

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

BETWEEN:

M.E. by her Guardian ad Litem, M.S.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

ARBITRATOR

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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 on August 12, 2010. The parties submitted an Agreed Statement of Facts which outlined, amongst other things:

Agreed Facts

1. The Claimant, M.E., sustained serious injuries including, *inter alia*, a severe traumatic brain injury with an acute panhemispheric left hematoma, a liver laceration, injury to her left leg resulting in it dragging and an injury to her right arm resulting in weakness, in a motor vehicle accident that occurred on November 22, 1997 (the "Accident").
2. The Claimant commenced a tort action which was settled for payment of the available policy limits, \$233,889.98 inclusive of taxable costs and disbursements.
3. As a result of her accident injuries the Claimant applied for and received CPP disability benefits from March 1, 1997 to July 31, 2010 totaling \$78,542.94.
4. The Claimant also received total temporary disability benefits from ICBC in the amount of \$50,025.62.
5. In addition, ICBC paid an additional \$152,749.76 in Part 7 rehabilitation benefits, of which it is agreed \$150,000.00 is deductible, with the balance of \$2,749.76 at issue.
6. The Claimant is entitled to the statutory UMP limit of \$1,000,000.00 less the applicable deductible amounts under Section 148.1 of the Revised Regulations (1984) under the *Insurance (Motor Vehicle) Act*.
7. With respect to the applicable deductible amounts, the parties agree the following deductions should be made:

A.	ICBC Part 7 Rehabilitation Payments	\$ 150,000.00
B.	ICBC Part 7 TTD Payments	\$ 50,025.62
C.	CPP Disability Payments	\$ 78,542.94
D.	Tortfeasor's payment to the Claimant	\$ 233,889.98
	Total Agreed Deductions:	\$ 512,458.54

ISSUES TO BE DETERMINED

- A. Whether there should be a deduction from the Claimant's UMP award for future CPP disability payments and, if so, what the amount of that deduction should be.
- B. Whether the \$2,749.76 overpayment made by ICBC pursuant to Part 7 should be deducted from the Claimant's UMP award.

SUMMARY OF THE EVIDENCE

- 8. The Claimant, M.E., is currently 32 years of age. She was born in Iran and immigrated to Canada via Montreal in 1988. In 1991 she and her family moved to North Vancouver. She has a younger brother who is 29 and is a computer engineer. Both she and her brother live with their parents.
- 9. The Claimant graduated from Handsworth Secondary High School in 1996. In high school she did well as a member of the wrestling team and attended the Provincial Championships.
- 10. She has no recollection of the motor vehicle accident in November of 1997; in fact she said she has no memory of anything after January of 1997.
- 11. As for her injuries, the Claimant describes that she had a serious brain trauma, including bleeding primarily on the left side. She was totally paralyzed at first but eventually got feeling back on her left side and then gradually somewhat on her right side. She was confined to a wheelchair for more than a year.
- 12. From 1998 to 1999 she underwent intense rehabilitation, primarily for her physical injuries which continued for a number of years thereafter but at a reduced level. She still gets occasional physiotherapy for the disability on her right lower side.
- 13. Because of the brain injury the Claimant was left functioning at a Grade 7 level in terms of her academics. From 1999 to 2003 she attended an adult education program, part-time, with the assistance of a tutor, to obtain her GED.

14. Her vocational plan after getting her GED was to attempt taking courses that would allow her to pursue a career in music therapy, which required her to become a psychologist. Unfortunately, she took Psychology 101 with a tutor and failed. She tried the course again and found it was too much for her.
15. In 2005 the Claimant realized she was quite good with numbers and, with the assistance of a tutor, she enrolled in a 10 month Business Administration/Fundamentals program offered by Capilano College. The Claimant graduated from the program as scheduled in 2006 and decided to try and find employment. When she could not secure work, the Claimant decided to return to Capilano College to pursue an Accounting Assistant Certificate as she felt the Certificate would provide her with more employment opportunities.
16. The Claimant, again with the assistance of a tutor, obtained her Accounting Assistant Certificate as scheduled in 2007.
17. During her time at Capilano College, the Claimant also volunteered at a senior's centre close to her home.
18. From September 2007 to June or July 2008 the Claimant worked for International Florists. Her hours there varied and her job duties included taking and facilitating flower orders and customer services duties. She says that she left that position because she wanted to pursue a job in accounting.
19. From August 2008 to December 2008 the Claimant worked at Pencari Mining. She describes Pencari as a very small business where her duties included acting as receptionist and also some accounting which she did manually even though the business had a quick book program that she was familiar with through her schooling. She says the atmosphere there was very quiet with the phones ringing perhaps once during the day.
20. The Claimant was laid-off from Pencari in December 2008 when the company went out of business.

21. From December 2008 to March 2009 the Claimant spent every day looking for work. She describes looking online at various websites for jobs, making numerous applications and going on some 50-60 interviews. Her feeling at the time was that she was having difficulty securing work due to the recession. She also speculates that she might have been having problems securing work due to potential employers being concerned about her disabilities, although none of the potential employers mentioned this to her.
22. In April 2009 the Claimant secured work as an accounting/office assistant with Kelsan Technologies. The Claimant says that during the application process with Kelsan she told them about her motor vehicle accident and her recovery process.
23. The Claimant says she started at Kelsan working two days per week from 9am to 5pm. The days were limited because they did not have a lot of work for her to do. The Claimant says that because she was only working two days a week she was concerned about learning and remembering her job duties and so she offered to work the remaining three days a week for free. Kelsan compromised with the Claimant and agreed to change her work schedule from two full days per week to five part-time days per week where she would work from 1-5pm or 3pm depending on how busy they were.
24. In December 2009 the Claimant received a small hourly raise and her hours were increased to full-time.
25. With respect to her job duties, the Claimant describes a typical work day as getting to the office for 10am, dealing with the incoming mail by way of opening, date stamping, organizing and circulating it and then attending to reviewing and posting invoices on the company accounting system. She also indicates that during any given day she may also do things such as ordering supplies, cerloxing, laminating, photocopying and faxing.
26. She says her energy level is getting better as she ages. After work she goes to the gym 3-4 times a week for an hour; then does some grocery shopping for the family, makes her own lunch and does laundry.

27. The Claimant's evidence is that she loves the work she is doing and is always looking to do more and learn more at work. She says she loves the people she works with, the routine of the job and that she would like to stay working at Kelsan.
28. The Claimant also says that at some point in the future she may want to return to school to pursue her CGA, although she is not able to state with any clarity as to when that might be.
29. The Claimant wants to get her driver's licence and wants to move out of the family home. She would love to have children someday, if she met an appropriate partner to marry.
30. In cross-examination the Claimant admits she had a difficult time securing work and agrees it took her months and around 50-60 interviews to get the job at Pencari Mining.
31. When asked about the information she provided in May 2009 to Dr. J. LeBlanc, Neuropsychologist, the Claimant did not remember telling Dr. LeBlanc that she did not drive because she was too distractible; she had a tutor every day after school and on weekends when she attended Capilano College; or that she has short-term memory problems.
32. The Claimant admits she has routines, such as counting to five when bathing herself to avoid over cleaning. She states that she "loves routine" and that she does the same things on the same days at the same times every day. She disagrees; however, with the suggestion that she suffers from obsessive-compulsive disorder. She acknowledges having heard the term but is not sure if her psychologist or any practitioners had told her she suffered from the condition. On that point, the Claimant states, "I have routines or rituals – who doesn't".
33. The Claimant also admits to participating in a cleaning ritual at work whereby she disinfects her workstation every Monday. She says she would like to vacuum her office but her supervisor W.T. has told her not to do that. When asked by Respondent's counsel if it would upset her if she were not able to clean her workstation the Claimant says that she did not think it would cause her any problem or anxiety despite the references to that in Dr. LeBlanc's report.

34. The Claimant was asked, and could not explain, why her mother, when she participated in a collateral interview in May 2009 would have told Dr. LeBlanc the following:

- She is slow at home due to cognitive problems or has a problem selecting or completing tasks;
- She needs help crossing the street;
- She has problems following directions;
- She fails to clean up after herself;
- Needs help to complete tasks in a timely way;
- Needs help handling money;
- Has problems with her temper;
- Is disturbed by changes in her routine; and
- Lacks insight.

When these items are put to the Claimant, I find her responses to be evasive. She insists the assertions are not applicable to her.

35. At this hearing, the Claimant called her existing supervisor at Kelsan Technologies, W.T., as a witness. W.T. is a Certified General Accountant who has been employed with Kelsan Technologies for the past seven years. The company has approximately 37 employees at their North Vancouver office.

36. W.T. states that he first met the Claimant in either March or April 2009 when he, the company controller and the human resource administrator were conducting interviews for the accounting/office assistant position. He describes that they had around 12 applicants for the position and that they conducted 6-8 interviews. He remembers during the Claimant's interview that she mentioned that she had been in a very serious motor vehicle accident where she was not expected to live and that she had some residual physical and

cognitive issues. W.T.'s evidence is that the Claimant was hired for the position because they liked her personality, professional manner and because she had the most relevant training with the Accounting Assistant Certificate. He says the Claimant's reported limitations were not a factor they considered a barrier for them in hiring her. He describes the Claimant as eager, professional and someone who realizes her job is an entry-level position with no possibility of advancing and she is fine with that.

37. W.T.'s recollection is that the Claimant started working in April 2009 and was paid \$12.45 an hour and worked 24 hours per week and that her hours were increased in December 2009 to 30 hours a week, at which time she also received a 75¢ an hour raise.
38. He says he is her direct supervisor and they share an office. Her job duties include doing general filing, helping their office manager, ordering supplies, and entering accounts payable. He trained her on their accounting system. He is responsible for checking all of her work and says it is the nature of accounting to have someone check things over and that he, in turn, has someone checking his work.
39. W.T. says the Claimant handles the job very well. While the job is repetitive in nature and might be boring for some people, she seems to thrive on the routine and it suits her. She is eager, even-tempered, professional, productive, and accepts direction. Everyone at the firm likes her. He attests to her very positive attitude and says, "she puts her heart and soul into her work".
40. Her job duties have expanded to include coding payables and dealing with vendors on issues related to invoicing and putting together promotional material. She communicates with the vendors by either phone or email.
41. W.T. has no plans on discharging her from her employment and would have no hesitation in giving her a job reference if she requested one.
42. When cross-examined W.T. admits Kelsan recently underwent a merger with another company and, while he did not anticipate any dramatic changes, he admits that with a previous merger, there was some trimming of jobs, but he qualified this with the comment that the market was much worse at that time.

43. He also admits that the Claimant's job does not place many demands on her. The job is routine and does not involve a lot of critical thinking. Any discrepancies she finds in checking invoices against orders she report to him and he decides what to do.
44. W.T. is aware she makes notes and uses a "cheat sheet" to remember accounting codes.
45. Although aware of the motor vehicle accident and her injuries, he has not noticed any issues with her memory, word finding or concentration that affects her performance. He has not found her to be distractible and has not noticed any physical limitations that impair her ability to perform the work.
46. W.T. disagrees with the suggestion that he is an advocate for the Claimant. He says he is simply her supervisor.
47. Also called to give evidence was the Claimant's mother M.S., who is both her Litigation Guardian and Committee. M.S. states that the Claimant was hospitalized at VGH for one month and 20 days following the motor vehicle accident. Upon discharge from VGH, the Claimant was admitted to GF Strong where she was an inpatient for around three months and then followed on an outpatient basis for a further three months. When the Claimant returned home, she participated in intensive community therapy involving physio and massage therapy, occupational and speech therapy and psychological counseling. The initial rehabilitation all focused on getting the Claimant's physical injuries stabilized and treated. After there was some physical improvements the therapy changed to focus more on the Claimant's cognitive issues, rehabilitation and returning to school to get back what she had lost due to her brain injury.
48. M.S. describes her daughter as being eager to get better and "to be normal". She is very proud of her daughter's determination.
49. M.S. confirms that the Claimant participated in an adult education program at Capilano College and used the help of a tutor and whatever other assistance she could get. She describes the Claimant as working day and night on her studies. She confirms that after obtaining her GED, the Claimant obtained her Business Administration Diploma at Capilano College.

50. M.S. confirms that she applied for CPP benefits on the Claimant's behalf in 1998 and that these benefits were paid through to July 2010.
51. M.S. says that the Claimant's first job after graduating from the Business Administration program was at a florist shop. M.S. is not sure how the Claimant got the job, but states she did not help her secure it. M.S. describes the job at the florist shop as involving long hours, with the Claimant starting at 7am and working from 5-12 hours a day depending on the time of the year. She states that she drove the Claimant to her first day of work but after that, the Claimant wanted to take the bus. She describes the Claimant's energy as being good and that after work she would go to the gym and help around the home.
52. M.S. also confirms that the Claimant started her current job at Kelsan in April 2009.
53. With respect to the Claimant's activities outside of work, M.S. says that after work the Claimant will call her to see if they need anything from the store. She will then carry on to the store or home and then to the gym. One of her household duties is to pay bills for both of her parents. M.S. describes her as being very good at this.
54. M.S. said the Claimant is now focused on leaving the family home and living on her own, something she does not think is financially feasible.
55. With respect to the Claimant's cognitive abilities, M.S. is aware she has issues with her short term memory but is not sure how it impacts her as she has improved considerably and knows how to use the adaptive tools she has been taught.
56. Under cross-examination, M.S. admits that she has been the Claimant's Committee since around 1998 and that with the assistance of a financial planner, she manages the Claimant's settlement fund investments. M.S. says the Claimant manages her employment income that is deposited directly into the Claimant's bank account.
57. M.S. denies that in May 2007 her daughter required supervision. When evidence from her 2007 Examination for Discovery was put to her wherein she testified, "but the truth is she needs supervision everyday for everything...", she responds that the statement might

be truthful and rationalizes she was uncertain about the language being used as she thought it could refer to her daughter needing the assistance of a tutor.

58. M.S. agrees that when she went to see Dr. Le Blanc with the Claimant in May 2009, she was given forms to fill out and that she completed these to the best of her ability and provided truthful information.
59. M.S. also agrees that Dr. Le Blanc told her that if she did not understand the forms she could make a note of her questions and go over them with Dr. Le Blanc. M.S. went on to say that she was not sure she understood what was being asked in the forms as English is not her first language, although she admits that as a realtor and a former accountant with the Vancouver Board of Trade, she was required to understand and communicate in English both verbally and in writing. She continues trying to rationalize her evidence by insisting she lacks familiarity of the language and terms used in the context of the medical assessment.
60. M.S. is somewhat evasive and uncomfortable admitting things attributed to her by Dr. Le Blanc in her report (as noted above in paragraph 34). These included her daughter's problems with activities such as crossing the street, remembering addresses, following instructions or directions. M.S. agrees; however, that in May 2009 it was difficult for the Claimant to switch between tasks or multitask. She disagrees that in 2008 she was concerned and told CPP officials that her daughter did not know her own "boundaries or limitations".
61. At the conclusion of her cross-examination, M.S. admits that as a mother she might have exaggerated some of her evidence to protect her daughter.

RESPONDENT'S EVIDENCE

62. The only medical expert called at this hearing was Dr. Le Blanc who is a well-respected Neuropsychologist.
63. As outlined above, Dr. Le Blanc saw the Claimant in May 2009 at the request of the Respondent.

64. Dr. Le Blanc's evidence is that she obtained self-reporting information both from the Claimant and from collateral witnesses, including M.S., and C.T., one of the Claimant's supervisors at Kelsan. She explains that she does this so she can get real life examples of how a person is functioning in comparison to their test results. Dr. Le Blanc was satisfied the Claimant's mother understood the questions and discussion that was undertaken during her interview.
65. Dr. Le Blanc says the Claimant's psychological testing indicates she lacks insight into her situation and the impact of her behavior on others. In particular, she was overly positive about herself and denied common shortcomings that most people would admit to. The Claimant did however admit to her to having anxiety if she does not perform certain rituals.
66. On intellectual testing, she found the Claimant's processing speed, or how quickly she could take in information, to be in the extremely low range. Dr. Le Blanc states this likely reflects both cognitive and physical issues but is much more likely to be cognitively based. The Claimant's speed for very basic items such as clerical testing was also very slow. Dr. Le Blanc says that the Claimant relies on assistive devices, such as an iPad, and strategies to assist her and that she does well with these aids.
67. Dr. Le Blanc opines that it is difficult for people with cognitive issues, such as those endorsed by the Claimant, to retain employment due to various factors including timeliness, inappropriate responses to frustration, behaving inappropriately and responding poorly to feedback.
68. During her testing Dr. Le Blanc found the Claimant endorsed hyper fluidity and made inappropriate comments, but that she was able to catch herself and redirect her comments and behavior. This was something Dr. Le Blanc felt might be more difficult for the Claimant if she was in a stressful situation.
69. Her view is that the Claimant has found a perfect work situation. While Dr. Le Blanc admits this is fantastic, she cautions that it may be difficult for the Claimant to find employment elsewhere in "the real world" where her job is routine, there are no

- distractions, she does not have to multitask and where her employer accommodates her needs.
70. Dr. Le Blanc says the Claimant's cognitive issues may compound as she ages as the medical literature does suggest that people who suffer brain injuries are at a heightened risk for conditions such as dementia.
71. Under cross-examination, Dr. Le Blanc admits that while the medical literature suggests that maintaining a job for six months to a year can be extremely difficult for people with brain injury, that the Claimant's ability to maintain her current job for over one year and to increase her job demands speaks well for her abilities and motivation.
72. Dr. Le Blanc admits that if the Claimant remains at her current job, or a job with the same conditions, she could work to age 65. She is; however, skeptical as to whether jobs exist that would provide routine, not require multitasking, have no distractions and where an employer would accommodate the Claimant's needs.
73. Dr. Le Blanc admits that while the medical literature does suggest that a person who suffers a brain injury may be at increased risk for conditions such as dementia, the literature does not address what that percentage risk is. She also admits there is nothing in the medical literature that says the Claimant is at a greater risk of suffering from conditions such as dementia earlier than age 65.
74. Dr. Le Blanc further admits the Claimant is capable and will be capable of performing part-time work 5 days a week or 20 hours per week to age 65 unless her cognitive issues increase and/or she suffers another brain injury. She prefaces this by stating this will only be possible if the work is akin to her current employment in that the demands are routine and predictable, her physical and cognitive limitations are accommodated and she is able to continue to use the compensatory strategies.

THE LEGISLATION

75. Section 148.1(1) 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.

[emphasis added]

76. Section 42(2)(a) of the *Canada Pension Plan R.S., 1985, c. C-8* provides:

When person deemed disabled

(2) For the purposes of this Act,

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is **incapable regularly of pursuing any substantially gainful occupation**, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and

(b) a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

[emphasis added]

77. The Canadian Pension Plan Disability Adjudication Framework provides the following information with respect to how Section 42(2)(a)(i) is determined and it states the following factors are taken into consideration when determining whether person has a severe and prolonged mental or physical disability:

- The nature of the medical condition, and whether it is progressive;
- Functional limitations imposed by the medical condition;
- Impact of treatments;
- Statements/opinions expressed by medical practitioners and/or other health professionals, and by the client;
- Existence of multiple medical conditions; and
- Personal characteristics.

78. There are five components in the CPP Legislation which relate to a person's capacity to work and these are "incapable," "regularly," "pursuing," "any," and "substantially gainful occupation".

79. Incapable under the Legislation means that because of disability, an individual will not be able to work in any substantially gainful occupation. Incapable does not relate to profitability.
80. The Framework clearly states that a person's medical condition is considered the primary indicator. That is, a person must first have a **medical condition** and then secondly that condition must result in a **severe** and **prolonged disability** for a person to be eligible for CPP disability benefits. An applicant must demonstrate that both the "severe" and "prolonged" criteria are simultaneously met.
81. Severe is defined in the CPP Legislation as meaning "having a mental or physical disability that regularly stops a person from doing any type of work (full-time, part-time or seasonal), not just the work that person usually does".
82. Prolonged is defined in the CPP Legislation as "disability that is likely to be long term and of an indefinite duration or is likely to result in death".
83. The Framework provides that determining whether or not a person has capacity for work requires on an assessment of the interrelationship among a person's performance, productivity and profitability and further involves assessing whether there has been an adaptation to the medical condition and/or improvement in the medical condition that has resulted in an increased capacity to work.
84. Substantially gainful employment is defined in the Legislation as, "an occupation where the remuneration for the work performed and services rendered is at a substantially gainful amount. The substantially gainful amount is a benchmark of earnings that likely indicates whether a person is showing regular capacity for work. The substantially gainful amount is the maximum monthly CPP retirement pension. The annual amount is equal to twelve (12) times the maximum monthly CPP retirement pension". According to the parties, the amount is \$934.17 per month for 2010 or **\$11,210.04** annually.
85. That being said, if a person does earn twelve times the maximum CPP retirement pension, it does not automatically disentitle them to CPP disability benefits, such as there

would be if a person were to earn twice the substantially gainful amount or \$22,420.00 annually.

86. The Legislation also provides that a person who was receiving CPP disability benefits and has returned to work is entitled to have the disability pension reinstated if, **within two years** after the month in which the pension ceased, they become incapable again of working. Any such automatic reinstatement application must be made within one year from the month the person stopped working. There is no limit on the number of times a person can use the automatic reinstatement policy.
87. Additionally, the Legislation provides that if a person who was receiving CPP disability benefits works for greater than two years that the person may be entitled to a fast-track reapplication for benefits up to five years after the benefits have stopped. If more than five years have elapsed then a person would have to make a new application for CPP disability benefits.

DISCUSSION & ANALYSIS

88. I agree with the Claimant that the onus is on the Respondent to prove the applicable deductible amounts.
89. As noted, the only expert witness called was Dr. Le Blanc. In her report dated May 21, 2009, she opines,

However, her particular constellation of cognitive weaknesses (varying levels of attention, difficulty inhibiting verbally, decreased memory, slower rate of processing and learning, reported quick temper at times, impaired cognitive flexibility) do not bode well on her continued employment throughout her life span. If her current job remains the same - or if she finds employment which is similarly structured, with the same types of supports - Ms. Eshghi has the potential to remain employed. However, these types of jobs can be hard to come by, and it is very likely that her job-keeping skills will evidence periods of decline from time to time as well (which may not be tolerable for many employers).

90. In her addendum report dated May 26, 2010, Dr. Le Blanc opines,

Research indicates that maintaining employment after a severe acquired injury can be difficult, with greater unemployment as the years pass, post injury. One study, for example, found that in individuals with TBI, the average employed person changed jobs every 3.5 years, with the majority (73 per cent) working in unskilled jobs, and 39 per cent working in a non-competitive setting, such as volunteering or structured workshops.

...

Thus, in order for Ms. Eshghi to maintain employment until the age of 65, it will be important for her to have employment related supports and job demands which have the following functional requirements...

Structure, consistency, tolerance of decreased speed of completion, tolerance of need to use compensatory strategies, tolerance of decreased ability to perform more than one task at a time, decreased distractions, and employer willingness to provide feedback to (and work with) Ms. Eshghi in respect of behaviors which may negatively impact work performance (such as hyper fluidity, periodic decreased frustration tolerance, occasional inappropriateness).

...

A final consideration is the potential impact of acquired illness as Ms. Eshghi ages. If Ms. Eshghi experiences any additional injury to the brain, then her ability to make up for newly acquired deficits is limited, and will negatively impact her ability to maintain vocational functioning. She may also be more susceptible to dementia as she ages, which could also compromise her skills.

91. As previously outlined, Dr. Le Blanc's evidence at this hearing is somewhat less pessimistic than what was outlined in her reports. During cross-examination, she agrees that many of the problems identified in her May 2009 report relating to the issues faced by people with brain injuries in obtaining and maintaining employment over a long time, do not apply to the Claimant. She also agrees the Claimant has far exceeded what the medical literature anticipated. Further, Dr. Le Blanc admits that when conducting her collateral interview with the Claimant's employer it was clear to her that the Claimant was extremely persistent and goal-oriented and as such was doing fantastically well with her job.

92. Dr. Le Blanc also agrees the Claimant could likely work to age 65 on a part-time basis, 20 hours a week, so long as her medical condition remained relatively the same and so long as she had the appropriate work environment.
93. According to the Agreed Statement of Facts, the Claimant's employment income has been as follows:

Year	Income
2007	\$ 4,359.60
2008	\$ 14,525.23
2009	\$ 8,464.48
2010	\$12,517.46 (to July 31/10)

94. Assuming no change in the Claimant's employment situation for the remainder of this year, her income for 2010 will be \$21,458.17, which is an amount that far exceeds twelve times the maximum CPP retirement pension or \$11,210.04 and falls just under twice the substantially gainful amount or \$22,420.00, which automatically disentitles a person from collecting CPP disability benefits.
95. That being said, the Claimant's CPP disability benefits were terminated effective July 31, 2010. As noted above, at that time her income totaled \$12,517.46.
96. Having regard to the evidence given by the Claimant's supervisor, W.T., and the collateral evidence obtained by Dr. Le Blanc, I find it is more probable than not, that the Claimant will remain working at Kelsan at her current level for the remainder of this year, and for the foreseeable future, such that CPP disability benefits will not be reinstated.
97. As for the Claimant's capacity to work in the future to age 65, the Claimant's evidence is that she will continue to work and seek out new opportunities to advance her education and career. Her view is that she will continue to work full-time. That being said she did express the desire to get married and have a family.

POSITION OF PARTIES

98. The Respondent submits that the evidence supports a finding that there is a real and substantial possibility that the Claimant will be entitled to, or will receive, CPP disability benefits in the future by reason of the severe injuries she sustained in the accident.
99. Counsel for the Respondent submits that the chance or possibility of the Claimant receiving CPP disability benefits in the future should be treated as a contingency and further that this contingency should be calculated at 50%. Counsel cites *SPW v. ICBC*, an arbitration decision dated December 10, 2007, where the arbitrator applied a 50% contingency to the net present value of future CPP payments. The facts in that case are distinguishable to those here.
100. Counsel for the Claimant submits that the likelihood the Claimant will have her CPP disability benefits reinstated is remote and further the chance of this happening is in the realm of speculation such that no contingency for future CPP benefit entitlement should be applied. He states that at her present employment the Claimant is earning almost twice the gainful occupation amount provided for in the Legislation and that it is unlikely her income will revert below that amount. He admits the Claimant may have periods of unemployment in her working life and that it may take her longer to secure new jobs but that in and of itself would not qualify her for CPP disability benefits.
101. The Claimant and Respondent both cite the following decisions for addressing the standard of proof when it comes to proving future hypothetical events such as those in issue here:

Rosvold v Dunlop, 2001 BCCA 1 (CanLII),

Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be

given weight according to the percentage chance they would have happened or will happen.

Reilly v Lynn 2003 BCCA 49,

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple **probability**, not the balance of probabilities, and hypothetical events are to be given weight according to their **relative likelihood**: *Athey v. Leonati*, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati, supra*, at para. 27, *Steenblok v. Funk* 1990 CanLII 3812 (BC C.A.), (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.).

[emphasis added]

Lines v W&D Logging Co. Ltd. 2009 BCCA 106 (CanLII),

In *Athey v. Leonati*, Justice Major, for the court, observed at para. 27 a “future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation”. In *Smith v. Knudsen* this Court applied this standard to both past and future hypothetical events. It is clear from these two cases that a chance of future improvement must meet the standard of a real and substantial possibility, and not mere speculation, in order to be taken into account. The task of the trier of fact is to assess the likelihood of such events and reflect that likelihood in the assessment of damages.

Kovacs v ICBC 1994 CanLII 560 (BCSC),

In order to make a deduction for future CPP payments, there must be a finding as to the **likelihood of payments in the future** and, if possible, some evidentiary foundation should be relied upon.

[emphasis added]

102. I agree with Counsel that the standard of proof to be applied to future hypothetical events is simple probability and not the balance of probabilities. That being said it remains that the probability, possibility or chance that a future event may occur, in this case the Claimant applying for and receiving CPP disability benefits in relation to her accident injuries, must be a real and substantial one.

103. In addressing whether or not there is a real and substantial possibility of the Claimant receiving CPP disability benefits in the future one has to consider the relative likelihood of both positive and negative contingencies that might affect the Claimant's ability to work and the anticipated course with respect to her accident injuries/disabilities.
104. No evidence was called with respect to the participation rates among people with disabilities similar to those of the Claimant, save and except the evidence outlined by Dr. Le Blanc regarding what the medical literature says generally about the difficulties that people with brain injuries face in maintaining employment, none of which appear to apply to the Claimant currently.
105. I am confident that a labour market economist could have provided statistical information with respect to the participation rates of BC resident males and females with disabilities, including those with brain injuries.
106. No evidence was led from CPP outlining what percentage of people whose disability benefits are cut off due to a return to the workforce ultimately have their benefits reinstated and within what period of time.
107. Having regard to the evidence tendered, I find the Claimant to be a credible, albeit an imperfect historian, who was sometimes inaccurate in her chronology of events and tends to look to her mother for information. She also tends to give more information than required and occasionally went off on tangents, and shows some of the hyper fluidity referred to by Dr. Le Blanc; however, I do not find any of this weakened the credibility of her evidence. As noted earlier, she is evasive when confronted with the discrepancies noted by Dr. Le Blanc and with her mother's stated concerns, but I find the Claimant truly believes these allegations do not apply to her; which evidences the over positive view she has of herself.
108. The Claimant impresses me as a very ambitious and tenaciously determined young woman. As Dr. Le Blanc states, she has far exceeded the expectations of the medical practitioners who treated her early on in her recovery. She has defied the odds outlined

in the medical literature dealing with the capacity of those with brain injuries to undertake and retain employment.

109. I also find the Claimant's witness, W.T., to be very credible. He is easily able to describe the nature of the Claimant's current job, how her abilities have improved and her responsibilities have increased since she was hired. More importantly, his evidence is that he is not aware of any physical limitations, cognitive or emotional/behavioral issues that impact the Claimant's ability to work. He is unshaken on his point in cross-examination.
110. With respect to the Respondent's evidence, I am impressed by Dr. Le Blanc and her willingness to acknowledge how far the Claimant has come. Dr. Le Blanc's evidence is not that the Claimant is or will be competitively unemployable in the future as a result of her accident injuries. To the contrary, Dr. Le Blanc admits the Claimant presently appears to be flourishing in her existing employment environment and that her employer appears very happy with her. Dr. Le Blanc also admits that the fact the Claimant continues to be employed for over a year at the same job bodes well for her, in that it defies what is a common problem in terms of employability for people who suffer from brain injuries.
111. Dr. Le Blanc did qualify her evidence by reminding us over and over again that the Claimant's current employment environment provides her with the perfect platform for her employment success and that these factors would not be easy for her to reproduce if she lost her existing job. That being said, Dr. Le Blanc, both in her report and in her evidence, states there is nothing that indicates the Claimant is not and will not be capable of working part-time, 20 hours per week, to age 65 unless, of course, she suffers some further injury and/or some accelerated process of dementia. Dr. Le Blanc could not say with any certainty if or when such a process might come in to play. She simply says that the medical literature suggests for some people with brain injuries there is an increased incidence of conditions such as dementia and Alzheimer's. Dr. Le Blanc could not say if the process in people with brain injuries occurred prior to age 65 and/or at what frequency level.

112. Given the evidence, I am of the view that the Respondent's position is far too pessimistic when it comes to what the future holds for the Claimant. By the same token, I am of the view the Claimant's position might be a little bit overstated.
113. I accept without hesitation that if the Claimant were to lose her current job at Kelsan she would, as she has demonstrated in the past, make it her mission to secure employment of a similar nature. I find that Kelsan is not a benevolent employer as argued by the Respondent. Kelsan is getting exactly the employee they sought for this position. In my experience, employment opportunities for entry-level clerks, such as the one offered by Kelsan, are not rare but rather are ample. What is rare is to find an employee who is so satisfied with an entry position. What is also unique is the professionalism, pride and drive the Claimant as an applicant brings to those positions.
114. Having met the Claimant and heard her evidence, there can be no doubt any employer with a position similar to the one she currently holds, would jump at the opportunity to hire her, She would most certainly be an asset to any employment environment, especially given the fact that she has now created a good employment history.
115. Notwithstanding the numerous positive contingencies regarding the Claimant, I am conscious of the comments made by Dr. Le Blanc with respect to the very specific circumstances that have to come into play for the Claimant to succeed in the employment world. I am also conscious of the fact that finding and maintaining employment may be more difficult for the Claimant if she is required to move from employer to employer.
116. It has been 13 years since the accident. 2010 will be the first full year of employment the Claimant has maintained since the accident. To assume the Claimant's accident injuries, in particular, her very serious brain injury and deficits are going to have no impact on her ability to work to age 65 is unreasonable.
117. However, it does not automatically mean that the impact translates into a real and substantial risk that the Claimant will face a severe and prolonged mental or physical

disability such that she is not substantially gainfully employable as defined in the CPP Legislation.

118. That is not to say there is no risk whatsoever. I cannot ignore the concerns outlined by the Claimant's mother. As well, I cannot ignore the evidence of Dr. Le Blanc. It may be difficult for the Claimant to find jobs over the course of her working life. Such jobs must have structured routine, few distractions and no multitasking. Her cognitive issues may be aggravated in unfamiliar and stressful situations.

DETERMINATION OF THE ISSUES

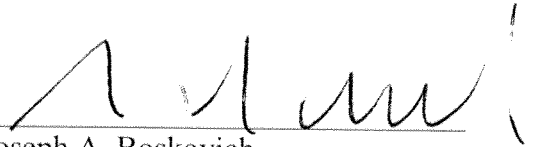
119. Having regard to all of the evidence, I believe there is a 15% chance or possibility that the Claimant will apply for and receive disability benefits from CPP in connection with her accident injuries.
120. The parties agree that the present day value of CPP disability payments to the Claimant's age 65 is \$135,652.00 and, in this regard, the appropriate contingency deduction to be made pursuant to Regulation 148.1(1)(f) is \$20,347.80.
121. With respect to the \$2,749.76 Part 7 overpayment, I do not find that it is deductible pursuant to Regulation 148.1(1)(e) as an amount payable under Part 7 as that amount is capped statutorily at \$150,000.00. This payment was made directly as a result of the motor vehicle accident and for the benefit of the Claimant in her rehab. The overpayment is; therefore, deductible pursuant to Regulation 148.1(1)(i) as "payable to the insured under any benefit or right or claim to indemnity".
122. The total applicable deductible amounts pursuant to Regulation Section 148.1(1) are as follows:

A.	ICBC Part 7 Rehabilitation Payments	\$ 150,000.00
B.	ICBC Part 7 TTD Payments	\$ 50,025.62
C.	CPP Disability Payments	\$ 78,542.94
D.	Tortfeasor's payment to the Claimant	\$ 233,889.98
E.	Future CPP Disability Payments	\$ 20,347.80
F.	Part 7 Overpayment	\$ <u>2,749.76</u>
	Total Deductions:	\$ 535,556.10

123. The Respondent shall pay the cost of this proceeding.

It is so awarded.

Dated this 22nd day of October, 2010.



Joseph A. Boskovich
Arbitrator