IN THE MATTER OF AN ARBITRATION PURSUANT TO *THE INSURANCE (MOTOR VEHICLE) ACT* REGULATIONS and *THE COMMERCIAL ARBITRATION ACT*

BETWEEN:

COSH, also known as COSH

CLAIMANT

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

RULING ON APPLICATION
RE: ADMISSIBILITY OF AN EXPERT REPORT

Arbitrator: **Donald W. Yule, Q.C.**
Place of Application: **Vancouver, BC**
Date of Ruling: **April 17, 2009**

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INTRODUCTION

1. This arbitration is to determine the compensation to which the Claimant COSH, ("COSH") may be entitled to recover from the Respondent pursuant to her underinsured motorist protection (UMP) coverage as a result of a motor vehicle accident that occurred on or about May 21, 2001 on or near Pacific Coast Highway at 17th Street in Sunset Beach, Orange County, California, U.S.A. ("the Accident").

2. In November 2008 the arbitration was set for hearing for two weeks, commencing April 14, 2009.

3. At a pre-hearing conference call on March 9, 2009, counsel for the Respondent advised that he was objecting to the admissibility of the report of one of COSH's experts, Dr. V.

4. At a further pre-hearing conference call on March 23, 2009, and in view of the Respondent's position regarding the admissibility of Dr. V.'s report, counsel for COSH applied for and was granted an adjournment of the arbitration hearing, which is now re-set for October 26th, 2009.

5. Counsel have made submissions in writing with respect to the admissibility of Dr. V.'s report (Mr. Harris by letter dated March 18, 2009; Mr. Gordon by letter dated March 30, 2009; Mr. Harris in reply by letter dated April 2, 2009).

6. The Respondent seeks an Order that Dr. V.'s report dated June 12, 2007 be ruled wholly inadmissible. COSH's position is that, for a variety of reasons, it is premature and unfair to determine the extent of Dr. V.'s expertise and the scope of his admissible evidence until the actual arbitration hearing when Dr. V. will, in the

normal course, be tendered as an expert witness and subject to cross-examination on his qualifications, leading to a determination as to the field(s) of expertise and permitted areas of opinion evidence.

BACKGROUND

7. COSH's Statement of Claim alleges that as a result of the Accident, COSH sustained *inter alia* a head injury and post-traumatic stress disorder, in addition to a number of physical injuries to other parts of her body. It is also alleged that she continues to sustain loss and expense for medical care and treatment.

8. Dr. V. is a "rehabilitation consultant". His report may generally be described as a "cost of care report" in that it sets out his opinions regarding various types of future treatment and support that COSH will require, the frequency and duration of the future treatment and support and the cost of the treatment and support by a particular treatment provider. The actual report is 30 pages in length, divided into 9 headings. A brief summary of the contents of the report is as follows.

In the **Introduction** (6 pages) Dr. V. includes some family background information regarding COSH, a list of medical conditions that COSH has been diagnosed with, a listing of current symptoms and problems COSH is encountering (taken from Dr. V.'s personal interview with COSH and her husband), a list of functional areas altered by COSH's disability, and a statement of her life expectancy.

The next section, **Medical History** (6 pages) contains a summary of pertinent information derived from medical treatment records and medical reports of others.

Dr. V. notes that there are no medical records available from May, 2001 to May, 2002 or for the years 2003 – 2005.

The next section, **Medical Status** (1 page) contains a list of seven medical conditions of COSH gathered from medical reports of others and Dr. V.'s personal interview with COSH and her husband. The listed medical conditions are:

- traumatic brain injury;
- post-concussion syndrome;
- cognitive disorder;
- post-traumatic stress disorder with generalized anxiety and panic attacks;
- pain disorder associated with both psychological factors and general medical conditions;
- dysthymic disorder; and
- dizziness.

The next section, **Limitations and Services** (9 pages) is divided into two parts. The first part is a listing of physical and mental limitations extracted from medical reports of others and Dr. V.'s personal observations. This list is six pages in length. The second part outlines a life long plan of care wherein Dr. V. lists the services and resources that, in his opinion, COSH will require in the future.

The next section, **The Cost Report** (3 pages) lists the type of services and treatment COSH will require, the duration and frequency of that treatment, the cost per unit, and one potential vendor for each service.

Under the heading **Annualized Costs** (1 page) the report summarizes the one time costs ($32,430.00) and the annual costs ($31,582.00). There follows a one page **Medical Index** listing the medical reports reviewed, a one page listing of **Reviewed Medical Records**, and a one page **Addendum** of other documents reviewed, including scan images and school records.

9. Dr. V.'s accompanying **CV** is 39 pages. It is also helpfully broken down into categories. In the first category, **Education and Training**, (8 pages) are set out Dr. V.'s academic degrees (BA, 1972; MA in rehabilitation counselling 1976; PhD in counselling 1978) as well as a lengthy listing under the subheading of **Specialized Training** of what appear to be conferences from 1979 to October, 2008 that Dr. V. attended. A great many of the conferences relate to brain injury and rehabilitation.

Under the heading **Professional Experience** (3 pages) there is a list of Dr. V.'s work experience from 1972 to the present. It is noteworthy that he is the President or CEO and Program Director of Care Facilities in New Orleans, Covington, Louisiana and in Virginia Beach, Virginia. This section notes that from September, 1978 to the present, Dr. V. has been a "rehabilitation specialist" which is described as follows:

> "Serve as a consultant to various individuals and agencies regarding rehabilitation and habilitation of the disabled population. Provide research and planning on services and equipment needed; frequency, present cost, and duration of those services and equipment, lost wages and benefits analysis, job development, rehabilitation program design, intervention strategies, and case management. Provide

counselling to individuals and groups. Provide evaluation
of programs and systems of health care."

Under the heading **Certifications and Licenses**, there is a listing of various certifications including a Diplomate of the American Board of Psychological Specialties; Forensic Specialty and Rehabilitation Psychology.

Under the heading **Advisory Councils, Boards and Committee Assignments** (2 ½ pages) there is a list of a variety of assignments, many of which relate to brain injury or head injury Associations.

There is a short listing of **Professional Societies** of which Dr. V. is a Member, including *inter alia* the American Congress of Rehabilitation Medicine (since 1986), the International Academy of Life Care Planners, and the North American Brain Injury Society (2003 to present).

There is a two page listing of **Sponsored Seminars/Symposiums**, and a 15 page listing of **Program Appearances and Invited Addresses**, the majority of which are invited lectures on various topics relating to brain injury, life care planning and rehabilitation.

There is a short section of **Honors and Awards**, a 2 ½ page listing of **Publications**, a half page listing of **Published Abstracts** and short sections on **Research**, **Other Activities** and **Courses Taught**, either at St. John's University or the Louisiana State University Medical Centre.

RESPONDENT'S BASIS OF OBJECTION

10. The Respondent does not object to the admissibility of Dr. V.'s report on the basis that Dr. V. is not an expert. The Respondent concedes that V.'s field of study "arguably" qualifies him to express opinions on rehabilitation management and thus Dr. V. may be qualified to express opinions on the need for cognitive remediation and counselling and the need for a case manager.

11. The Respondent's objection, however, is that Dr. V. does not have any medical degree and is not entitled to express opinions on matters relating to medical care. Thus, he is not qualified to express opinions on the need for or future frequency of visits to a family practitioner, an ophthalmologist, a psychiatrist, a neuropsychologist, or the need for "support care and medication".

12. In summary, the Respondent's objection is that many of the opinions in Dr. V.'s report are outside the area of his expertise.

13. In support of its position, the Respondent relies upon three American decisions in which Dr. V.'s qualifications were challenged.

14. In *Norwest Bank, N.A. and Frick v. Kmart Corporation* (1997) W.L. 33479072 (U.S. Dist. Ct., N.D. Indiana South Bend Div.), Dr. V.'s evidence on the impact of a traumatic brain injury and on the necessity and costs of various medical expenses incurred by persons who have suffered brain injuries was ruled inadmissible. Although the Court acknowledged that by any definition of the term, Dr. V. was an expert, declaring him to be an expert was only the beginning because the opinion

offered by the expert must fit the expert's expertise. Dr. V. had prepared a report in which he set out the future health care that he believed the claimant, Mrs. Frick, would need, based upon his review of her medical records, his personal interview, and his own experience and training. Second, Dr. V. assigned a cost to each of the categories of medical care he believed she would require, based upon his inquiries to health care providers. As an example, Dr. V. considered that Mrs. Frick would need to see a neurologist 4 to 6 times annually for the rest of her life at a cost of $35.00 per visit with a Dr. Keenan. There was no other evidence in the case to indicate that Mrs. Frick would need this frequency of treatment.

15. The Court ruled as follows:

> "First, the court does not believe that Dr. V. has the education, training or experience needed to predict the care and treatment Mrs. Frick needs today, or will need in the future. Dr. V.'s extensive experience in the treatment of neurologically impaired patients qualifies him to state opinions of the costs of treatment, if the need for treatment is established by medical evidence, but the court does not believe that Dr. V. is qualified to provide the medical evidence. The court recognizes that a witness may qualify under Rule 702 solely by virtue of experience rather than education [citation omitted], and that an adequately qualified witness need not specialize in the field in which the opinion is offered [citation omitted], or be licensed in the field in which the opinion is offered [citation omitted]. Nonetheless the court is unaware of any instance in which a witness with no education or licensure in medicine,

> osteopathy, dentistry, chiropractic, or nursing has been found qualified, regardless of experience, to give an opinion on a person's medical condition and medical future based on a review of medical records and an interview with the patient and her husband."

16. The Court also considered Dr. V.'s opinions to be inadmissible because they were based on his training and experience rather than scientific principle and methodology.

17. Finally, although Dr. V. had the requisite experience to make his opinion on the cost valuation of the life plan he outlined helpful to the trier of fact, the cost valuation opinion was also inadmissible because there was no evidentiary foundation for the life plan itself.

18. In *Adeola v. Kemmerly* (State of Louisiana, Court of Appeal, First Circuit, 2001 C.A. 1231) the Louisiana Court of Appeal set aside a jury award and sent the matter back for a new trial because the trial judge had not permitted defence counsel to cross-examine Dr. V. with respect to his qualifications in front of the jury. A *voir dire* had been held at trial, in the absence of the jury, to determine the admissibility of Dr. V.'s proposed testimony. The trial judge concluded that Dr. V. was eminently qualified as a life care planner and a rehabilitation expert and so instructed the jury. During cross-examination, in the presence of the jury, defence counsel was prohibited by the trial judge from raising the issue of Dr. V.'s background and credentials. The Appeal Court found no abuse of discretion in the trial judge's decision to qualify Dr. V. as an expert witness in the field of life care planning and rehabilitation but found the trial judge committed reversible error in depriving defence counsel of the ability to cross-examine on qualifications and credentials, because such cross-examination could go to the weight of Dr. V.'s opinion, separate from the issue of admissibility of his opinion.

19. Finally, in *SeaRiver Maritime Inc. v. Pike* (Court of Appeal, 13th District of Texas, Corpus Christie B. Edinburg, Case No. 13-05-0033 – C.V., June 8, 2006) the Texas Court of Appeal dismissed the defendant's allegation of error by the trial judge in failing to exclude the entire testimony of life care planner Dr. V. Sea River argued that Dr. V. was not a medical doctor, yet was allowed to testify as to the need for future medical care, citing the *Norwest Bank N.A.* case. The Texas Court of Appeal, however, distinguished *Norwest*. Unlike *Norwest*, other qualified health care providers testified and related many of the components of the health care plan. The defendant also provided health care evidence through its own expert. Pharmaceutical prescriptions were based on the plaintiff's past treatment history. Dr. V. was said to have "avoided the mistakes in *Norwest*" because he consulted and confirmed with the treating physicians their opinions on both the need for and costs of on-going treatment.

20. In the present case, the Respondent asserts that Dr. V.'s report is in the same category as was his intended evidence in the *Norwest* case. This position is perhaps not the result of Dr. V.'s choice of preparation for his report but because of the absence of medical evidence on which he could rely. Although I do not know what other expert reports may have been served by COSH, the Respondent asserts that apart from a neuropsychological evaluation by Dr. S. (herself not a medical doctor) there are no medical records upon which Dr. V. could rely as a basis for his opinions. As stated in the Respondent's Submission:

> "There are no follow up records, no records of the claimant's progress (or lack of progress) from 2002 to 2009, no diagnostic records, no records of treatment, no records of medication, no records of follow up or the need for follow up care. In short, no medical records which a

> non-medical 'expert' can use as a basis for medical conclusions as to the need for future treatment."

21. In addition, the Respondent relies upon s. 81 of the *Medical Practitioners Act* of British Columbia which makes it an offence to practice medicine when not registered under the *Act.* Practicing medicine includes holding out as being able or willing to diagnose, prescribe for or advise on the physical or mental condition of a person and advising on the physical or mental condition of a person.

SUBMISSION OF COSH

22. COSH submits that Dr. V. is fully qualified to give the opinions set out in his report. Given his very extensive training and experience, and obvious expertise, it would be unfair to rule on his qualifications, and the scope of his permitted opinions without his having an opportunity, as would normally apply at a Hearing, of explaining the relevancy of his background and experience and being subjected to questions about it.

23. No case authority is cited by the Respondent in support of its submission based on the *Medical Practitioners Act* which it is submitted does not govern the giving of opinion evidence in a trial or arbitration in British Columbia. No Canadian authorities are cited in support of the Respondent's objection to Dr. V.'s report and, without knowing the applicable procedural rules in the different American jurisdictions, the American authorities are of no assistance. Moreover, even if Dr. V.'s report were ruled inadmissible, COSH is not precluded from treating the report as notice, and calling Dr. V. to give oral opinion evidence under *Rule* 40A(3). Moreover the Respondent seems to admit that Dr. V. is qualified to give some of the opinions in his report yet inconsistently seeks to exclude the entire report.

24. Finally, the arbitrator cannot know what other evidence may be adduced at the Hearing, and Dr. V.'s opinions will have to be viewed in the light of all of the evidence adduced at the Hearing; hence it is premature to rule on the scope of Dr. V.'s evidence at the arbitration and the Respondent's application should be dismissed without prejudice to its right to contest the extent of the admissibility of Dr. V.'s evidence at the arbitration hearing.

DISCUSSION and ANALYSIS

25. Counsel have advised that Dr. V.'s report has been served upon the Respondent both under Rule 40A(2) and (3) so that either option for tendering Dr. V.'s evidence is available to COSH. I do not consider the fact that the report may never be introduced into evidence under Rule 40A(2) because COSH may elect to treat the report as notice and introduce Dr. V.'s opinions *viva voce* at the Hearing under Rule 40A(3), as a reason for declining to address the Respondent's objections. In either instance there will arise the same question of admissibility, ie. whether some of his expressed opinions are outside the area of his expertise as outlined in the CV. If his evidence were tendered through Dr. V. at the Hearing, the only difference would be that Dr. V. would give evidence and be questioned about his qualifications in the course of determining the scope of his admissible opinions. However, the fundamental proposition on which the Respondent relies is that some of the opinions expressed in Dr. V.'s report can only properly be given by someone with a degree in medicine and it is not disputed that Dr. V. does not hold such a degree.

26. It also seems to me beneficial to both parties to know in advance of the new Hearing date whether the Respondent's objection will be sustained. The Hearing was adjourned in order to allow COSH time to address the potential impact of the objection if it were successful. That presumably involves obtaining additional opinion evidence from other experts to fill any "gaps" created by any adverse ruling on the admissibility of Dr. V.'s evidence. Some clarity on the admissibility of Dr. V.'s opinions may assist both parties in determining what additional steps they wish to take in preparation for the new Hearing.

27. In his report Dr. V. provides two categories of opinion. The first category is the nature and extent of future treatment required. The type of treatment is set out at pages 20-22 of the report and the frequency and duration of such treatment is incorporated into the cost report chart at pages 24-26 of the report. The second category of opinion is the estimated unit cost of the described treatment. I think it is appropriate to consider these two categories separately.

28. A test for establishing a claim for cost of future care is set out in *Milina v. Bartsch* (1985) 49 B.C.L.R. (2nd) 33 (S.C.), affirmed (1987) 49 B.C.L.R. (2nd) 99 (C.A.). At page 84, McLachlin, J., [as she then was] said as follows:

> "The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on <u>medical</u> evidence.
>
> These authorities establish:
>
> (1) that there must be a <u>medical</u> justification for claims for cost of future care; and
>
> (2) that the claims must be reasonable." [emphasis added]

29. In *Jacobsen v. Nike Canada Ltd.* (1996) 19 B.C.L.R. (3d) 63 @ p. 99 Levine, J. in addressing the "medical necessity" for costs of future personal care attendant and homemaker services rejected the defendant's submission that only a medical doctor could provide the evidence on which an assessment could be based. Levine, J. accepted the qualifications of a nurse with experience and education in rehabilitation nursing and an occupational therapist as being qualified to assess future care needs. At paragraph 182 the Court said:

> "The test [McLachlin, J.] enunciated does not, in my view, require that the evidence of the specific care that is required by the plaintiff be provided by a medical doctor. In *Milina v. Bartsch,* McLachlin, J. accepted the evidence of a rehabilitation expert as to the type of care that should be provided."

Levine J. also relied upon information in the plaintiff's clinical records to support her award.

30. In *Chiu v. Chiu* (2002 B.C.C.A. 618) the Court of Appeal upheld awards for a life skills evaluation, rehabilitation worker for life and a case manager for life, rejecting the defendant's submission that these awards were not supported by medical opinion. At paragraph 40 the Court said:

> "The authorities cited by the appellant (*Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229 and *Milina,* [*supra*]) do not require that specific items of cost of future care be approved by medical experts. They only require that the evidence as a whole support awards for specific

> items, including medical opinions. Ms. Schulstad made recommendations based upon the medical evidence and her assessment of the respondent's specific needs."

31. Further, at paragraph 41, the Court said:

> "The award under this head of damage is based on the evidence of the plaintiff, the medical opinions, the collateral evidence and the assistance provided by the Schulstad report."

Ms. Schulstad was a rehabilitation nurse consultant with accreditation as a disability management specialist.

32. My starting point is that a non-medical person is not qualified to make a medical diagnosis. On page 13 of the report under the heading "Medical Status", Dr. V. lists seven medical conditions of COSH including, *inter alia:*

- traumatic brain injury;
- post concussion syndrome;
- cognitive disorder;
- post traumatic stress disorder; and
- dysthymic disorder.

33. Dr. V. notes that this information has been gathered from a number of medical reports of others but then adds that in addition, he has interviewed COSH and her husband. It is not entirely clear whether the seven medical conditions listed come from the diagnoses of others or from Dr. V.'s own interview. For example, with respect to the diagnosis of traumatic brain injury:

a) the summary of Dr. L.'s neurological evaluation contains no diagnosis;

b) D. S.'s orthopedic examination is inapplicable;

c) an MRI study of the brain was read as normal;

d) a positron emission tomography scan was read as abnormal, with a pattern that was "compatible with brain injury"; and

e) the summary of Dr. Sz.'s neuropsychological evaluation does not contain a diagnosis of traumatic brain injury.

It is possible that Dr. V. is relying upon the PET scan result although I would not consider it to be a diagnosis. Similarly, with respect to post-concussion syndrome, the body of the report does not identify that diagnosis as having been made by anyone. It may be that these diagnoses are, in fact, contained in records reviewed by Dr. V. but not attached to or forming part of his report. The point is that, in my view, Dr. V. cannot make these diagnoses and the report does not satisfactorily reference that all of the medical conditions have, in fact, been diagnosed by medical doctors.

34. For the same reason that I do not think Dr. V. is qualified to diagnose a medical condition, I also do not think he is able to express an opinion on medical treatment that is necessary or justified, including the need for future prescription medication. I do not see how a non-medically trained person can provide a reliable opinion, for example, on the medical justification for seeing a psychiatrist six times a year for 10 years which is one of the services recommended in the report.

35. The Respondent submits that it would be "intellectually indefensible" to sever any admissible portions of Dr. V.'s opinion from those that are inadmissible because it is impossible to consider his recommendations in isolation. I disagree.

36. The Respondent does not challenge Dr. V.'s qualification as a rehabilitation counselor and concedes that he may be qualified to express opinions on the need for cognitive remediation, counselling and a case manager. I would add the issue of support care to the list of services under treatment program, about which Dr. V. may well be qualified to express opinions. The decisions in *Jacobson, supra* and *Chiu, supra* make it clear that the opinion of a medical doctor is not a prerequisite for establishing the medical justification for certain types of rehabilitation or future care services. In *Jacobson* one of the services at issue was that of a personal care attendant, and in *Chiu*, one of the services at issue was a rehabilitation worker. Those services may well be similar to the four hour per day support care recommended by Dr. V. (the report does not set out in detail precisely what the support care worker would do). I recognize that in the *Jacobson* and *Chiu* cases some evidence to support the awards came from a nurse with experience in rehabilitation nursing and an accreditation as a disability management specialist. In accepting those qualifications, it is not clear how much reliance was placed upon the nursing background as opposed to the experience and training in rehabilitation. I am not prepared to conclude at this stage that Dr. V. is not qualified to express the opinions in his report respecting the four items identified under the head "Treatment Program".

37. I also do not accept the Respondent's submission that the portion of Dr. V.'s report dealing with the costing of different items is not admissible. The circumstances in the present case are distinguishable from those in *Norwest Bank.* The Court in *Norwest Bank* concluded that although Dr. V. was plainly qualified to provide an opinion of cost evaluation, the cost evaluation was ruled inadmissible because the opinion would be without foundation in the record. The court was apparently able to conclude that no other health care provider was going to testify that the plaintiff would need the treatment that Dr. V. had costed. I accept the proposition that if there is no admissible evidence to support a particular form of treatment, evidence of the cost of that treatment is not admissible because it is not relevant. In the present case, however, I am not in a position

to know what other expert evidence there will be supporting what forms of future treatment and support services. On the assumption that there is some admissible evidence to support, for example, future periodic assessments by a psychiatrist, I do not see why Dr. V.'s costing of that treatment should be inadmissible.

38. In summary:

a) I dismiss the Respondent's application for a declaration that Dr. V.'s report is wholly inadmissible;

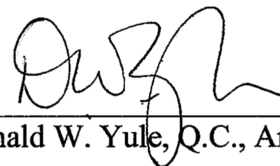
b) I conclude that Dr. V. is not qualified to diagnose COSH's medical conditions nor to express an opinion upon the nature or extent or duration or frequency of future medical treatment, in particular the items listed under Medical Evaluations and Treatment, Therapeutic Evaluations and Medications;

c) I make no final determination of Dr. V.'s entitlement to express an opinion regarding the four items listed under "Treatment Program" at this time. I note simply that the Respondent concedes that Dr. V. may be qualified to express an opinion on three of these four items. If Dr. V. is tendered as a witness at the Hearing, then there may be further exploration of his qualifications to express opinions about these matters. If Dr. V.'s report is simply tendered as an expert report at the Hearing as it is, then I will make a determination of admissibility at that time;

d) The portions of Dr. V.'s report dealing with the per unit cost of all evaluations, treatment and medication is within the scope of Dr. V.'s expertise and is *prima facie* admissible, subject to possible issues of relevancy depending upon the totality of the evidence at the Hearing.

39. I would add one further observation. I have indicated that Dr. V.'s opinions regarding a treatment program may well be admissible. An appropriate treatment plan depends upon proof of the medical conditions to be treated. Moreover, where a treatment plan is based on medical evidence that is old or outdated, the weight to be accorded an opinion recommending such a treatment plan would require careful consideration.

DATED at Vancouver, BC this 17th day of April, 2009.



Donald W. Yule, Q.C., Arbitrator