some of my rulings pertaining to costs may be affected by offers to settle that have been exchanged by the parties. Because I have no knowledge of these offers, except that they have been exchanged, I invite the parties to determine what effect, if any, the exchange of these offers to settle has on my rulings on costs. In the event that the parties cannot agree whether my rulings on costs have been affected by the various offers to settle, I will hear the parties further to resolve this issue.

21. Dealing first with my arbitration determination pertaining to governing law, there can be no doubt about the fact that ICBC enjoyed success on that motion. Counsel for the claimants argued that the claimants should be entitled to costs or, at the very least, no costs should be awarded, for two reasons. First, he says that this determination was in the nature of a test case. On this subject, Prof. Orkin said as follows:

> An action or motion may be disposed of without costs when the question involved is a new one, not previously decided by the courts, on the theory that there is a public benefit in having the court give a decision; or where it involves the interpretation of a new or ambiguous statute; or a new or uncertain or unsettled point of practice or law; or in a case of first instance; or where there were no previous authoritative rulings by courts; or decided cases on point; or where an application concerned a matter of public interest and both parties acted in complete good faith; . . . or where the action was a test case. [footnotes omitted]
>
> Mark Orkin, *The Law of Costs*, 2nd ed. looseleaf (Aurora, Ont.: Canada Law Book, 2002) at s. 205.2(2).

Dealing with the criteria suggested by Prof. Orkin of what constitutes a matter of public interest or a test case, I first harken back to my determination dated September 17, 2009 on the governing law in which I said at paragraph 29: "Having said that there is no case squarely on point, there is a helpful British Columbia Supreme Court and British Columbia Court of Appeal decision ..." both of which I quoted from at some length. Hence, there was some useful authority. Furthermore, I did not find the statute to be ambiguous. Hence, I am not persuaded that this determination reaches the threshold of being a matter of public interest or a test case. Second, counsel for the claimants says that the claimants ought to be awarded costs because of the "misconduct" of ICBC in appointing Mr. Boskovich whose appointment was overturned. Nor am I persuaded by this argument. First, I do not consider that I have any jurisdiction to deal with costs of an earlier arbitration albeit one that dealt with the identical issue that I determined. Second, it is up to the parties to sort out costs of that arbitration, if any, and the costs associated with overturning the appointment of Mr. Boskovich. I therefore find that ICBC is entitled to costs pertaining to my arbitration determination pertaining to governing law. It is my further view that my arbitrator fees constitute a reasonable disbursement which was necessarily or properly incurred.

22. Dealing next with my determination pertaining to ICBC's motion for independent medical or other examinations, I find that the claimants enjoyed success on that motion and that they are entitled to their costs including my arbitrator fees.

23. Dealing next with my arbitration determination of the damages claims of [redacted], [redacted] and [redacted], I find that the claimants enjoyed success and that they are entitled to their costs including my arbitrator fees. I will address the argument of additional disbursements associated with this particular determination below.

24. Dealing next with my arbitration determination of various subsidiary issues associated with the claims of [redacted], [redacted] and [redacted], I find that the claimants enjoyed much more success than ICBC and I therefore find that they are entitled to their costs including my arbitrator fees.

25. Dealing next with the instant arbitration determination on costs, I cannot logically make any finding as to who enjoyed success and I therefore leave costs associated with this costs determination open.

26. One of the core legal debates in this hearing, both orally and in written submissions, was whether my costs award should include the disbursements incurred by the claimants in the underlying litigation in Washington State which culminated in the jury trial awards made in April, 2004. The claimants argued that ICBC required the claimants to prove the liability case that triggered the UMP coverages and, indeed, that ICBC supported the notion that the liability case proceed in Washington in hopes that the jury would find against the tire manufacturer which finding would have eliminated the need for the claimants to resort to any UMP coverages.

27. I first note that Washington State has its own laws pertaining to costs and expenses that may be recovered in such trials. It was common ground between the parties that those costs and expense provisions are very constrained and, in fact, so constrained that counsel for the claimants did not bother to advance any claim for costs and expenses associated with the Washington State trial.

28. The foremost argument made by counsel for the claimants was that many of the disbursements associated with the Washington State trial should be considered reasonable disbursements necessarily or properly incurred for the purposes of these UMP arbitrations to determine the quantum of the damages to which these claimants are entitled.

29. Mr. Mersey emphasized that UMP is first party insurance used only for payment in circumstances of last resort and for which the insured pays a very low premium. It is my view that this argument is ill founded in two respects. First, the owner/operator of the subject vehicle Mr. [redacted], had third-party liability insurance issued by ICBC, albeit for only $200,000, which obligated ICBC to respond to the negligence allegations against him in Washington State or elsewhere and which obligated ICBC to respond to any proper claim for legal costs and disbursements. Second, the *Regulation*, the *Commercial Arbitration Act* and the Rules of Procedure for Domestic Commercial Arbitration spell out a legal regime that binds me with respect to awarding costs including reasonable disbursements.

30. Mr. Mersey also argued that the claimants expressly or impliedly waived any claim to costs and disbursements in the "Advance Loan Agreement and Covenant Not to Execute". I have reviewed that document and do not find any express or implied waiver. To the contrary, paragraph 6 expressly acknowledges that the claimants are entitled to pursue UMP claims against ICBC up to the potential maximum of $1 million per claimant. I reiterate that this UMP process permits an arbitrator to award party and party costs including all reasonable disbursements.

31. Mr. Mersey also submitted that an UMP arbitrator has no jurisdiction to award costs that would include legal fees and disbursements in the Washington State action. Although I agree with this bald assertion, an UMP arbitrator has a broad discretion to award party and party costs including reasonable disbursements that are utilized in the subject UMP arbitration process. This is the approach that I adopt for the reasons that follow. The reasonable disbursements that I find are recoverable in these UMP proceedings find their genesis in the MVA which eventually gave rise to these arbitration proceedings. Yes many of these reasonable disbursements were used in the Washington State trial but they were also necessary and used in these UMP arbitration

proceedings. There is no risk that there is any chance for double recovery of these disbursements by these claimants and I reiterate they are subject to the test of reasonableness.

32. Finally, Mr. Mersey made the argument that any award of party and party costs and reasonable disbursements are governed by Washington State law which, as noted above, severely restrains recoverable costs and disbursements relative to the law of British Columbia. I disagree. In my view there is no connection between entitlement of UMP claimants to party and party costs and reasonable disbursements pursuant to the British Columbia provisions of the *Regulation* and the *Commercial Arbitration Act* and the Rules of Procedure for Domestic Commercial Arbitration, and the provisions of Washington State law which severely constrains recoverable costs and disbursements. I am bound to adhere to the former.

33. There are five points that drive me to the conclusion that some of these expenses sought by the claimants ought to be recovered in these arbitration proceedings.

34. First, ICBC was not prepared to forgo any finding of liability against its insured driver and allow the matter to proceed to UMP resolution. Rather, as I said at paragraph 23 of my determination dated September 17, 2009 on the governing law, "In this case, the evidence satisfies me that ICBC required a tort trial to determine the prerequisites necessary for UMP arbitration." ICBC appointed counsel to defend the liability interests of their insured driver although, so I am informed, this counsel took no position on damages. Needless to say, the evidence pertaining to damages, and therefore the expenses associated with generating this evidence, played a central role in the Washington State litigation.

35. Second, the parties came to an agreement at the outset of these arbitration proceedings to determine damages suffered by the claimants that the hospital records, medical reports, the reports of other damage experts, the deposition transcripts of damages witnesses and experts, etc. that were generated in preparation for and introduced at the Washington State trial would be available to the parties and to me in the arbitration process which I conducted. The thinking that underlay this agreement was to avoid unnecessary expense.

36. Third, I note that counsel for ICBC took advantage of this agreement pertaining to the underlying damages record in so far as he utilized deposition transcripts of damages experts and other clinical notes and expert reports in his argument pertaining to a proper award of damages for [redacted], [redacted] and [redacted].

37. Fourth, I made extensive use of this voluminous damages record in arriving at my determination of the damages claims of [redacted], [redacted] and [redacted].

38. Last but not least, counsel for ICBC conceded that, subject to reasonableness, expenses to update medical reports solely for the purpose of the arbitration proceedings were necessarily and properly incurred and could form part of an award of costs. In my view, I do not see any reasonable grounds to distinguish between expenses incurred to generate such reports in the first instance as opposed to expenses incurred to update such reports.

39. At this stage, I am not prepared to make a finding pertaining to all of the expenses sought by the claimants. Rather, at this stage, I am prepared to say that the disbursements directly relating to or necessarily ancillary to the damage claims of [redacted], [redacted] and [redacted] should be considered as being *prima facie* proper and necessary. Before they can be recovered, however, they must also be found to be reasonable. In this connection, I invite the parties to review the disbursements pertaining to the claims of [redacted], [redacted] and [redacted] for reasonableness. If the parties cannot come to terms with respect to reasonableness, I will hear further argument and determine the reasonableness of these disbursements.

40. With respect to the UMP claim asserted by [redacted], as noted earlier, I was informed that the parties reached an agreement with respect to his UMP claim for damages. Some but not all of the arguments noted in paragraphs 34-38 above would also apply to his claim. I invite the parties to review the underlying disbursements associated with his damage claim and if they cannot come to terms on the issues of both whether they are proper and necessary and whether they are reasonable, I will hear further argument.

Dated: May 6, 2011 Signed: _____