IN THE MATTER OF AN ARBITRATION
PURSUANT TO SECTION 148.2(1) OF THE *INSURANCE (MOTOR VEHICLE) ACT*,
REVISED REGULATION (1984)

BETWEEN:

S.P.W.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

ARBITRATOR	**JOSEPH A. BOSKOVICH** DuMoulin Boskovich West Coast Lawyers Since 1972 1800-1095 West Pender St. Vancouver, BC V6E 2M6
COUNSEL FOR THE CLAIMANT	**DAVID BROOKS** Ramsay Lampman Rhodes 111 Wallace St. Nanaimo, BC V9R 5L9
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The parties have agreed, pursuant to Section 148.2 of the Revised Regulations (1984) of the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, and *The Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 to submit this matter to Arbitration.

The arbitration was held in Victoria, BC in November 2006. Written submissions regarding liability and damages were tendered by the parties, with the Claimant's reply submissions having been received on July 3, 2007. Submissions regarding the deductible amounts were received on August 20 and 21, 2007 respectively.

Background Information

This action was brought by the Claimant SPW ("the Claimant"), a 43 year old journeyman carpenter, as a result of some very serious injuries he suffered in a motorcycle accident on **August 25, 2000**. The Claimant maintains that his injuries have resulted in considerable pain and suffering and have left him with permanent disability and resultant loss of past earnings, loss of earning capacity, and expenses for medical care and treatment.

The Claimant was born and raised in Victoria, British Columbia. At the time of the accident he was 36 years old. He was single and not in a relationship. His parents resided in a naturist community in the Cowichan Valley outside Cobble Hill, British Columbia. The Claimant's grandfather and father were both carpenters. The Claimant has one older sister and two older brothers, one of whom is also a carpenter by trade.

The Claimant has never married, but has recently rekindled a previous long term common-law relationship with KJ, who has three children.

The Claimant suffers from dyslexia and was not a gifted student. He left high school without completing grade 10. At the age of 17, with the support of his family, the Claimant began his apprenticeship as a carpenter. While the Claimant did very well with the practical aspects of this training, he had problems with the classroom work.

In the days prior to the accident, the Claimant had returned to Victoria from a two month motorcycle trip and, while he had no concrete plans in terms of his future career goals, he was looking for employment as a construction carpenter, which by all accounts is physically demanding work. He had registered at the local union office and on the day of the accident was en route to meet with a potential employer.

The evidence indicates that prior to the accident, the Claimant was physically active. He was an ardent outdoorsman who enjoyed motorcycle trips, dirt bike riding, hunting, hiking, trapping and travelling.

Liability

1. On **August 25, 2000**, at approximately 11:30 a.m., the Claimant was riding his Harley Davidson motorcycle northbound on Belmont Road in Victoria, BC. The Claimant was traveling from his home located at 324 Belmont Avenue, towards downtown Victoria.

Belmont Road is a two lane road running north and south and it intersects with Ocean Boulevard at an uncontrolled t-intersection.

2. The road conditions were ideal. It was a sunny, dry summer day and traffic was light. The Claimant's motorcycle was equipped with a headlight that turned on when the motorcycle was started. No evidence has been tendered which would allow me to conclude that the motorcycle was not in proper working order and, in this regard, I accept the Claimant's evidence that the headlight was working at the time of the accident.

3. At his Examination for Discovery, the Claimant's evidence was that he is very familiar with the intersection having lived a few blocks away from there for six months and having passed by it two to three times a day. He stated that he was aware that there could be vehicles turning left and merging from the right.

4. The Claimant would be described as the driver who enjoyed the statutory right of way on Belmont Avenue. Those intending to merge from Ocean Boulevard or turn onto Ocean Boulevard from northbound Belmont would be described as having servient positions.

5. As the Claimant approached the uncontrolled intersection at Ocean Boulevard, he took notice of traffic ahead of him and to the right that was on Ocean Boulevard slowing to merge onto Belmont Road. He also took notice of the dark blue truck coming towards him southbound on Belmont which was a fair distance away from him.

6. At the time the Claimant saw the southbound truck it had just turned off of Sooke Road onto Belmont Road. The truck was in southbound lane of travel and did not have its left turn signal illuminated. The Claimant estimates that the truck was 300-400 feet away from him traveling southbound when he became aware of it and, while he was conscious of its presence and position on the roadway, he did not feel the truck posed an immediate hazard to him as there was no indication its driver was going to turn left. The Claimant's perception at the time was that the vehicles merging from his right were more of an immediate hazard. I pause to note that the Claimant did acknowledge that as a driver of a motorcycle everything around him was a potential threat to him.

7. The Claimant's evidence is that as he entered the intersection the southbound truck cut across the southbound lane and designated left turn lane and it made a sharp left turn immediately in front of his motorcycle which resulted in the collision. The Claimant's evidence is that at no time did he see the truck stop in the left turn lane nor did he ever see its left turn signal illuminated such to give him warning that the driver might be turning left at Ocean Boulevard. He testified that he had very little time to react, except he did lock his brakes. He estimates this action took 20 to 30 km off of his traveling speed prior to the impact.

8. No evidence from the driver of the truck was tendered at this hearing. I was informed that the driver passed away after the accident (his death was not related to the accident). No

argument was made with respect to the admission of any statement or evidence given by the driver of the truck either to police, the insurer and/or by way of evidence at an Examination for Discovery.

9. The Respondent submits that because the Claimant had ridden motorcycles for many years and was aware that motor vehicle drivers sometimes have difficulty observing and reacting to the movement of motorcycles, he should have been aware that as he approached the intersection because he was emerging from a deep shadow that it would have been difficult for the truck driver to see him. The Respondent further submits that the Claimant should have exercised more caution and should have maintained observation of the truck as it moved along rather than turning his attention to the drivers merging from his right off of Ocean Boulevard "over which he had the right of way".

10. The Respondent admits "the lion's share of liability" rests with the driver of the truck for not seeing the Claimant's motorcycle and having not yielded the right of way to him; however, the Respondent submits that this does not alleviate some contribution of liability on the part of the Claimant for assuming the driver of the truck would obey the law and observe and react to him when he was "there to be seen". It appears the Respondent is suggesting to me that because the accident occurred the logical conclusion is that the Claimant was negligent or drove at an unreasonable rate of speed.

11. The law establishes that collisions of this nature necessitate an examination of whether, under the circumstances, the dominant driver's actions were reasonable. The servient driver has the onus of establishing that they were not.

The Law

12. Section 174 of the **Motor Vehicle Act**, RSBC 1996, c.318 governs the right of way at intersections when a vehicle is turning left and states:

> Yielding right of way on left turn
>
> 174 When a vehicle is in an intersection and its driver intends to turn left, the driver **must yield the right of way** to traffic approaching from the opposite direction that is in the intersection **or so close to constitute and immediate hazard**, but yielded and given a signal as required by section 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.
>
> [emphasis added]

13. This section has received much judicial interpretation. In ***Raie v. Thorpe*** (1963) 43 WWR 405 (BCCA) the definition of what constitutes an immediate hazard was considered and

the court found:

> ….it appears to me that the *punctum temporis* at which the question of immediate hazard and right of way arises is the **moment before the driver who proposes to make a left turn actually commences to make it and not some time earlier**.

14. No witness or engineering evidence was called to address the accident dynamics (eg: stopping distances, the parties ability to observe and react to one another, etc.) such that might assist me in the determination of liability. That being said, I am left with the evidence of the Claimant.

15. I find that Section 174 imposed a duty on the driver of the truck as the servient driver to yield the right of way to the Claimant. I also find that the Claimant was entitled to assume that the driver of the truck was going to carry along Belmont Road northbound and if the trucker driver wanted to turn left at Ocean Boulevard, which I find he gave no indication of, that he would yield the right of way accordingly.

16. I find the often cited quotation from ***Walker v. Brownlee and Harmon*** [1952] 2 DLR 450 (SCC) bears repeating here:

> While the decision of every motor vehicle collision case must depend on its particular facts, I am of the opinion that when A, the driver in the servient position, proceeds through and intersection in complete disregard of his statutory duty to yield the right of way and a collision results, if he seeks to cast any portion of blame upon B, the driver having the right of way, A must establish that B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law and that B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skillful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favor of A, whose unlawful conduct was *fons et origo mali*.

17. In ***Walker v. Brownlee and Harmon***, supra, it was argued that the driver with the right of way could have avoided the accident if he had looked to his left. The majority of the court agreed that on the evidence, even if he had been observing the other car, by the time he could reasonably have expected to realize that the driver was not yielding him the right of way, it would have been too late for him to do anything effective to prevent the collision. It was not enough that the accident would possibly have been avoided had he looked to the left.

18. I do not agree with the Respondent's submission that the Claimant had an opportunity to avoid the accident. I do not find there is any evidence to support the contention he was exceeding the speed limit or driving an excessive rate of speed given the road conditions, traffic and visibility conditions.

19. I find that the driver of the truck made a quick left hand turn into the path of the Claimant's motorcycle. In considering whether or not the Claimant was contributory negligent, the question that must be asked is whether the Claimant could have reduced the speed of his motorcycle or taken evasive action at the moment that the driver of the truck commenced his turn.

20. Having regard to the unrequited evidence given by the Claimant, I find that there is no evidence to the effect that even if the Claimant had looked left that the disregard of the law by the driver of the truck in failing to yield to him would have been apparent to him at such a time that the Claimant could have avoided the accident.

21. Accordingly, I find there was no contributory negligence on the part of the Claimant and conclude the driver of the truck was 100% liable for the accident.

Accident Injuries and Convalescence

22. The accident by all accounts was horrific in nature with the Claimant's left leg being crushed between the truck's front bumper and his motorcycle and his body then being thrown approximately 35 feet.

23. Ambulance attendants arrived on the scene and stabilized the Claimant and then transported him to Victoria General Hospital where it was determined he had suffered multiple injuries, including a complex pelvic fracture with separation of the symphysis pubis and fracture of the right sacrum, a left tibiofibular fracture, a fractured right humeral shaft, fracture of his left second rib, as well as a large laceration to his right thigh and multiple cuts and abrasions.

24. Initial treatment included a protracted surgery to secure external fixation of the pelvic fracture using a Hoffman apparatus as well as fixation of the tibiofibular fracture and the fractured humerus.

25. A few weeks after the accident, and while he was still in the hospital, the Claimant developed an antibiotic-related bowel infection that resulted in severe diarrhea and abdominal distention. He was treated by a Gastroenterologist.

26. On **October 6, 2000**, the Claimant underwent removal of the Hoffman apparatus.

27. On **October 13, 2000,** the Claimant was discharged from hospital to the care of his parents. At the time of his discharge he had limited ability to ambulate and weight bear on his right side due to the pelvic fracture and his left tibiofibular fracture. His ability to use mobility aides was also restricted because of his fractured humerus.

28. In the late **fall of 2000**, although the Claimant was using crutches, he managed to take a three day repositioning cruise from Los Angeles to Vancouver with a girlfriend, RS.

29. On **January 23, 2001**, the Claimant underwent surgery to have the distal locking screws removed from his left tibia.

30. The Claimant remained in the care of his parents until around the end of **January 2001** and during this time he received both physiotherapy and massage therapy. At the beginning of **February 2001**, the Claimant moved back to the Belmont Street address where he had been living at the time of the accident. At that time, he enrolled in courses to obtain his grade 12 equivalency through Royal Roads College in Victoria. The Claimant could not complete these studies due to his inability to tolerate sitting in a classroom. It does not appear his dyslexia was a precipitating factor in his decision to withdraw from these studies.

31. When Dr. Calder, Orthopaedic Surgeon, saw the Claimant on **April 12, 2001**, he noted that the Claimant continued to have a number of problems including: persistent back pain which limited his ability to walk, left leg pain aggravated by walking, bowel and urinary frequency, numbness in his right foot, sexual dysfunction and problems with his memory and concentration. Review of radiology studies revealed that the right humeral fracture had gone on to sound union. The pelvic fracture was not united and there was evidence of a right sacral nerve injury. The tibiofibular fracture resulted in vargus deformity of the left leg and some leg length discrepancy.

32. In **June 2001**, the Claimant was able to undertake a two day road trip to Prince George. Despite his ongoing physical limitations, during that trip he attempted to hike 25 km to an old hunting cabin. Not surprisingly, he was not able to complete the hike.

33. In **July 2001**, the Claimant moved from the Belmont Street address to Cobble Hill, British Columbia where he, together with two roommates, rented a home on a rural acreage property.

34. On **September 18 and 26, 2001**, the Claimant was seen by Dr. Decker, GP, for complaints associated with urinary frequency and pain for which antibiotics were prescribed.

35. In Dr. Decker's clinical entry dated **January 10, 2002**, he notes that the Claimant was seen with complaints of increased pain in his left tibia.

36. As a result of delayed union of his left tibia, the Claimant underwent revision IM nailing and bone grafting in **February 2002**.

37. Despite his ongoing pain and limitations, the Claimant was able to take a trip to Cuba in **February 2002**.

38. The Claimant was seen by Dr. Decker on **March 26, 2002**, for complaints of persistent pain and mobility issues involving his pelvis.

39. In Dr. Decker's clinical entry dated **April 15, 2002**, he noted that the Claimant's left tibia had improved somewhat following the IM nailing and bone grafting but that he was continuing to have discomfort.

40. On **April 24, 2002**, the Claimant was seen by Dr. P. McAllister, Orthopaedic Surgeon. At the time of that assessment the Claimant's complaints included: neck discomfort, chronic headaches, left lower leg pain, numbness down both his legs, weakness in his right foot and right lower back and posterior pelvic and groin pain. He also continued to complain of bowel urgency, urinary tract infection and sexual dysfunction. His lower extremity symptoms were aggravated by sitting and weight bearing. At that time he was continuing to use crutches to ambulate.

41. At the Arbitration, the Claimant testified that in **April of 2002**, he saw a psychologist, Marge Forbes because he was undergoing a period of depression associated with his injuries and physical limitations.

42. The Claimant returned to Dr. Decker on **September 18, 2002**, with complaints of increased stomach pain and urinary frequency.

43. On **November 21, 2002**, the Claimant returned to Dr. McAllister for assessment. At that time he was ambulating with the use of a cane. His complaints included: pain in his right shoulder with overhead use, pain in his left knee with corresponding difficulty kneeling related to the intermedullary rod in his tibia, pain in his lower back and pelvis. MRI of his lumbar spine and pelvis revealed distortion of his right lumbosacral plexus (L5 and S1 nerve root). Removal of the hardware in the humerus and tibia was discussed and a referral to Dr. Peter Dryden was made.

44. On **March 4, 2003**, Dr. Decker noted that the Claimant was "doing well" and was ambulating without crutches. He reported mild constant discomfort in his pelvis and right groin. Dr. Decker noted that the Claimant remained disabled from working as a carpenter.

45. In **April 2003**, the Claimant underwent removal of the intermedullary nail by Dr. Dryden from his tibia. Following that procedure his left knee complaints decreased. A three month course of physiotherapy treatments to stabilize the tibia was suggested by Dr. Dryden. It is not clear whether the Claimant undertook those physiotherapy treatments.

46. In the **spring of 2003**, the Claimant took two trips to Belize, both for a number of weeks.

47. On **October 30, 2003**, the Claimant returned to Dr. McAllister. At that time, his complaints included: continued headaches, neck discomfort, low back and right posterior pelvic discomfort and left knee and leg discomfort. His right arm continued to cause him

problems when he was required to do any work over his head. His lower back and pelvic pain were noted to be aggravated by walking on uneven ground, walking up or down hills, ascending/descending stairs and with activities involving bending, but the doctor noted that he was able to walk on level for an hour or more. He also reported continued urinary problems and sexual dysfunction which were thought to be related to the injuries he sustained to his anterior pelvis for which referral to a urologist was made.

48. At the time of that assessment he remained disabled from working and Dr. McAllister noted his tolerance for standing would continue to be restricted, as would his ability to perform laboring jobs. An occupational rehabilitation assessment was recommended.

49. On **January 5, 2004**, the Claimant attended Dr. Decker with complaints of persistent abdominal pain, pain with urination, abdominal discomfort, and sexual dysfunction. A diagnosis of a bladder infection was made and antibiotics prescribed. At a subsequent visit on **January 19, 2004**, the urinary tract infection was ruled out and a diagnosis of suprapubic discomfort was made.

50. On **February 23, 2004**, the Claimant was seen by Dr. M. Rocheleau, Physiatrist. At that time his complaints were noted to include: recurrent bladder problems, ongoing sexual dysfunction, ongoing lower back and pelvic pain, sensitivity in his left knee, soreness in his right shoulder and arm, neck pain, headaches and intolerance to cold. At the time of that assessment the Claimant was noted to be keeping himself busy around the acreage he was renting. He was tending to a vegetable garden and canning. He was also doing some woodworking, building hope chests. The comments in Dr. Rocheleau's report about the Claimant's physical activity level accord with the evidence given by the Claimant at this hearing.

51. The Claimant returned to Dr. Decker on **May 11, 2004**, with suprapubic pain. Dr. Decker noted that the Claimant had been suffering from recurrent bladder infections but that previous investigations were normal with good bladder functioning. Similar complaints were noted on **May 27, 2004**, **July 23, 2004** and **July 27, 2004**. Referral to Dr. Nielsen, Urologist, was made.

52. On **June 7, 2004**, at the request of the Respondent, the Claimant attended an appointment with Dr. David R. Ellis, Orthopaedic Surgeon. Dr. Ellis' conclusion was that although the Claimant's pelvic fracture had progressed to healing "the involvement of the adjacent sacroiliac joint and scarring about the fracture site, with nerve root entrapment involving particularly the SI nerve root, will, more probably than not, result in ongoing symptoms". He also indicated that there was the potential for post traumatic degenerative arthrosis which could necessitate fusion of his sacroiliac joint.

53. Dr. Ellis indicated that the residual widening of his pelvis could also result in ongoing pain and instability and "genitourinary tract trauma should he suffer a significant injury to the area". The neurological symptoms in his right leg, stemming from the sacrum injury were felt to be permanent. With respect to the left leg, Dr. Ellis indicated the Claimant may

suffer degenerative changes in the left knee which may require surgical intervention in 15 or 20 years. As for the right humeral shaft fracture, Dr. Ellis indicated that while solid union had been achieved, that the Claimant was left with residual crepitus and he might have future rotator cuff tendonitis.

54. On **August 9, 2004**, Dr. Nielsen saw the Claimant for ongoing urinary complaints. At that time he noted, "the sacral fracture has probably caused some degree of damage to pelvic nerves".

55. On **September 28, 2004**, the Claimant returned to Dr. Nielsen who noted that the Claimant was suffering from urinary leaking at night, urgency and pain in his lower abdomen. Dr. Nielsen's opinion was that the nerves going from his lower spine to the Claimant's bladder and penis were damaged as a result of the injuries to his lower back, pelvis and sacrum. He indicated the damage was permanent and that his symptoms might worsen with age.

56. The Claimant returned to Dr. Decker with recurrent bladder and urinary complaints on **November 29, 2004**. Percocet was prescribed. On **December 1, 2004**, antibiotics were started.

57. The Claimant returned to Dr. Nielsen on **March 11, 2005**, with complaints of increased symptoms. Investigation for an infection was undertaken. On **May 10, 2005**, the Claimant complained to Dr. Decker with complaints of blood in his urine and increased discomfort associated with physical activity.

58. On **September 27, 2005**, the Claimant was again seen by Dr. Decker with complaints of pain and spasm in his bladder. He was noted to be suffering from a fever, myalgia and increased urinary frequency. Dr. Decker questioned whether or not he was suffering from interstitial cystis and prescribed antibiotics. Cialis was also prescribed to help with his sexual dysfunction.

59. In **October 2005** the Claimant purchased a 6.5 acre property in Cobble Hill. The property included a home, a chicken coop, a barn with a woodworking shop and a small mechanics shop. He also purchased the egg selling business from the former owners.

60. On **December 18, 2005**, the Claimant slipped and fell when he was trying to get into his hot tub. He caught his tailbone which resulted in a significant aggravation of his lower back, sacrum and pelvic complaints. His bladder and bowel problems were also considerably aggravated.

61. In Dr. Decker's clinical entry dated **January 27, 2006**, he noted that the Claimant was suffering from persistent back pain and pain in his suprapubic area since the fall in the hot tub. He was noted to be planning a trip to Cuba but he felt unable to travel because he was unable to sit for any length of time.

62. On **March 8, 2006**, the Claimant returned to Dr. Rocheleau. The Claimant reported ongoing back pain in the sacral region, radiating into his buttocks bilaterally, ongoing neck pain, increased bladder problems, numbness in his right leg, erratic bowel function, and ongoing sexual dysfunction. Dr. Rocheleau expressed concern about the aggravation of symptoms stemming from the fall in December 2005 and in this regard requested a CT scan of the Claimant's lumbosacral spine and pelvis.

63. The Claimant returned to Dr. McAllister on **April 19, 2006** and he reported similar complaints to those noted by Dr. Rocheleau. Dr. McAllister noted that while the Claimant's symptoms were aggravated by the fall in December 2005, such an incident and response was not unusual. A repeat CT scan of the posterior pelvis and nerves was recommended.

64. On **April 28, 2006**, the Claimant returned to Dr. Nielsen with complaints of increased urinary symptoms. A barium enema revealed significant narrowing of the colon, a mass effect at the dome of the bladder and multiple diverticula. A colonvesical fistula was diagnosed (diverticulitis).

65. On **May 22, 2006**, the Claimant underwent a bowel resection. This surgery cured his bowel and bladder problems that had persisted since 2003.

66. In a report dated **August 31, 2006**, Dr. Nielsen opined that the Claimant's bladder complaints in the previous couple of years were due to the diverticulitis of the large bowel. He could not say that the diverticulitis was caused by the MVA, especially given the Claimant's family history of diverticulitis, but he opined that his erectile dysfunction was related to the motor vehicle accident and sacral fractures.

67. The Claimant's evidence at this hearing is that he has been left with chronic discomfort affecting primarily his lower back, sacrum, pelvis and legs. This pain worsens with walking, bending, lifting and crouching, especially on hard or uneven surfaces. The Claimant cannot sit for extended periods of time, nor can he walk, bend, stoop, crouch or lift and carry heavier objects without aggravating his discomfort. He has followed the recommendations of his treating medical practitioners and feels he has done everything he can to improve his symptoms and make the best of his situation.

68. In his testimony Dr. Rocheleau suggests that he felt that a more active rehabilitation program could have been undertaken by the Claimant. This is also suggested by Dr. Ellis who recommended a weight loss program and an active pool program progressing to a swim program, all of which he felt would help in controlling the Claimant's symptoms. With the exception of the initial treatments, the Claimant says that he found physiotherapy was not helpful. As for pain medication, the Claimant said that he tries not to take any drugs but occasionally does take Ibuprofen. He also says that he drinks much less now than he did initially after the accident, which possibly had something to do with his depressive state at that time. The evidence is clear, however, that the Claimant smokes marijuana, which he indicates is for pain control. The amount of marijuana actually being

used is not clear from the evidence. The Claimant has told some doctors he just takes it occasionally at night to help him sleep but there was other testimony given that he uses it more frequently than that.

Non-Pecuniary Damages

69. Claimant's counsel submits that the Claimant's injuries are serious in nature and in this regard cites a number of cases, some of which need to be adjusted for inflation, in support of a figure of $190,000.00 for non-pecuniary damages.

70. Counsel for the Respondent acknowledges that the Claimant suffered serious orthopaedic injuries as a result of the accident but submits that the Claimant has been able to resume and enjoy many of his pre-accident pursuits including driving, riding a motorcycle, traveling, maintaining his home and property and is able to do carpentry work. Counsel for the Respondent acknowledges these pursuits are now on a somewhat limited basis. He submits a figure of $125,000.00 as reasonable to compensate the Claimant for his non-pecuniary damages.

71. I pause to note that counsel for the Respondent spent a great deal of time at this hearing and in his submissions dealing with the Claimant's urinary, bladder and bowel problems and pointing out the apparent misdiagnosis and mistreatment of those complaints in the first few years following the accident. While I agree that the evidence establishes that the urinary, bladder and bowel issues were more likely than not due to the diverticulitis of the large bowel, I find that the sexual dysfunction is related to the pelvic and sacral fractures. I infer from Dr. Nielsen's testimony that had the Claimant not had such serious injuries to his pelvis that the diverticulitis may have been more readily diagnosed as it would not have been masked by the numerous symptoms relating to his motor vehicle injuries.

72. The Claimant impressed me, as he obviously impressed his doctors, as a sincere kind of person who may rightly be a little angry about his ongoing problems, but who seems to have the strength of character to try to live with them and do the best he can in his own way.

73. There is no question that the Claimant had a pre-existing degenerative condition with respect to his lumbar spine as identified by Dr. Schweigel in 1997; however, he was not functionally disabled as a result of that condition in the years leading up to the accident. Nor was there evidence that it would have affected him in the absence of the accident. There is also no question that following the accident he had issues relating to diverticulitis which caused him pain, concern and ultimately a need for surgical intervention.

74. I find that the Claimant suffered multiple serious injuries as a result of the accident which have resulted in permanent injuries and disability to his pelvis, sacrum, left leg, right foot and, to a lesser extent, to his right shoulder and arm. Those injuries have impacted his ability to walk, his gait and balance and have resulted in neck and lower back pain. He has

been left which chronic discomfort, restricted mobility and reduced ability to participate in physical activities. I find that his present disability is entirely related to the motor vehicle accident.

75. Before the accident the Claimant was extremely active and enjoyed a good level of fitness which allowed him to work at physically demanding jobs. His injuries are particularly devastating to him as all of his interests are founded in physical pursuits. He seems to have no interest in sedentary or intellectual activities. To say the least, he has had difficulty adjusting and accepting his physical limitations.

76. In considering the appropriate award for non-pecuniary damages, I am conscious of the fact that the accident has adversely affected every aspect of the Claimant's life. He cannot work at his previous type of employment; he cannot engage in most of the outdoor physical activities that he enjoyed; his relationships have suffered and, for the most part, he is a shell of the person he was. His functional losses are severe. He is honest in stating that he has suffered periods of depression, anger and irritability as a result of his injuries and the protracted course of treatment and recovery that have followed, including the misdiagnosis of his bladder and bowel problems.

77. After considering the authorities submitted I find, having regard to the horrific circumstances of this accident, the nature of the injuries, the ongoing pain and the residual permanent disability which has resulted in a devastating change in the Claimant's quality of life, that he is entitled to non-pecuniary damages of **$175,000.00**.

Past Income Loss

78. The Claimant is a journeyman carpenter having obtained his ticket in **February of 1988**. Since that time the majority of his paid employment has been as a carpenter, in both union and nonunion positions, save and except for short periods of time when he worked as a fisherman, in the automotive industry and on a labor crew during pulp mill shut downs.

79. Initially, the Claimant built houses with his father "from scratch" where he did everything from the concrete framing to the finishing carpentry work.

80. In **1995** the Claimant and his brother started a small construction company in Prince Rupert. The Claimant, who at the time owned two homes in Prince Rupert, sold those properties to help finance the construction company. One of their first, and ultimately last jobs, was renovating the local Anglican church. This job involved both heavy physical outdoor work and all the finishing work. The pair, with a small crew, worked on the project for one and a half years. The project was ultimately not completed as there were issues with payment that eventually resulted in litigation.

81. In the **fall of 1997** the Claimant worked as an automotive mechanic with a company, R&D, in Prince Rupert. At the end of November 1997, he had a problem with his lower

back which necessitated a few months off work and for which he underwent a steroid injection.

82. From **February 1998-August 27, 1999**, the Claimant returned to work as a mechanic with R&D in Prince Rupert, following which he was laid off. In **September 1999** he moved back to Victoria, BC. In **November 1999**, the Claimant returned to Prince Rupert to work on a mill shut down for a period of one month. In the **spring of 2000** (April-June 2000), he worked in Prince Rupert doing carpentry work at the local high school and also worked on a pulp mill shutdown.

83. At the time of the accident the Claimant was unemployed. He had just returned home from an almost two month motorcycle trip through the United States and was looking for work as a construction carpenter, a job which required him to move around in a variety of positions, climb ladders, kneel and periodically lift heavy materials. On **August 22, 2000**, the Claimant signed up for work at the union hall in Victoria and his evidence at this hearing was that he had been offered a well paying full time job through the union that he was scheduled to start on the Monday following the accident.

84. The Claimant tendered actuarial evidence from a Labour Market Economist, Jeff Taunton of PETA Consultants, in which he estimated the Claimant's past income loss based on three assumed possible scenarios: earnings based on the Claimant's pre-accident average earnings adjusted for inflation; earnings based on average earnings for full time carpenters (non union); and earnings based on carpentry work in a unionized work place. These estimates total $132,339, $167,520, and $199,841.

85. The evidence tendered establishes the following with respect to the Claimant's pre-accident earnings history:

- He secured journeyman status on February 13, 1998
- In 1995 he earned $36,415.00 ($7,686.00 of which was from EI)
- In 1996 he earned $27,882.00 ($8,648.00 of which was from EI)
- 1n 1997 he earned $24,784.00 ($7,023.00 of which was from EI)
- In 1998 he earned $26,798.00 ($5,222.00 of which was from EI)
- In 1999 he earned $27,561.00 ($2,065.00 of which was from EI)
- In 2000 he earned $18,118.00 ($6,608.00 of which was from EI)

86. No tax returns for the years following the accident were produced at this hearing and in

this regard I do not have the benefit of seeing exactly what the Claimant's 'with accident' earnings have been. Based on the evidence, I assume the only income that would be shown on these returns would stem from the RRSPs he cashed in, interest from investments he made after receiving the $200,000.00 in uninsured motorist benefits and the nominal earnings or losses from the egg and produce business he took over in the fall of 2005, when he purchased the Cobble Hill acreage. The Claimant's evidence is that the egg business is self sustaining and that he does not draw income from it. The same holds true for the produce and flowers he sells off of the property.

87. At this hearing, in addition to the economist report, the Claimant tendered evidence from two witnesses, WC and SK, regarding the earnings potential for union and self-employed carpenters. WC, a union business agent, gave evidence that in the past couple of years union membership has increased because of the demand in the industry for skilled carpenters. Both WC and SK, a self employed contractor who attended trade school with the Claimant, indicated a number of skilled carpenters are choosing to work outside of the union at the present time because they are able to earn more money than the union rates which are currently about $28.00/hr, plus benefits. Both indicate the market for skilled carpenters has never been as good as it is at the present time.

88. Notwithstanding the figures outlined in Mr. Taunton's report, Claimant's counsel submits that a figure of $250,000.00 net of taxes is appropriate for past income loss. This calculation assumes annual earnings of $40,000.00 per year to the date of the Arbitration. I note that this figure exceeds Mr. Taunton's estimate of the Claimant's earnings if he were working full time at a union rate. This estimate also far exceeds the Plaintiff's pre-accident earnings which were on average was $23,000 a year, a fact that must be put against the backdrop of the Claimant's own evidence that he never had trouble getting work which dovetailed with SC's testimony that skilled carpenters can always find work. SK himself gave evidence that in 1999, which was the last year he worked as an employee, his earning totaled $75,000.00, plus a contribution towards his pension. SK's evidence is that the Claimant is a more skilled carpenter than he is.

89. Counsel for the Respondent argues that the past income loss claim must be calculated on the basis of what the Claimant would have earned and not what he could have earned and, in this regard, the Claimant's pre-accident work history was critical. Counsel for the Respondent also submits that there should be a "downward adjustment" to the income loss awards to account for the fact that, even without the accident the Claimant would have suffered from the urinary/bladder problems and these would have disabled him for a long time.

90. Having regard to what the Claimant would have earned, Counsel for the Respondent states that I must rely on the figures "firmly grounded in the PETA report and [I] should reject the invitation to embark on any flights of fancy based on the unsubstantiated [WC and SC] "charge-out rates". The Respondent submits a figure of $70,000.00 for past income loss after considerations for tax and a reduction for some time off work because of the 3 years the Claimant had the urinary/bladder disability.

91. Mr. Taunton, under cross examination, testified that the Claimant prior to the accident earned 17% less than the average BC carpenter. A rough glance at the Claimant's tax returns for those years indicates that a fairly large percentage of his income, in some years upwards of 30%, came from Employment Insurance Benefits. I do not wish to put this evidence in a critical or pejorative context as has been suggested by Respondent counsel. I find the Claimant's earnings are reflective of a lifestyle choice. Rather than working full-time, he enjoyed the flexibility of his job and his ability to take time off and spend time in the outdoors. His evidence is that he "loved to travel anywhere" and he loved hunting, fishing, and going to the Queen Charlotte Islands, and doing other endeavors that did not result in remuneration. This was corroborated by the evidence of KJ, who had lived with the Plaintiff in Prince George and by SK whose, evidence was that he offered the Claimant a job in 2000 (prior to the accident) as a supervisor on a construction job site, which the Claimant declined.

92. Despite the overwhelming evidence indicating that the Claimant was a man who enjoyed, for lack of a better term, working smarter and not harder to achieve his life goals, at this hearing his counsel submitted that with his move to Victoria in 1999, the Claimant had decided to put his past lifestyle behind him and that he wanted to get more serious with his employment so that he could look after his elderly parents. While the Claimant testified to this as well, his income tax returns for 1999 and 2000 show otherwise. I do not accept that the Claimant had or was going to undergo a radical change in his lifestyle and work habits had the accident not occurred and I must reflect this finding in my assessment of his income loss claim, both past and prospective.

93. That being said, the Claimant has clearly sustained a past income loss and having regard to his testimony as well as the medical, vocational and actuarial opinions, I find a figure of **$130,000.00** is a reasonable sum to compensate him for his net past income loss.

94. In reaching this figure, I have assumed the Claimant's income would have not increased substantially from his average earnings until the year 2005 when, according to the evidence of WC, wage rates went up. The Claimant would have then, because of the high market demands, earned income commensurate with the statistics provided for males seeking employment as a carpenter both in the union and non union jobs. In coming to the figure outlined above, I have also applied a negative contingency for the fact that the Claimant may have, in spite of the accident, suffered from diverticulitis and may have been unemployed for periods of time associated with that condition. I have also factored in a reduction for tax.

Future Income Loss – Loss of Capacity

95. The medical evidence establishes that the Claimant will not be able to return to the laboring type of work that he did prior to this accident. Dr. Rocheleau, Physiatrist, in his report dated **April 19, 2004** opined:

> In relation to SPW's disability, it is evident that he has had a reduced physical

> capacity. Previously, he had a lengthy work history in heavy construction. He has worked on many large projects. It is my understanding that he was an accomplished and valued employee in this regard. At the time of the motor vehicle accident he was scheduled to return to work in Victoria in the construction industry.
>
> It is now 3½ years post injury. The majority of the injuries and residual impairment that SPW has as a consequence of these injuries would lead me to conclude that he is no longer fit for this type of employment. It is my opinion that he is no longer fit for this type of employment. It is also my opinion that this is a permanent disability. In general, he is best suited to light or sedentary occupation, which allows him to sit, stand and move around as required. He should avoid repetitive bending, lifting or twisting work that allows him to adopt static postures, either sitting or standing.

96. In *Kwei v. Boisclair* (1991) 60 BCLR (2d) 393 (CA) at 399-400, the court endorsed the often quoted passage of Mr. Justice Finch, as he was then, describing some of the factors to be considered in assessing damages for loss of capacity:

> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
>
> (*Brown v. Golay* [1985] BCJ No. 31 (SC)).

97. All of those factors are relevant to the Claimant's case. When considering the Claimant's capital asset loss, once must remember that not only was he a skilled tradesman but he was someone who was able to perform physically demanding work. There is a real and significant risk of future income loss particularly in his case because he is untrained in any other discipline that would allow him sedentary employment.

98. The report tendered by Mr. Taunton, based on the three assumed scenarios outlined at paragraph 84 of this decision, estimates the Claimant's future loss of income at $516,052, $621,217 or $886,009.

99. At this hearing, Mr. Taunton provided estimates based on a without accident income stream to age 65 using wage rates of $45.00 and $65.00 per hour, which are substantially more than the current union rates. When he adjusted these higher rates to present value, they totaled $1,246,000 to $1,662,000.

100. These higher wage rates were based on evidence given by WC and SK who confirmed that with the construction boom in the recent years, there is such a demand for skilled carpenters that many are working outside the union and mostly in self-employed situations and were demanding and getting such rates.

101. Based on this evidence, Claimant's counsel submits that the sum of $1,250,000 is the appropriate figure for the Claimant's loss of capacity. However, he acknowledges that the Claimant does have some nominal residual earning capacity and after factoring in this and other contingencies, the claim advanced for future income loss is $1,000,000.

102. As previously outlined, counsel for the Respondent argued that the evidence of WC and SK regarding "charge out" rates should be ignored because this evidence is hearsay and anecdotal. He says the rates apply to self-employed individuals who have overhead and expenses that do not apply to a person working as an employee.

103. Counsel for the Respondent admits that the Claimant's physical capacity to work has been compromised by his accident injuries. He submits that while the Claimant may not be able to return to full time work as a union carpenter, the evidence does not establish that he has no residual earning capacity. The Respondent states that just because the Claimant has been awarded CPP disability benefits effective June 2003, this does not mean he is unable to work and/or retrain. The Respondent further submits "that it is virtually certain that the Plaintiff will find something 'financially productive' to do, such that his future income loss will be mitigated".

104. Counsel for the Respondent argues that a large negative contingency should be applied when calculating the future loss for the Claimant's unhealthy lifestyle of drinking, smoking, riding motorcycles, and being overweight. He submits that with this lifestyle he would not have been able to do construction work to age 65 in any event. This may be counsel's perception, however no evidence was called to indicate such there was going to be such an adverse effect on the Claimant's ability to work.

105. As with the past income loss claim, counsel for the Respondent argues that the best indication of what the Claimant could have earned in the future is to look at what he actually earned in the years before the accident and in this regard references the first scenario outlined in Mr. Taunton's report. Counsel for the Respondent submits that the sum of $350,000.00 is an appropriate award for the Claimant's loss of earning capacity. In coming to this figure, he states that he is attributing only a modest residual earning capacity to him. He also indicates that this figure is based on the Claimant working to age 55.

106. In my opinion, it is very clear that the Claimant will not be competitively employable in the physically demanding jobs that he has previously done in his working life, as result of his physical disabilities. His injuries limit him from all but limited, light and some medium strength work and even those types of occupations are wrought with restrictions.

107. The actuarial and economic evidence provides some context in which to consider the arguments of both parties and while the award regarding future capacity involves consideration of many of the same factors relevant to the Claimant's past loss of income, it requires speculation about future events which are difficult to predict with precision.

108. The law is clear in stating that an award for future loss of capacity does not have to be calculated on a mathematical basis, but is to be assessed based on the facts and the evidence, *Parypa v. Wickware,* [1999] 169 DLR (4th) 661 (BCCA).

Residual Earning Capacity

109. Since the accident, the Claimant has spent much of his time convalescing from his injuries and dealing with bouts of diverticulitis. He has also spent time attending to his ill mother, who has since passed away, and looking after his aging father. He has done all this while trying to adjust to his ongoing disabilities which have resulted in a complete change in his lifestyle and personal life.

110. While the Claimant made a brief attempt to try and upgrade his education initially following the accident, he has not made any further effort, outside of making a few enquiries, at retraining or seeking vocational counseling. What he has done is purchase the farm acreage he currently owns and operates. He has been able to occupy his time operating this farm. Many of the tasks include performing medium strength jobs that have resulted in some nominal earnings.

111. Claimant's counsel has tendered a report from Derek Nordin, Vocational Consultant, dated April 15, 2004, in which he opines:

> As I have already said, I am of the view that any work skills he does obtain will need to be acquired through on-the-job training. In spite of his academic difficulties (which are likely negatively impacted by his dyslexia), I am of the view that SPW is likely a man of average intelligence. Therefore, I think he is capable of acquiring skills through on-the-job training but the real test will be in finding an employer willing to hire him. I anticipate this will be a difficult task.

112. Dr. Colleen P. Quee-Newell, Vocational Consultant, who assessed the Claimant at the request of the Respondent and who gave evidence at this hearing, noted the following in her report dated **June 30, 2004**,

> …he is quite enjoying operating the small 6 acre farm. He hires street kids from Victoria to help out with the weeding and farm work and has convinced his landlord to whole selling off the property because he wishes to purchase it and 'take charge of my own destiny'. He said he is able to manage the physical demands of farming because he can pace himself and take breaks as required.

113. Since he purchased the 6.5 acres in October 2005, the Claimant has managed to physically operate and run the farm, from which he sells eggs, chickens, vegetables and flowers. Although he has friends who assist him with the heavier work, his evidence at this hearing was that he can operate a bobcat and weed whacker for up to an hour. He can also paint and use a chainsaw, again all on a limited basis. He can garden for three or four hours a day and he can walk for one mile as long as it is on even ground.

114. The medical evidence indicates that the Claimant's residual symptoms will preclude him from doing "heavy construction" and he must avoid repetitive bending, lifting or twisting and walking on uneven ground, or repeated climbing of stairs or ladders.

115. In Dr. Rocheleau's report dated **April 19, 2004** he opines,

> In all likelihood, SPW is best suited to work at what emphasis his natural skills in relation to hand function. SPW does have a 'ticket' as a carpenter and his description of the skills in this regard would lead me to conclude that he is a very accomplished woodworker. Possibly, he could find some work as a finishing carpenter/cabinet maker. However, I am not an expert in all of the demands of this type of occupation and that would need to be assessed taking into account his already identified physical limitations. In addition, it may well be that he cannot do this type of work on a full-time basis.

116. Dr. Daniel Goews, Occupational Health Physician, who saw the Claimant on **March 4, 2004**, opined, "It is my opinion that he is well suited to become an artist/craftsman."

117. Functional capacity testing done by F. Vandenboer, Occupational Therapist, at the request of the Respondent in **June 2004** indicates,

> Based on the results of the functional capacity testing, SPW is best suited to light assembly/fine carpentry work, performed primarily at bench height, with an allowance for postural freedom between sitting, standing and walking short distances.

118. These opinions tendered by the occupational and vocational consultants shed some light on what the Claimant may be able to do in terms of gainful employment. Mr. Nordin's opinion, which was the more negative of the two vocational reports tendered, seems to limit the Claimant's transferrable skills and learning opportunities to a traditional employer/employee relationship. Dr. Colleen P. Quee-Newell sees the Claimant's transferrable skills, particularly his carpentry skills and abilities, in a broader perspective. She takes into account the Claimant's stated vocational interests and goal to become independent. At page 19 of her report she notes:

> Taking this beyond a recreational hobby, SPW may be able to apply his woodworking skills and carpentry experience to work in furniture

> refinishing. Work of this nature involves refinishing and repairing old and used furniture. With his longstanding carpentry work experience and current woodworking activities, SPW may find that he can move to this occupation on a direct-entry basis.

119. The Claimant has a workshop equipped with the power tools he needs to pursue woodworking and according to the evidence he gave at this hearing, since the accident he has built shelves for a friend and has completed a couple of well handcrafted hope chests. At this hearing, SK attested to the Claimant's skill as a finishing carpenter and stated there was a high demand for craftsmen of his caliber.

120. Under cross-examination, the Claimant admitted that if he didn't have to perform the chores associated with operating the farm, he could likely dedicate at least three to four hours a day working in his woodshop. He said he would require a 15 – 20 minute break every hour and was unsure if he could work five consecutive days.

121. Although the Claimant does not have much in the way of formal education, I found him to be very "street smart". RE, the Claimant's former landlord and the former owner of the farm, testified on the Claimant's behalf at this hearing. His evidence confirmed my impression that the Claimant is a very social, charming type of person who can connect and interact with others. RE described that in 2001, when he was renovating his barn on the property, the Claimant, although in poor physical shape because of his injuries, would come and visit RE at the site. RE consulted with and used the Claimant's expertise regarding the reconstruction of the post and beam frame of the barn. RE also described a situation in 2003 when he hired one of the Claimant's friends to do construction work on the barn and the Claimant agreed to direct and supervise the friend's work.

122. Based on my review and consideration of all the evidence, including the testimony given by the Claimant, I find there is a realistic possibility of him pursuing his fine woodworking skills or, to use his words, "creative woodworking". In that regard, he does have a residual earning capacity that extends beyond what he has undertaken.

123. Both counsel agree that the Claimant has a residual earning capacity, however, that leaves the difficult question of its quantification. Most of the evidence and discussion at this hearing focused on the Claimant's loss of capacity, as opposed to the valuation of his residual earning capacity.

124. Mr. Taunton does outline in his report a hypothetical scenario for calculating with accident earnings based on the Claimant working 20 hours per week at $12.00 per hour. This would amount to annual earnings of $12,889.00. If he was to do that to age 65, he would have residual earnings of $179,827.00. If the Claimant was able to earn the same $12.00 per hour, but was able to work 40 hours a week, his residual earning capacity through to age 65 would be $344,342.00. I believe it is important for at least illustrative purposes to set this out, thus rounding out the statistical evidence.

125. Dr. Quee-Newell, set out the annual salary for BC resident males working full time as a furniture refinisher at $28,602.00 per year, furniture maker/craftsperson at $23,402.00 per year and a farmer at $24,639.00 per year.

126. None of the statistics outlined above was referred to at the hearing or in the submissions, except for the educational requirements needed to become a furniture refinisher.

127. The Claimant's employment history, which cannot be ignored, indicates he was inclined to perform physically demanding work whether it was as a carpenter, auto mechanic or laborer. As I have indicated, no evidence was tendered to support the Respondent's contention that the Claimant had any plans for, or was physically predisposed to having to take, early retirement. He enjoyed working and the benefits and flexibility that it provided to him in terms of his ability to save money, enjoy life and travel. That being said, I have no problem concluding that it is more probable than not that had he not been involved in the accident he would have continued working at the same sort of jobs, both union and nonunion, that he had enjoyed over his working life. He is entitled to be compensated for this loss.

128. Negative contingencies that I have to consider for his 'without accident' earnings, in addition to the standard statistical adjustment made by Mr. Taunton, the Claimant's previous earning history, his lifestyle and the fact that he may have worked less at heavy construction jobs as he aged.

129. A positive contingency that I have to consider is the fact that with the current booming construction industry, the Claimant may have had some banner income producing years. Economies however are fickle at best. WC, the business agent for the carpentry industry, with 20 years of experience, testified that it is dangerous to forecast just how the construction industry is going to go more than 12 months ahead.

130. As indicated, I find that the Claimant does have a residual earning capacity that exceeds what he is currently doing. I am mindful of the comments made by the Claimant's witness, SK, when he saw the photos of the hope chest made by the Claimant and indicated that a skilled carpenter such as the Claimant could earn upwards of $60/hr for his work. I am also mindful of the evidence given by the Claimant's other witness, WC, who said that regardless of market conditions, there is always a demand for skilled carpenters such as the Claimant.

131. My impression upon review of the evidence is that the Claimant has, as he did before the accident, established a lifestyle for himself by which he can work as much or as little as he is inclined to do. I find that when this litigation has reached a conclusion that the Claimant may be more inclined to market his skills as a craftsman and return to the workforce in some capacity outside of operating his farm.

132. The medical evidence supports that I factor in a negative contingency when assessing the

Claimant's residual earning capacity, because of his injuries there is the likelihood that his physical condition may deteriorate in the future which will impact his capacity to work and earn income to age 65.

133. As previously stated, an assessment of loss of earning capacity does not require mathematical precision as it is not future income that is being calculated.

134. After consideration of all evidence and taking into account all of the factors outlined above, as well as having regard to all of the negative and positive contingencies, I assess the Claimant's loss of income earning capacity at **$575,000.00**.

Cost of Future Care

135. The standard for awarding cost of future care was set out by McLachlin J in *Milina v. Bartsch,* [1985] BCJ NO. 2762 when he stated:

> The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award of future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff.

136. That being said, I must determine if there is medical justification for the claims for future care and if the claims are reasonable.

137. The Claimant is not advancing a cost of care claim associated with ongoing medical or rehabilitative expenses. What he is claiming is the cost for assistance around his home and acreage into the future at a rate of 4 hours/week, $15/hr. The present value of this cost totals $60,000.00.

138. While a multiplier was provided by Mr. Taunton during his oral evidence for the cost of care, no medical or occupational therapy evidence was tendered to support the claim. Although there was a report prepared and referred to at this hearing from Allison McLean, this report was not tendered into evidence.

139. The evidence shows that the Claimant is capable of doing most of his household chores including vacuuming, washing windows and painting. He is also able to do a considerable amount of gardening and he can even brew his own beer. He is able to work on his vehicle and his motorcycle. Because of the size of the property and his ongoing physical complaints, it appears the Claimant is limited in the amount of work he can do and that he does need some help to keep the property going. I pause to note that the Claimant started living on this property after the accident, purchasing it at a time when he was well aware of what his residual physical limitations were. With that said, I am not convinced the cost of maintaining the acreage would lay at the feet of the Respondent.

140. Nevertheless, it is clear reading the reports tendered and in considering the oral evidence given by the Claimant, that he has limitations such as climbing ladders and working on uneven surface that will prevent him from performing maintenance around his home. This limitation would impact him regardless of whether he lived on the farm or in a suburban bungalow. Common sense dictates that the Claimant should be provided with some assistance and, as arbitrary as it may seem, I find $15,000.00 should be sufficient to compensate him for such future needs.

Special Damages

141. The Claimant has submitted a number of receipts for out-of-pocket expenses or special damages (exhibit 6, tabs 1, 2 and 3) associated with his accident injuries. These expenses include: prescription medications from November 6, 2000-October 13, 2006; physiotherapy and massage therapy user fees from November 19, 2000-February 19, 2004; and miscellaneous expenses such as expenses associated with his motorcycle, a walker, raised toilet seat, bath seat and bath hand rail, lumbar support, TV rental during his hospital stay, the clothing destroyed in the accident, meal expenses and taxi expenses associated with a trip to Vancouver in March 2004. In his submissions, Claimant's counsel indicates that some of the items (Phoenix Cycle and Kenco Motorcycle & Salvage) contained at tab 3 were included by error. The total claim, with a reduction for the items included in error, totals $7,426.77.

142. Counsel for the Respondent submits that the $2,039.45 spent on the bed did not arise out of the accident. The Respondent also disputes the amount spent on the purchase of a new toilet ($320.07) and the estimates provided by the Plaintiff for the clothing he was wearing at the time of the accident, which was destroyed ($266.52). Also in dispute are travel expenses for a trip to Vancouver, the cost of purchasing a computer ($2,157.12), rental of a vehicle after the accident to transport him from his parents' compound to the city for medical appointments.

143. The Respondent has accepted the items marked as exhibit 6, tabs 2 and the medications listed at tab 1 up until September 26, 2001 ($117.39).

144. A plaintiff is entitled to recover as special damages all reasonable expenses incurred as a result of his injuries. The test for recovery of an expense claimed, as noted by Cooper-Stephenson, in ***Personal Injury Damages in Canada*** (1981) at page 135, is its reasonableness.

145. The general approach to special damages is based on the same principles as the approached to loss of earning capacity and cost of future care. The plaintiff, "is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money", ***Milina v. Bartsch*** **(1985)** 49 BCLR (2d) 33 (SC), aff'd (1987) 49 BCLR (2d) 99 (CA).

146. With respect to the expenses at issue, I find that the medical evidence establishes the expenses incurred for the prescription expenses are reasonable, aside from associated with his fall in December 2005 and the increased bladder complaints and bowel surgery. I find the medication expenses to be reimbursed total **$232.58**.

147. The expenses incurred for items including: the walker, raised toilet seat, bath seat and bath hand rails ($20.00), TV rental during the hospital stay ($59.92), crutches ($23.00), cleaning expenses ($1,020.00**)**, and crutch tips (**$**4.29**)** are supported on the evidence. These expenses total **$1,127.21**.

148. I do not see anything in the medical records or in the evidence tendered supporting that the computer was a reasonable expense associated with the motor vehicle accident. Had the computer been used for the Claimant to upgrade his education, retrain and/or secure employment then there may have been some argument that it was reasonable and related to his accident injuries.

149. With respect to the purchase of a new mattress, having regard to the Claimant's evidence at this hearing, I am prepared to award him one half of the purchase cost, or **$1,019.72**.

150. I am unclear why a new toilet was purchased and can see nothing in the medical records or reports supporting the fact that the purchase was necessary and/or related to the accident injuries. That expense ($320.07) will not be allowed. I am also unclear on how the travel expenses for the trip in March 2004 relate to the Claimant's claim. If these expenses were for the purposes of a medical appointment or Examination for Discovery associated with the litigation then such expenses would be considered reasonable. I will leave it to the parties to discuss these expenses further and come to some agreement on them.

151. The estimates ($**266.52**) provided by the Claimant for the boots and clothing destroyed in the accident appear to be reasonable and no evidence was tendered by the Respondent showing that such estimates were not reasonable. These expenses will be allowed.

152. Having regard to the status of the Claimant's injuries when he was discharged from hospital to the care of this mother, the time of year and the need for him to travel to and from medical appointments, I find the car rental expense (**$370.88**) he incurred to be reasonable and as such that expense will be allowed.

153. Factoring in the expenses for the physiotherapy and massage therapy fees, the total award for special damages will be **$3,016.91**. Added to this would be the expenses for the trip to Vancouver in March 2004 if the parties can agree that the trip was related to this litigation.

UMP Deductions

154. Section 148.1 (the wording in effect as the time of this hearing) provides the following:

"deductible amount" means an amount

(a) payable by the corporation under section 20 or 24 of the Act, or recoverable by the insured from a similar fund in the jurisdiction in which the accident occurs,

(b) payable under section 148,

(c) payable under Part 7 or as accident benefits under another plan of automobile insurance similar to Part 7,

(d) paid directly by the underinsured motorist as damages,

(e) payable from a cash deposit or bond given in place of proof of financial responsibility,

(f) to which the insured is entitled under the *Workers Compensation Act* or a similar law of the jurisdiction in which the accident occurs,

(f.1) to which the insured is entitled under the *Employment Insurance Act* (Canada),

(f.2) to which the insured is entitled under the *Canada Pension Plan*,

(g) payable to the insured under a certificate, policy or plan of insurance providing third party legal liability indemnity to the underinsured motorist,

(h) payable under a policy of insurance issued under the *Insurance Act* or a similar law of another jurisdiction providing underinsured motorist protection for the same occurrence for which underinsured motorist protection is provided under this section, or

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

155. The Claimant has received **$200,000.00** from the available uninsured motorist protection, **$7,274.08** in Part 7 payments, a **$10,000.00** UMP advance, **$6,608.00** in Employment Insurance Benefits and **$36,252.43** in CPP disability benefits to August 31, 2007. Each of these items is an applicable deductible amount. The payments total **$260,134.51**.

156. The fundamental issue between the parties is whether the future disability benefit payments are an applicable deductible amount. The evidence submitted indicates that if future CPP benefits are to be received the benefits will total **$123,500.00**.

157. The deductibility of future CPP payments raises some difficult considerations having regard to the evidence and submissions tendered by both parties.

158. At this hearing, the Claimant admitted that he would be able to work three to four hours a day in his woodworking shop if he did not have to undertake the maintenance and work obligations required on his property. In the submissions tendered on behalf of the Claimant at the conclusion of this hearing, his counsel states that the Claimant will, "make some very modest amount of income in the future". What the submissions did not go on to say or suggest was whether or not these earnings would preclude the Claimant from collecting benefits from CPP.

159. In his email submissions dated August 20, 2007 regarding the applicable deductible amounts, Claimant's counsel now submits that the Claimant's ability to earn some form of income in the future will preclude him from receiving disability benefits from CPP. I pause to note, the Claimant has evidenced some capacity to earn income and that this capacity to date has not precluded him from collecting such benefits.

160. While the Respondent agrees "the Plaintiff is unlikely to be able to return to full time employment as a union carpenter….the Plaintiff has not proven, on the balance of probabilities, that he has little or nothing in the way of residual earning capacity". The Respondent submits that the Claimant's woodworking and carpentry and his personal woodworking shop provide him with the ability to take on custom projects and to work at his own pace if he so chooses. The Respondent submitted, "it is virtually certain that the Plaintiff will find something "financially productive" to do during that time frame to mitigate his loss".

161. In his submissions dated August 21, 2007, regarding the applicable deductible amounts, counsel for the Respondent submits that there is no evidence at all before me as to the rules and regulations outlining how earnings may affect the Claimant's continued entitlement to CPP disability benefits to age 65.

162. I note that the evidence given by Dr. Colleen Quee-Newell, indicates that CPP supports its recipients exploring return to work options without fear of loosing their benefits if the attempt fails. She stated that the program itself provides counseling and two years of re-training and up to 3 months of job search assistance and those benefits are maintained for the first 3 months of employment and can be re-instituted if the return to work attempt fails.

163. No documents from CPP were submitted in support of Dr. Quee-Newell's statements nor was anyone called from CPP to verify these statements, a task that would have been simple for either party and something they both should have given serious consideration to doing given the quantum of the potential deduction for future CPP payments.

164. To say the least, I am troubled by the incongruent nature of the submissions tendered by both parties when it comes to these future payments in the face of what they have both submitted with respect to the Claimant's potential future income loss/loss of capacity.

165. In order to determine if future payments should be considered as "applicable deductible amounts" under the Regulations the law is quite settled that there has to be some evidentiary foundation to determine likelihood of the continuance and certainty of such future payments. The onus of proof that these payments will continue is on the Respondent. While the evidence given with respect to payments having been received in the past is of assistance, it does not provide conclusive evidence that the payments will continue in the future.

166. That being said, having regard to the submissions delivered by counsel and the admissions made by the Claimant and his counsel and my own findings that the Claimant does have some residual earning capacity, which may or may not translate into income depending on what the Claimant does vocationally, I find that there is a 50% contingency of the likelihood that his CPP payments will continue in the future and in this regard 50% of the net present value of the future payments should be deducted from the award.

The Award

The award shall be as follows:	**Amount**
Non-Pecuniary Damages	$175,000.00
Past Income Loss	$130,000.00*
Loss of Earning Capacity	$575,000.00
Cost of Future Care	$ 15,000.00
Specials	$ 3,016.91*
Total	**$898,016.91**
Less UMP Deductions (past)	**$260,134.51**
Less UMP Deductions (50% future CPP)	**$ 61,750.00**
Total:	**$576,132.40**

***Plus Court Order Interest**

Added to this would be costs and disbursements which are to be agreed or assessed and Court Order Interest on the past income loss award.

Counsel for the Respondent, at paragraph 155 of his submissions, states there should be no award for Court Order Interest because the various advance payments made.

The advancing of funds advanced does not automatically disentitle the Claimant to Court Order Interest unless there is evidence that the advance was made and accepted pursuant to terms and conditions that would indicate the payments specifically relate to the heads of damage that attract Court Order Interest and in effect that the Claimant has waived his entitlement in this regard.

If the parties are unable to resolve the issue of costs and disbursement and Court Order Interest within 30 days of this decision then they will be at liberty to apply to me for a ruling in this regard.

It is so awarded.

Dated this 10th day of December, 2007.

Joseph A. Boskovich, Arbitrator