IN THE MATTER OF AN ARBITRATION
PURSUANT TO SECTION 148.2 (1) OF THE REVISED REGULATIONS TO THE *INSURANCE (MOTOR VEHICLE) ACT*
BC REG. 447/83

AND

THE COMMERCIAL ARBITRATION ACT,
RSBC 1996, c. 55

BETWEEN:

BL

CLAIMANT

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

SUPPLEMENTARY DECISION ON APPLICATION OF ARBITRATOR, MARK TWEEDY

Counsel for the Claimant: Mark Belanger

Counsel for the Respondent: Guy Brown, QC

Date of Supplementary Decision: July 5, 2016

1. Introduction

[1] I issued a Decision in this matter on June 29, 2016. I dismissed this proceeding, with costs to the Respondent The Insurance Corporation of British Columbia ("ICBC").

[2] By letter dated July 5, 2016, counsel for the Claimant BL has asked, pursuant to Rule 39 (4) of the Domestic Commercial Arbitration Rules, for three "clarifications" of my Decision.

[3] I will deal with each matter where clarification is sought by counsel, in turn.

2. Whether this tribunal may determine if KF is an "underinsured motorist"

[4] In my view, it is not the function of this tribunal to determine if KF is an "underinsured motorist" as that phrase is used in the *Regulations.* Whether

someone is an underinsured motorist can only be determined by there being a judgement in excess of policy limits and an inability of the tortfeasor to pay that judgment, or if ICBC admits these matters. See *Beauchamp v ICBC,* 2005 BCCA 507 and *GG v. ICBC* (Arbitration, October 27, 2010).

[5] Dealing specifically with the submission that the *Regulations* are "silent" as to the timing of when it is determined that there is an underinsured motorist, that is so. However I regard that silence as immaterial. In my view, it is the manner in which the determination is to be made which is important under the *Regulations*, not when that is to take place.

[6] Finally, were it up to this tribunal to determine whether KF was an underinsured motorist, a necessary component of that would have to include an assessment of damages under the law of Washington State. There is nothing in the *Regulations* or the authorities which have considered them which leads me to believe that this was my intended function.

3. Whether there is no prejudice to ICBC flowing from the lack of consent because it will recover costs if it is successful

[7] I dealt with the issue of prejudice in paragraphs 55 and following of my original Decision. As I there stated, BL's arguments as to prejudice are an attempt to establish coverage by proving an exception within what is clearly an exclusion as to coverage. I view this argument the same way.

[6] In any event, the true prejudice to ICBC is that the Washington State Action did not proceed to judgment, which might have resulted in a judgment for less than KF's policy limits, thus eliminating an UMP claim.

[8] I therefore do not agree that costs to ICBC in a successful arbitration proceeding would make up for the prejudice it might potentially suffer as a result of BL's case not proceeding to judgment in Washington State.

4. Whether denying a claimant the ability to accept a tender of limits without ICBC's consent "interferes with the statutorily mandated coverage"

[9] The coverage that is statutorily mandated requires there to be an underinsured motorist. As I have said, *Beauchamp* and *GG* both stand for the proposition that whether someone is an underinsured motorist is to be determined judicially, or with the consent of ICBC. Those two decisions make it cleat that there is no other way to do it. I do not therefore accept the view that requiring ICBC's consent to accept a tender of policy limits interferes with the statutorily mandated scheme. Rather, it is something that is mandated by the scheme, as it is has been interpreted by our Court of Appeal, and as applied by another Arbitrator.

Mark Tweedy
July 5, 2016