

IN THE MATTER OF AN ARBITRATION  
PURSUANT TO S.148.2(1) OF THE REVISED REGULATION 1984  
UNDER THE *INSURANCE (VEHICLE) ACT*,  
B.C. REG 44/83 AND THE *ARBITRATION ACT*, R.S.B.C. 1996, c.55

BETWEEN:

J W

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

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ARBITRATION AWARD

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## INTRODUCTION

1. The Claimant, J [REDACTED] W [REDACTED] (the "Claimant"), seeks compensation under his under-insured motorist protection ("UMP") coverage with the Respondent, Insurance Corporation of British Columbia ("ICBC") for personal injuries arising out of a motor vehicle accident that occurred on October 13, 2011, at the intersection of [REDACTED] in North Vancouver, BC (the "Accident"). For the purposes of this arbitration, it is agreed that the Claimant is an insured for UMP purposes; that the Accident was wholly the fault of another motorist; and that the at-fault motorist is an under-insured motorist. The sole question for determination is an assessment of damages for the injuries that the Claimant has sustained. Following the assessment of damages there will be a further hearing, if necessary, to address the issue of applicable deductible amounts.

2. The Claimant seeks awards for general damages, past income loss, loss of future earning capacity, cost of future care, and special damages, all of which are in dispute.

## EVIDENCE FOR THE CLAIMANT

### The Claimant

3. The Claimant, age 34, was born [REDACTED]. He grew up in Ladysmith, BC, attending Ladysmith Senior Secondary School where he graduated in 2001. From 2001 to 2009 he worked at a variety of jobs including as a cleaner at the Banff Hotel, making barbecue starters for a Ladysmith company, making windows for Thermal Proof, recycling at the Dollars and Cents Depot and installing insulation for Insulpro. These were all full time, labor intensive jobs. He was laid off, went on EI, and saw a TV commercial for Lost Boys Academy (Lost Boys) in Courtenay, BC, for visual effects artists training. He obtained some funding from EI, and took out a student loan of \$7,000 to \$8,000 and enrolled. The course lasted one year. He commuted an hour and a half each way between Nanaimo and Courtenay, BC. Gillian Pearson was a co-owner of Lost Boys. She did not teach the visual aspects of the program but helped with resumes, creating websites and advising on his demo reel. A visual effects artist integrates computer graphic images into real world footage, working on film footage after it has been shot and adding or deleting visual effects. The Claimant learned how to model which involves taking a big grid with thousands of intersecting lines which are moved about to create whatever image is needed.

This is all performed sitting at a computer. Visual effects are used in movies, television shows, and commercials.

4. The Claimant graduated from Lost Boys in April 2010 with an honors pass, the highest level of achievement. Ms. Pearson assisted him with job finding. Upon graduation he had a job lined up at ██████████ Studios in Vancouver as a visual effects production assistant. This required that he move to North Vancouver. He remained at ██████████ Studios for approximately one month when he was let go as the studio needed a senior animator. He was paid \$700 per week at ██████████. On one occasion at ██████████ he worked 14 hours straight doing a night shoot in the woods on the North Shore Mountains. He next obtained employment within a few weeks as a visual effects artist at ██████████. Most of the work was on a computer. He did go on set and did a lot of modeling. He built an international space station model. He found the job awesome and was totally happy. He worked there just over a year prior to the Accident.

5. For the first three months at ██████████ he worked for "free" as part of an "internship" to make sure he was competent. He agreed to this arrangement to "get in the door". His starting pay rate was \$110 per day for an 8 hour day (\$13.75/hour). He filled in his own work time on a computer spreadsheet. He did work a bit of overtime which was put into a "time bank" and does not appear on the spreadsheet. Shortly prior to the Accident his rate increased to \$130 per day (\$16.25/hour). He signed a standard employment contract with Lux.

6. But for the Accident his plan was to remain at ██████████ for a while but then to move around trying to get into one of the larger studios that had big budget movies. This would expand his expertise and get him more money.

7. He has been in a relationship with S█████████ ██████████ (██████████) for 13 or 14 years. They currently live in Nanaimo. She is attending nursing school and has a part-time job at TD Bank.

8. In the Accident the Claimant was a right front seat, belted passenger stopped at an intersection. A vehicle ran the red light striking another vehicle which then struck the right side of the vehicle in which the Claimant was a passenger. All three vehicles were written off. The following day he went to a walk-in clinic and saw Dr. Lee. He was sore and stiff in his neck and back. He continued to see Dr. Lee through 2011. The symptoms were a sore neck and back and

possibly a few headaches. Dr. Lee possibly prescribed muscle relaxants. He was referred for x-rays and for massage. The massage was very painful and he did not return. He commenced physiotherapy with Mr. Oldham in either late 2011 or early 2012. The symptoms were a really sore neck and back. He was given breathing and posture exercises and manual manipulation. He did the exercises recommended at home. He continued to see Mr. Oldham until he moved to Ladysmith in the Spring of 2013.

9. Following the Accident he attempted to return to work a few times but could barely look at a computer after travelling 45 – 60 minutes from home to work by bus – Sea bus – Skytrain and on foot. He worked part days a few times but was ultimately told just to stay home. He knew he was not able to perform as required. When he had attempted to return to work, and was sitting in front of the computer, and assuming his customary posture with his head thrust forward so as to be very close to the computer screen, his symptoms were a lot worse. He never got to the point where he felt he could sit for long enough periods of time and did not want to sign a contract with another studio and have to leave because of health issues. It was a small industry and word would get around if you could not complete your contract. He did lots of work at home simulating sitting and standing at a desk. He was never extremely confident that he could do it on a continual basis.

10. He became frustrated with the walk-in clinic where Dr. Lee worked as it did not accept advance appointments and he had to wait hours when attending. His symptoms were getting worse. He commenced to see his former family doctor at Ladysmith in February 2012. He took the ferry to Nanaimo and was picked up there.

11. The Claimant asserts that the injuries he sustained in the Accident are headaches, sleep problems, emotional difficulty, injury to the neck, injury to the left mid-upper back, injury to the lower back, and injury to the left upper leg.

12. The neck was quite sore most of the time post-Accident but there was quite an improvement when he was being treated by the kinesiologist, Ms. Law, on a regular basis. Otherwise the symptoms were up and down depending on activity. At first he was unable to turn his neck, but that has improved. He does not currently have daily neck pain; it only really bothers him when his back gets sore. Sitting too long in a car causes soreness in the back which

starts soreness in his neck. He had been very uncomfortable sleeping in a hotel in Vancouver during the hearing. He developed a severe headache and had to nap on the floor in his hotel room.

13. The upper middle back has been really sore. Mostly it was a throbbing pain that spread out. Currently his mid-back is very sore which he attributes as the reason for his sore neck and headache. The mid-back symptom has gotten better over time but is always there and he has learned how to deal with it. Sitting at a computer, any posture where his arms are extended in front of him and doing dishes aggravates his back. Exercise helps, but what is most effective is lying on the floor with a bolster under his legs. This was a posture recommended by Mr. Oldham. He does lots of exercises mostly stretching, some given to him by Mr. Butt and Ms. Law who was a "lifesaver". The mid-back pain began on the night of the collision. He reported it to Dr. Lee. It has continued up to the present although the intensity has fluctuated.
14. The lower back pain did not commence immediately after the Accident. It really started to hurt when he commenced cardio exercises with Ms. Law (which was May 2015). It might previously have hurt a little bit. Currently his lower back symptoms come and go depending on activity. Long walks, wearing a backpack and exercising aggravates these symptoms.
15. He had very bad headaches when his neck was stiff and sore. They came from the back of the neck up over the top of the head. The headaches were present throughout the time until he started strengthening his neck with Mr. Butt. They slowly started to get better with the IMS treatment and neck exercises.
16. After the Accident he was super depressed, frustrated and easily angry. He did not enjoy big crowds. He was having sleep issues. He had dreams that he was being attacked by animals and once woke up throwing punches into his pillow and once pushing Ms. [REDACTED] head into the pillow. These emotions first occurred about a year after the Accident when he started to think whether he was going to be able to return to work as a visual effects artist. Dr. Kennedy prescribed some medications which he took, although he was not a fan of taking any kind of medication. Dr. Kennedy mentioned counselling but the Claimant did not feel it would be helpful as he is not a talkative type of person.

17. Prior to the Accident he always had some difficulty falling asleep but he would sleep through the night. After the Accident he could not get to sleep at all. He was trying to sleep on his back. He could not stop thinking about things. He took some medication at one point to assist with sleep but it made him drowsy. Currently his sleep is better. He got a new bed in 2014 which seemed to help. He started to sleep quite well when he was working with Ms. Law.

18. The Claimant has also had tingling and numbness in his left thigh and super tight calves when walking.

19. He has had three functional capacity evaluations (FCE) all of which aggravated his symptoms but the recovery time from the most recent FCE was faster.

20. He underwent physiotherapy treatment with Mr. Oldham, initially once every one or two weeks. It was hands on manipulation of the neck, upper and mid-back. He was prescribed exercises, told to sleep on his back, and stay in bed for long periods of time to keep the symptoms down.

21. He received additional exercises from Ms. Law and Mr. Butt. He worked with weights and heavy balls. He did the exercises every day at home and had to stop a little bit to let his body rest. He continues to do daily stretches as otherwise he gets really stiff really fast. His home routine included an hour stretching, an hour walking, and 40 minutes working with weights and balls or stretch bands.

22. At the end of 2013 or the beginning of 2014 he commenced an active rehabilitation program at the Canadian Back Institute (CBI) in Nanaimo, paid for by ICBC. He went once or twice for a few months. He felt the treatment was not beneficial and stopped. The Claimant commenced treatment with Mr. Butt at Nanaimo Physiotherapy Clinic in February 2014. He began IMS (intramuscular stimulation) injection treatments. It was scary and painful but slowly helped. Initially he received treatments once a week; now it is once every 6 or 7 weeks. He has had at least 30 treatments. He has paid for these treatments and has to continue them. Mr. Butt recommended yoga classes but he could not afford classes and so he got a DVD from the internet.



23. He began seeing the kinesiologist, Ms. Law, in May 2015. He saw her for about 6 months until funding for it stopped. He saw Ms. Law approximately 40 times. Her exercises helped a lot and he would continue with the treatment if there were money for it.
24. Prior to the Accident he had no neck or back problems and no physical difficulties working at [REDACTED]. He had no restrictions on his social or recreational life or housekeeping activities. The majority of the day at work he would be seated at the computer. His hands were in front of his body, one on the mouse and one on the keyboard.
25. He became super depressed at the prospect of giving up his dream job. He did not want to go back to the kind of regular old jobs he had had in the past. When he moved to Vancouver Island in 2013 he was still not willing to give up on his career; that was why he continued to simulate sitting at a desk. He was never able to sit more than 4 hours at a desk without having to get up and stretch, and when the pain increased he would lie down with his feet on a bolster and wait it out.
26. The Claimant worked with Mr. Woodward to look for a job in 2013. They prepared a resume and he volunteered at a sign shop for a couple of days. He had to scrape a decal off a work truck on the first day and the scraping motion with his arms really aggravated his symptoms. He did a small design and took it to the company but never heard back.
27. The Claimant also worked with Mr. Bhopal for 2 to 3 months in 2015. Mr. Bhopal's services were paid by ICBC. He went to a few places, a chef's position at the resort in Parksville, at a window/truss shop and a kitchen cabinet shop. The window shop job was as a salesman for which he was not suited. The kitchen cabinet shop involved installation which would include overhead work which he could not do. Similarly he did not consider work as a chef an option. The Claimant expressed interest to Mr. Bhopal with occupations such as home inspector, kinesiologist, horticulturalist, taxidermist, and conservation officer.
28. The Claimant was really excited when he first began to work with Mr. Bhopal as he hoped they would get him some sort of schooling or find him "the miracle job" he could do. He expressed an interest in retraining. The relationship however deteriorated and the Claimant did not really understand why.

29. At present the Claimant intends to become a taxidermist. He has made his own inquiries and found some schools. One is "Birds Only" in Surrey. There is a school in Montana which is a 4 week course, as well as a 2 week custom designed course. The Montana course, including fees, travel and accommodation, costs between \$18,000 to \$20,000, plus the cost of the specimens.

30. The Claimant continues to receive temporary total disability (TTD) benefits from ICBC. The Claimant applied for Canada Pension Plan (CPP) disability benefits but they were denied either because he had not paid into CPP long enough or he was too young, or some other reason.

31. Had the Accident not occurred he intended to stay in Vancouver for a few years but move into bigger studios, and then to get hired in Toronto, Montreal or London and L.A. It is common for visual effects artists to move around and it would be an opportunity to see the world. His financial goals were to pay off debts, do some travelling, buy a house or condo in the Lower Mainland and start a family. At present, he has no money for a down payment; his credit is not good, he has been unable to get a new car and he has not been able to travel.

32. His relationship with Ms. [REDACTED] has been affected. They are now often frustrated with each other and constantly fighting. He does not play sports or golf. He does not like to socialize because he has nothing good or interesting to say. They were invited to a wedding in Turkey in late 2011 by a friend with all expenses in Turkey paid for, but had to cancel the trip as they were not able to travel or carry their suitcases.

33. The Claimant still performs housekeeping activities but he spreads them throughout the day. Cooking, doing dishes, washing the floor all aggravate his back too much. He would not attempt snowboarding again and Ms. Law discouraged golfing.

34. The Claimant is looking forward to getting into a new career as a taxidermist.

#### *Cross Examination*

35. The Claimant tried to provide accurate information to his health care providers and information correctly recorded in care records was likely more accurate than his memory of events five years ago. He guessed that possibly did have poor posture prior to the Accident and

agreed that he was overweight and not happy with his physical condition following the year at Lost Boys when he had not been exercising.

36. He kept a pain journal commencing immediately after the Accident. Initially he could not say who recommended he keep it but agreed that on discovery he said Dr. Lee had recommended it. The pain journal entry for October 14, 2011 (the day after the Accident) contains no note of low back pain. The Claimant only recorded low back pain when it was really bad and it was only after he began treatment with Ms. Law that it bothered him enough to complain about it. The Claimant agreed that a number of the daily entries in the pain journal are identical and a "cut and paste" job. The Claimant was not a fan of the pain journal which he found depressing, particularly where overall the symptoms did not vary a great deal and he was in constant pain unless he was in bed. On multiple occasions there is a pain journal entry recording symptoms on the same day that the Claimant was attending a doctor or physiotherapist who also recorded symptoms and the recordings are different. For some entries the Claimant attempted to explain the differences; for other entries he agreed there was a discrepancy. Generally the pain journal entries were more negative whereas the health care providers were recording some improvement. The pain journal is not shown to any treating healthcare professional and ultimately he simply discontinued it.

37. In June 2012, when Dr. Kennedy recorded continuing improvement and that the Claimant was looking for new employment, the Claimant agreed that he was only doing research trying to figure out what he was going to do. He did go back and forth a lot between thinking he could return to work as a visual effects artist and trying to find other employment. He did not actually apply for any employment and did not know what kind of jobs he could do given his symptoms.

38. It was suggested that the Claimant mislead his healthcare providers by telling them that he often had to work 12 or 14 or 16 hours a day. The Claimant explained that additional hours not recorded on the [REDACTED] spreadsheet were "banked". The Claimant insisted that he did work overtime at [REDACTED] and was not paid overtime. Finally, if the [REDACTED] spreadsheet did not reflect his overtime hours, then his explanation was that he was getting "ripped off".

39. The Claimant agreed in direct examination he said that he was fired from [REDACTED] because he could not meet work demands because of his injuries, but on discovery he had said that [REDACTED] told him they did not have any work for him anymore.

40. Being a visual effects artist was a lifelong passion, a "dream job", and he would have done anything to get back into the business.

41. When considering a return to work, it did not occur to the Claimant to seek assistance from Ms. Pearson. He did not attempt to obtain small freelance jobs because it would be doing "crappy things"; he wanted to work on blockbusters. He agreed he could have tried.

42. Between June and September 2012 he was reporting an ability to sit longer hours at the computer but the longer he sat the more his pain increased. He did not want to take pain medication and put toxins in his body to get in a job. Between 2012 and 2014 he did from time to time take medication to assist with sleep. He discussed retraining with Dr. Kennedy in September 2012 but had not done any retraining for money reasons. He agreed that he commenced to receive TTD benefits from the respondent in May 2012 with a cheque that included back benefits of about \$9000. Between May and December 2012 he received \$11,285 in TTD benefits. In 2013 he received \$16,425; in 2014 he received \$15,642, and in 2015 he received \$11,732 for a total to the end of 2015 of \$63,085.

43. In 2010 he had a total income of \$24,748, of which \$11,385 was net commission income and \$10,476 was EI benefits. In 2011 he had total income of \$18,552 which was all net commission income. At the end of 2015 he received the sum of \$47,612.15 being his pro rata share of the liability insurance limits arising from the Accident.

44. The Claimant did discuss with Dr. Kennedy the career of home inspector. The Claimant looked into it but decided that it was not within his capabilities. He did not have enough construction experience. He did not attempt a job shadow. A family member had a home inspection company and he did discuss the occupation with her.

45. The Claimant did not remember discussing with Mr. Winkelaar neutral postures and use of a Varidesk but agreed that Mr. Winkelaar held out the possibility of returning to the job of visual effects artist if the Claimant could retrain himself to maintain a neutral posture. As of

December 2014 no specific work option for which he was fit and which interested him had been identified. The Claimant did look into the CNC machinist occupation raised by Mr. Winkelaar but did not go to BCIT because he had no money for the course. When in late 2015 he did receive the \$47,000 payment from ICBC, he used the funds to pay off a loan of about \$8000, pay other bills, buy some new clothing and eat dinners rather than soup.

46. The Claimant agreed that his use of prescription medication diminished over time. He took a lot of Tylenol 3 for the first year or two. He has not filled any prescriptions for a long time, as he learned how to pace his activity.

47. Dr. le Noble's physical exam in 2012 was a particularly aggressive exam which hurt him. Dr. le Noble did recommend resuming his old exercise routine but dividing the weights by 10 as well as some hand-written exercises. The Claimant did purchase a bench and weights in September 2012 and used them.

48. He did not take up Dr. Kennedy's suggestion of swimming, as he was not a fan of the water. He did not immediately start cycling but subsequently bought a spin bike but using it hurt his back. Subsequently he used a recumbent bike at Mr. Butt's facility.

49. He did not enroll in yoga classes because he could not even have afforded a \$15 fee. He knew that it would be better to have an instructor able to see that the exercises were being performed correctly.

50. The working relationship with Mr. Bhopal ultimately broke down. The Claimant never received a copy of Mr. Bhopal's discharge report. There were occasions when the Claimant canceled scheduled meetings with prospective employers on two days' notice and other occasions where there was a delay of up to five days in responding to a prospective new date. Mr. Bhopal was scheduling meetings without prior consultation. The Claimant's availability was affected by his access to the car shared with Ms. [REDACTED] and his own physiotherapy or kinesiology appointments for which he was paying personally at the time. Ultimately the Claimant supplied lists of dates up to a month in advance when he was available. Another issue was phone contact. That was corrected by use of e-mail, except for misaddressed e-mails. At times the Claimant did initiate communications with Mr. Bhopal. The Claimant looked at a small

welding job but it was only piecework and he would need retraining to be a welder. He considered volunteering as a dog walker but never did it, possibly because of scheduling issues.

51. On Questions From the Arbitrator, the Claimant said he had a little bit of low back pain throughout that increased quite a bit to the point that he was complaining about it when he commenced cardio exercises with Ms. Law. He was at the time going for really long walks and leaning over quite a bit which may have caused the low back pain. At one point both Ms. Law and Mr. Butt told him to cut back on his exercising as he needed rest days. Before he cut back he was exercising over two and half hours each day.

52. Being a chef was not an option because there was lots of reaching for the dishes overhead and bending over and he was having a problem with cooking at home. The Claimant has never asked ICBC to pay for the cost of any taxidermy course as he was unaware he could do that.

53. The Claimant does not recall whether he mentioned low back pain to Dr. Yoneda. If it was really bothering him he would have, because he tends to just tell people what is really bothering him.

54. The Claimant considers that his mid-back symptoms plateaued a year and a half previously, shortly after commencing therapy with Mr. Butt.

55. The Claimant explained that his frequent body movements whilst sitting giving evidence at the hearing, sitting with his hands on his cheeks, elbows on his knees and holding his head in both hands, is more comfortable than sitting upright and it stretches his back. His back had been quite sore for the last few weeks and so he may have been moving about more than usual.

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56. Ms. [REDACTED], age 31, is the common-law partner of the Claimant. She is currently enrolled at Vancouver Island University in the third year of a nursing program. She also works part-time at TD Canada Trust. She met the Claimant about 14 years ago when they both worked at a Dollars and Cents Recycling Depot. They have been living together since shortly after they met. Ms. [REDACTED] was the driver of the vehicle in which the Claimant was the passenger at the time of the Accident. Her own claim for her personal injuries suffered in the Accident remains outstanding.

57. The Claimant discovered the visual effects course at Lost Boys after being laid off from a previous job in 2009. He arranged funding for the course through EI and was very enthusiastic about it. He drove daily from Nanaimo where they were living to Courtenay and returned except for some occasions when he stayed at the college overnight and slept on a couch or the floor. Upon graduation from Lost Boys, they moved to North Vancouver. She obtained a transfer to a TD branch there. They lived rent-free with her grandfather but were responsible for looking after the house, his cat and groceries.
58. Immediately following the Accident the Claimant was in constant pain, appearing stiff and slow in his movements, and was angry. He tried to return to work at [REDACTED] but was not able to do it. He would come home early and lay down. He was fired from the job. He was devastated by the loss. Working in the visual effects industry was his long-term ambition.
59. In 2013, they moved to Nanaimo because her grandfather's house was to be sold.
60. Prior to the Accident the Claimant was a happy, cheery person, full of life and interested in nature. After the Accident he was sad, down, and did not smile or laugh much. He was more irritable and had some anger and frustration. There are now some topics that they do not discuss because it may lead to an argument.
61. The Claimant does the cooking and dishes but he now takes a break before doing dishes because he says he is in pain. The Claimant has had some nightmares and fighting dreams. On one occasion he woke in the course of shoving her face into a pillow. The areas of pain are mostly the neck and back generally, as well as headaches.
62. Prior to the Accident they enjoyed scenic drives, walking, hiking, socializing, camping and visiting family and grocery shopping together. Since the Accident they do not socialize much or go camping or on long drives. They shop for essentials. Their sexual activity has decreased because one or other of them is in pain.
63. Prior to the Accident their plans were to pay off loans, buy a house somewhere where the Claimant could work and ultimately to have a family.

64. Ms. ██████ believed that the exercises overseen by the kinesiologist had been very beneficial. His neck and back have gotten better with exercise and treatment but she was unable to say what part of the back had improved as the Claimant “keeps it pretty general”.

#### **MEDICAL WITNESSES FOR THE CLAIMANT**

##### Dr. Mona Lee

65. Dr. Lee is a general practitioner called as a fact witness. She saw the Claimant on nine occasions between October 14, 2011 (the day after the Accident) and March 9, 2012. She worked at the Mount Seymour Walk-In Medical Clinic. The Claimant had not previously been her patient. The Claimant reported symptoms of pain in his neck, mid-back (thoracic area), and low back. There was palpable spasm in the low back. The symptoms were moderate. She prescribed a muscle relaxant and recommended physiotherapy (which was instituted by Mr. Oldham in November 2011). On October 25, 2011, she wrote a note indicating the Claimant could return to work three days a week as tolerated. On December 23, 2011, she referred the Claimant to a physiatrist, Dr. le Noble (who saw the Claimant on March 27, 2012). X-rays of the thoracic and lumbar spine were normal. The last appointment was March 9, 2012. Dr. Lee understood the Claimant was moving to Vancouver Island.

##### John Oldham

66. Mr. Oldham is a registered physiotherapist who treated the Claimant on 47 occasions between November 23, 2011 and February 21, 2013. He was called as a fact witness. The vast majority of Mr. Oldham's treatment was at the cervical and thoracic levels, although from time to time he also treated the lumbar area. The Claimant's low back pain was intermittent from the beginning. The neck pain and thoracic pain were constant initially. In December, 2011, Mr. Oldham was concerned about a possible compression fracture in the low thoracic spine. By history and observation, Mr. Oldham understood that the Claimant had pre-existing poor posture, and customarily slept prone. Mr. Oldham had the Claimant change his sleeping position to lying on his back with two pillows under his head and a knee bolster which provided immediate comfort. Mr. Oldham routinely recorded the Claimant's subjective reports of his activities in response to treatment. Mr. Oldham was made aware of the work requirements of a visual effects artist which he understood to require basically sitting in front of a computer for 8 hours per day or longer. The treatment was aimed at maximizing the Claimant's pain-free sitting capacity for



whatever job he might obtain. From time to time, the Claimant's reported symptoms worsened which was thought to result from either increased activity or more aggressive physiotherapy treatment. Generally however, over the course of treatment, the Claimant's subjective complaints decreased and his function improved. The treatment generally was aimed at straightening the spinal column.

67. In January 2012, the Claimant reported being pain free for between 1 to 3 or 4 hours, depending on activity. In February 2012, the Claimant reported having rested 16 hours in a day and being pain free. In March 2012, he was furious at having markedly increased symptoms caused by what the Claimant considered to be a rough physical exam by Dr. le Noble. In June 2012, the Claimant reported sitting at his computer for 8½ hours in a day with his pain beginning to increase after 5 hours. In July 2012, he reported taking two days to recover from having sat 8 hours a day at the computer for 3 days. In December 2012, the Claimant reported a "vice like neck pain" after sitting 8 hours at the computer. The pain started increasing after 45 minutes.

68. Over the general course of treatment, the Claimant was generally getting better with time, but symptoms were worse when the Claimant increased his level of activity, particularly sitting at a computer. During Mr. Oldham's treatment, the Claimant was not engaged in an active rehabilitation program; he was given exercises and encouraged to walk. Mr. Oldham was trying to keep the Claimant off work as long as possible because the Claimant was very slowly improving with time and Mr. Oldham thought that the longer the Claimant was off work the more likely he would be able to return to work. Mr. Oldham urged the Claimant to increase the amount of rest or non-weight bearing time while at the same time increasing exercise such as walking. Mr. Oldham knew that computer work was problematic. He had many discussions with the Claimant about returning to some kind of employment, although Mr. Oldham has not recorded the dates of those discussions. At some point Mr. Oldham did tell the Claimant that he would not be able to return to his old job. Mr. Oldham agreed that any suitable job would likely require the Claimant to be able to take rest breaks and take some medication for pain relief. In July 2012 the function and complaints were basically static. Nonetheless, there had been pretty significant improvements in less than a year post-Accident.

69. Mr. Oldham never saw Dr. Kennedy's clinical records. Mr. Oldham's objective findings supported the Claimant's subjective complaints. Mr. Oldham's involvement with the Claimant ended on February 21, 2013 as the Claimant was moving to Vancouver Island.

Dr. Fergus Kennedy

70. Dr. Kennedy is a duly qualified and licensed general practitioner practicing in Ladysmith, B.C. He had been the family doctor for the Claimant from childhood until the Claimant moved to Vancouver. His medical/legal report is Exhibit '6'. It reproduces very closely his clinical notes appointment by appointment. Dr. Kennedy has treated the Claimant from February 17, 2012 up to the present. (From February 2012 until March 2013, the Claimant travelled to Ladysmith from North Vancouver for the purpose of seeing Dr. Kennedy.)

71. Over the course of treatment, Dr. Kennedy prescribed Naproxen, Tylenol #3, Flexeril, Trazodone, and Cipralex and Lyrica, and encouraged active movement to improve physical condition. In April 2012, the Claimant reported intermittent tingling in the left lumbar area, intermittent neck pain and some low back pain. The Claimant was considering a return to work in some capacity but said he could not return to his former employment. A return to work was encouraged. In June 2012, the Claimant reported he was looking for new employment and Dr. Kennedy suggested he might need to take some rest breaks and some over-the-counter medication for pain. In the Fall 2012, the Claimant was somewhat depressed and given a trial prescription for Trazodone. He thought he might need retraining for new employment in the future. In November 2012, the Claimant was feeling despondent and given a trial of Cipralex.

72. In January 2013, his neck pain was improved but the low back condition was essentially unchanged. He was engaging in an activity program supervised by a physiotherapist and appeared motivated to return to work. In March 2013, the Claimant hoped to be retrained for a new occupation at some time in the future and Dr. Kennedy advised that a return to work would be beneficial for the Claimant's mood, self-esteem, and finances. In the Fall of 2013, he was exercising regularly, had lost weight, was still having daily muscular pain, but his overall mood was improved. Dr. Kennedy thought that the Claimant was gradually realizing that he would never be able to return to his former employment.

73. In January 2014, the Claimant reported having attended a rehabilitation program that was too aggressive and severely aggravated his symptoms. In February 2014, he commenced physiotherapy treatment with Brandon Butt which included intramuscular stimulation and an exercise program. This treatment was beneficial. The Claimant hoped to become employed as a home inspector. He was taking less medication. In December 2014, he had a FCE which worsened his physical symptoms and made him despondent about future employment.

74. In April 2015, he was attending the physiotherapist once every two weeks. He no longer was having headaches and neck pain. He continued to have low back pain with some referred neuralgia down both legs. A repeat lumbar x-ray was normal. Walking 10-15 minutes brought on an onset of low back pain. He was not taking any prescription medications, only Ibuprofen. In August 2015, his neck was much improved since he had been attending a kinesiologist. He was working with a vocational counsellor but the jobs under consideration were not realistic. In September 2015, the Claimant expressed a desire to go back to school to retrain.

75. In March 2016, he was continuing to see the physiotherapist once every 6 weeks and hoping to retrain as a taxidermist. He continued to have pain in the left anterior thigh, but was focusing on his fitness level and had lost a bit more weight. On September 13, 2016, the Claimant continued to see his physiotherapist once every 6 weeks. Another FCE in July 2016, had caused significant low back pain. The Claimant was interested in becoming a taxidermist and had identified a program in Montana.

76. Dr. Kennedy concludes in his medical/legal report as follows:

*In summary, this 34-year-old man has had chronic pain and stiffness since he suffered soft tissue injuries affecting his neck and lumbar spinal areas after the motor vehicle Accident referred to above. He has lost his job as a visual effects artist, because he was unable to perform his required duties, as a direct result of these injuries. He remains unemployed to the present day. In my opinion, he is capable of doing other work, but should not return to his previous career. He should avoid working long hours and should avoid postural strain on his neck and lower back.*

*He has also had significant mental health issues, with a probable diagnosis of*

*adjustment disorder. He has tried hard to improve his physical fitness, and has committed to regular aerobic exercise and weight loss. He has a very supportive physiotherapist, and continues to get benefit from his physiotherapy treatments.*

*His prognosis is-unclear I think he will continue to have pain and stiffness in the affected areas of his body in the long-term, but there may be some further improvement in this regard over time. He no longer requires prescription medications for this, and this is obviously a good thing He should continue to be physically active, and should avoid weight gain in the future. With regard to his mental health, the best assistance for this would be for him to find a new career, reestablishing daily routines and regular remuneration.*

77. At the hearing, in cross-examination, Dr. Kennedy also gave the following evidence:
- a) If the Claimant did not follow treatment recommendations, it could hinder his improvement over time;
  - b) Up to April 20, 2012, the neck and low back were the main areas of complaint; there is no note of a prior thoracic spine complaint although there had been a prior thoracic spine x-ray;
  - c) As of September 2012, it was obvious to Dr. Kennedy that the Claimant could not return to his former employment;
  - d) In May 2013, when the subjective symptoms were worse, Dr. Kennedy could not say why, as generally symptoms do not get worse;
  - e) Dr. Kennedy completed the physician's portion of an application for a CPP Disability Pension although he considered that the Claimant was not totally disabled;
  - f) The first recorded complaint of left thigh symptoms and headache is November 21, 2014;
  - g) Although Dr. Kennedy gave a note in August 2015 to say that the Claimant was fit to do job shadowing, he had been capable of job shadowing for a long time; and
  - h) Dr. Kennedy has encouraged the Claimant to pursue becoming a taxidermist. It is a job that involves movement even if there is a sedentary component. There may be some further improvement in the Claimant's physical condition. It is a good sign that he does not know require prescription medication. Primarily, he needs to get a new job.

Brandon Butt

78. Brandon Butt (Mr. Butt) is a licensed registered physiotherapist. He was called as a fact witness. He treated the Claimant from February 20, 2014 up to the present for a total of 36 visits. The last visit was October 3, 2016. The Claimant was very cooperative with treatment although there were times when he appeared depressed and frustrated. He was enthusiastic to resume activities. From Mr. Butt's observation the Claimant seemed to be working hard when exercising at the clinic and was at the high end of the scale for enthusiasm.

79. On initial assessment, the Claimant had pain in the neck, thoracic and lumbar spines, significant limitation of movement in all directions of the neck and thoracic spine and all directions of movement of the lumbar spine except right rotation and right side flexion. Mr. Butt proposed intramuscular stimulation (IMS) in combination with exercise as treatment. IMS is painful. It involves the placement of between 20 - 30 needles into muscle to a depth of 15 - 20 mm. Mr. Butt did not commence his IMS treatment until April 2014 after the Claimant had left the CBI program.

80. Over the course of his treatment Mr. Butt considered that the Claimant's functional complaints had been a relatively stable although the frequency of IMS treatments required had been reduced significantly from once per week to once every two months. In addition, Claimant was better able to do vigorous exercise on a self-directed basis.

81. Generally speaking the Claimant's subjective complaints were consistent with Mr. Butt's objective observations. An increase in activity such as that involved in undergoing a FCE caused an exacerbation of symptoms. The "recovery" time following the 2016 FCE was much shorter than for previous evaluations.

82. In January, 2015 there was some improvement in symptoms. In March 2015 more spinal segments were being treated with IMS. A reported reduction in symptoms allowed more aggressive treatment. By the last appointment on October 3, 2016 following the summer FCEs, the Claimant felt he was almost back to his pre-FCE condition and Mr. Butt was back to his maintenance kind of treatment. Subjectively, the Claimant was reporting that his low back was pretty good; he mid-back sore but not too bad; exercise and stretching were better tolerated; his headaches were improved and his neck had been fairly good.

83. On cross-examination Mr. Butt gave the following evidence:

- a) On initial presentation in February 2014 the Claimant was still trying to decide if he could return to work as a visual effects artist;
- b) The Claimant was noted to be “deconditioned” at the outset and there was discussion aimed at improving the Claimant's physical condition;
- c) In May, 2014 Mr. Butt recommended cognitive behavioral strategies. The Claimant fitted any definition of chronic pain and instruction on pacing his physical activities and reducing psychological stressors might assist;
- d) The sources of the Claimant’s stress were the relationship with his girlfriend, lack of finances, and an inability to settle on a vocation as well as the number of medical treatments that were aggravating his symptoms;
- e) Mr. Butt recommended yoga but had in mind organized classes with an instructor rather than using a DVD for instruction;
- f) Mr. Butt was aware that his treatment was not producing all of the results that he had hoped for; and
- g) Sitting at a computer for long periods was the Claimant’s biggest problem in aggravating his symptoms.

Nicole Law

84. The Claimant attended 36 kinesiology sessions with Nicole Law, starting on May 8, 2015 and ending on September 29, 2015.

Dr. Roy O’Shaughnessy

85. Dr. O’Shaughnessy is a duly qualified and licensed psychiatrist who saw the Claimant on May 12, 2015 on referral from the Claimant's counsel. His medical/legal report dated May 19, 2015 is Exhibit ‘1’.

86. Dr. O’Shaughnessy diagnosed an adjustment disorder with anxious mood and depressed mood. More serious symptoms suggesting a major depressive episode or other anxiety disorder were not present. The adjustment disorder was attributed primarily to the injuries sustained resulting in pain and difficulties initiating and maintaining sleep as well as the secondary stressors, including financial difficulties and alteration of lifestyle. At the time Dr.

O'Shaughnessy saw the Claimant most of his symptoms had improved and it was appropriate to focus more on vocational issues and retraining if required. The Claimant needed to have some form of meaningful employment. Dr. O'Shaughnessy recommended a referral for a vocational assessment to include both interests and abilities and thought that many of the Claimant's symptoms would improve substantially once he was able to deal with the anxiety related to financial stress and not having work or a career. The Claimant did not then require any psychiatric or psychological intervention although he was at risk for developing further symptoms if his pain complaints did not improve and/or if he was unable to find suitable employment.

87. On cross examination, Dr. O'Shaughnessy gave the following evidence:

- a) lack of cooperation and a poor attitude towards vocational rehabilitation would be a barrier towards getting a job; and
- b) the Claimant was prescribed an antidepressant only once for a very brief period of time. He was also prescribed Trazodone but it was mostly for sleep issues.

88. From Dr. Shaughnessy's perspective the most important thing for the Claimant was to find a new job as the anxiety and depression components of his symptoms would likely get better. It would be detrimental to his mental health if he stayed off work and did not make any attempt to return or retrain.

Dr. Bruce Yoneda

89. Dr. Yoneda is a duly qualified and licensed orthopedic specialist practicing in Victoria, B.C. He conducted at ICBC's request in April 2016 an independent medical exam (IME) for the purpose of determining the Claimant's continuing entitlement to 'no fault' benefits. His report dated April 26, 2016 and the single page addendum dated October 13, 2016 were admitted as Exhibits '4' and '5'. Despite being retained by the respondent, Dr. Yoneda was called as a witness for the Claimant. In his report Dr. Yoneda diagnosed soft tissue injuries to the neck and upper back, caused by the Accident, and gave a prognosis as "poor – as good/bad as he is going to get." He recommended the Claimant be assessed for "permanent disability pension" on the basis that his FCE from 2014 would not have changed significantly. Dr. Yoneda's report is quite brief, barely over two pages. In coming to his opinion, he relied upon a vocational rehab

discharge report from Bhopal Rehabilitation Consulting dated December 30, 2015 and a FCE from Mr. Winkelaar dated December 29, 2014. The history he obtained included an inability of the Claimant to "stand, sit, walk more than 15-20 minutes at a time".

90. Dr. Yoneda understood the purpose of his recommendation was to help the Claimant to cope, because he had plateaued a couple of years earlier and was not going to get any better.

91. On cross examination he agreed that the documents he reviewed were incomplete. He did not have Dr. Kennedy's clinical records. Additional treatment records would have been helpful. He was unaware of the Claimant's reports to Dr. Kennedy in 2012 about his capacity to sit or walk for much longer periods of time. The doctor's response was that those reports were not relevant because they recorded activity in 2012. Dr. Yoneda had observed the Claimant during the 45 minute assessment and noted him to be looking pretty uncomfortable with shifting and compensatory body movements. He remained adamant that the Claimant was not able to do to any work at all, not even a part-time job. The December 2014 FCE was consistent with this conclusion. He agreed that soft tissue injuries do not usually deteriorate but the Claimant's condition had deteriorated and he did not know why.

#### **EMPLOYMENT WITNESSES**

##### Greg Woodward

92. Mr. Woodward is a vocational consultant retained by the Claimant's former solicitors who between June and September 2013 tried to assist the Claimant in finding new employment. The efforts were ultimately unsuccessful. The Claimant attended one business, Signs Now, for a day of job shadowing on July 25, 2013. Mr. Woodward explored several print houses and expanded his geographical area of perspective employers to include Duncan, Parksville and Victoria but ultimately concluded that there was nothing he could find that matched the Claimant's transferable skills and took into account his physical limitations. He found the Claimant interested in finding work but ultimately Mr. Woodward effectively discharged himself in large part because of the Claimant's reported discomfort in driving more 20 minutes and doing basic household chores.



Amanda Berg

93. Ms. Berg is an occupational therapist retained in April 2015 by ICBC to provide case management or coordination oversight of the efforts to have the Claimant returned to gainful employment. She was not to be a treating occupational therapist. She ended her involvement with the Claimant in October 2016.

94. Ms. Berg prepared an initial case management report dated September 11, 2015 following a meeting with the Claimant. She identified four client concerns based on the Claimant's subjective report. These were:

- (1) weight gain;
- (2) neck to lower back pain including a report of "frequent daily aching pain from his cervical spine to his lumbar spine, concentrated in the mid thoracic spine primarily";
- (3) decreased endurance for walking and sitting; and
- (4) low mood (for which the Claimant did not wish to explore treatment).

95. Ms. Berg observed frequent body movement, change of position, shifting etc. while sitting for 40 minutes. She completed a form scoring functional status on a scale of 1 to 4 for a variety of activities. The Claimant was already participating in vocational rehabilitation with Bhopal Rehabilitation Consulting. Ms. Berg recommended a continuation of active rehabilitation and physiotherapy IMS treatment; progression to an independent gym pass; continuation of vocational rehabilitation services and continuation of her case management services.

96. When a copy of this report reached the Claimant through his counsel, he took exception to many items of the reported history. This led to a further meeting between the Claimant and Ms. Berg following which she prepared a "revised" report. In her evidence Ms. Berg took responsibility for the revisions on the basis that the Claimant was a reserved historian.

97. Ms. Berg maintained contact with the Claimant, those treating him and Mr. Bhopal. There was initially some difficulty in receiving prompt communications from the Claimant by phone. That was subsequently resolved by using emails primarily. In a further report dated January 28, 2016, by which time Mr. Bhopal had discharged the Claimant, Ms. Berg continued

to recommend physiotherapy treatment, involvement of a kinesiologist, and participation of a vocational consultant to pursue employment opportunities for which continued funding was recommended.

98. The Claimant was expressing an interest in taxidermy as an occupation and had located some training programs including one in Montana, USA. There was also a taxidermist working in Campbell River and Ms. Berg proposed a visit to that employer by the Claimant and herself. Her reservation was that the most recent FCE report described the Claimant as suitable for “light” occupations whereas as taxidermy was classified as requiring “moderate” strength. The proposed visit never took place. When she discharged herself in October 2016 the recommendations in her January 2016 report had not been implemented. She had not recommended funding for retraining, but had recommended the renewed involvement of a vocational consultant to investigate retraining.

99. Throughout her involvement the Claimant had preferred retraining and she would have reported this preference sometime between August and December 2015 to Mr. Bhopal.

Gillian Pearson

100. Following a *voir dire* on her qualifications, Ms. Pearson was duly qualified to provide opinion evidence regarding the history and nature of the visual effects industry in Vancouver and evidence about wage rates and terms of employment for visual effects artists in Vancouver. Her slightly redacted report was admitted as Exhibit ‘42’. Ms. Pearson is presently the production and studio manager for CoSA VFX Vancouver Inc., a position she has held since August 2013. She has been involved in the visual effects industry for approximately 25 years. She was a co-owner and part-time instructor at Lost Boys from 2006 to 2011. For the last five years she has been employed with three start-up companies in the visual effects industry, and for all of those companies she has been involved in hiring artists which requires knowledge of the industry, employment contract terms and wages and hours. She has hired approximately 100 visual effects artists in her career. The Claimant was a student at the Lost Boys in 2009-2010. He graduated with an Honors Pass, the highest level of achievement. The visual effects industry in Vancouver is thriving, in competition with Los Angeles and London, England. She has been involved in obtaining permits for foreign workers to enter Canada to work in the visual effects industry. For immigration purposes, the classification for visual effects artists is NOC 5241-

Graphic Designers and Illustrators. Based on her own experience in hiring visual effects artists and from discussion with others in the industry she provided an opinion of typical hourly rates in Vancouver ranging from the minimum wage up to \$17.50 - \$24.00 as a starting range and up to \$50.00 an hour for visual effects artists with more than five years' experience. These are wage rates for a 40 hour week, with overtime in addition. Most visual effects artists are hired as employees on short term contracts to match production projects. Ms. Pearson is not a visual effects artist herself. There are currently some 3,000 to 4,000 visual effects artists working in Vancouver. She is not aware of any centralized data bank or industry surveys that track wages in the Vancouver visual effects industry.

101. While visual effects artists work primarily on a computer, they are not "tied to the desk" and can take breaks to go to the bathroom, for lunch and there are opportunities to get up and move around when needed, so long as they meet work deadlines. Because many visual effects artists must work long hours, particularly as production deadlines near, it is not uncommon for such artists to take time off when going from one project to another. Burnout is a risk for visual effects artists.

Caleb Clark

102. Mr. Clark is a 25 year old US citizen who is currently employed as a visual effects artist with Image Engine in Vancouver. Technically he is a "compositor". He is a graduate from Lost Boys from the class that followed the Claimant's class. He knew the Claimant from school and described him as one of the more dedicated students who had produced some technically complicated work products. Following his graduation Mr. Clark returned to the US, obtaining a job in Los Angeles within a week. His resume (Exhibit '8') shows that between 2010 and 2016 he has worked at 15 different studios on multiple projects involving feature films, TV series and commercials. His starting hourly rate in 2010 was \$27.00 per hour. It has increased annually to his current hourly rate of \$51.00. Those rates are for an eight hour day with overtime extra. In 2016 he has averaged 60 hours work per week. He considers himself an average visual effects artist who was lucky at the beginning of his career in what he was paid. At the time most first year artists were paid between \$15.00 and \$20.00 per hour. He discloses his hourly rates to friends and other workers and believes that at the third year level of experience rates generally level off in the \$32.00-\$38.00 per hour range.

103. The work involves sitting at a computer desk for long periods of time and is mentally taxing. There is the stress of client demands and deadlines. He was once required to work 41 hours straight, sleep eight hours in a hotel and return to work. In house catering was provided. He kept a pillow underneath his desk so could nap while waiting for something to be processed. He was able to stand up and stretch. Burnout was always a risk. He took two months off work in 2015, and four months off in 2014. He has experienced working for an employer who shut down almost overnight giving him a week's layoff notice. That is more a risk with smaller studios. Visual effects artists often spend more time with co-workers than with families. He is aware of a few people who have retired in their late 40's after being in the business 20 years. The average age of his coworkers is in the mid 30's.

Heather Paul

104. Ms. Paul is chief financial officer of [REDACTED] Visual Effects Inc. (Linx), the company for whom the Claimant was working at the time of the Accident. He had been hired as 3D artist in July 2010. She was not aware of any complaints about his work. After the Accident, the Claimant was let go because was not able to do his job in a timely manner. At the time of the Accident he was working under an independent contractor agreement. The contract showed an increase in his pay from \$110.00 per day to \$130.00 per day based on an eight hour day. He was expected to work eight hours per day and would be paid if he worked overtime. In 2010 a new hire visual effects artist with no experience was paid \$110.00 per day. [REDACTED] currently employs 16 visual effects artists and it has employed up to 40 artists based on the number of projects. The Claimant did not work overtime with [REDACTED]. If overtime is required, it is given to salaried employees. [REDACTED] tries to take on projects without overtime demands. Contract employees are hired for a particular production and then often jump to another studio. The lowest hourly rate presently for a visual effects artist is \$168.00 per day and the highest is \$600.00 per day. She described wage rates at [REDACTED] in three ranges namely a low range of between \$168.00-\$200.00 per day; a mid-range between \$200.00-\$350.00 per day; and high range of \$350.00 and above, not necessarily based only on years of experience. Talent for certain is a factor. The work for [REDACTED] since 2009 has increased pretty steadily.

105. Ms. Paul is not herself a visual effects artist. Contract employees get lunch and coffee breaks and can take the breaks they need provided they get the work done. Vancouver is the hub

for visual effects studios outside of Los Angeles. [REDACTED] gives its employees generous vacation time so as to reduce the risk of burnout. Hiring is primarily based on talent and years of experience is a factor.

Christopher Winkelaar

106. Mr. Winkelaar is an occupational therapist who conducted two FCEs. The first was done at the request of ICBC and the resulting December 29, 2014 report is Exhibit '14'. The second FCE was conducted at the request of the Claimant's counsel and the resulting report dated August 4, 2016 is Exhibit '15'. Mr. Winkelaar was called as a witness for the Claimant.

*First Report (December 2014)*

107. Mr. Winkelaar obtained a history from the Claimant of "constant neck pain, constant mid and low back pain" at the time of the FCE. The Claimant described the steps he was taking to control or alleviate his symptoms, his self-perception of functional status and his current status. The Claimant reported difficulty with prolonged sitting and the necessity to adjust his position regularly to manage low back symptoms. He typically avoided sitting. Activities involving sustained stooping aggravated his symptoms. He walked for up to an hour daily on level terrain. He typically averaged 6 - 8 hours sleep per night. The Claimant did not feel he would be able to work as a visual effects artist due to the prolonged sitting and postural demands. He did not think his employer would be willing to accommodate the use of adapted aids. He was willing to consider further training to acquire other suitable work. He preferred to work alone in a regular structured job working towards the creation of a product.

108. Upon testing, the level of effort overall was good and the results of testing were considered reliable. Mr. Winkelaar concluded that the physical job demands of a visual effects artist were not within the Claimant's physical capacity because of the continuous use of a computer work station with static postures of the neck and back. He required the ability to utilize neutral postures and regular opportunities to stretch and alter his position. There was discussion of the use of a standing work station and technical advances in monitor pixilation and zoom features that would avoid the habit of the Claimant flexing his head forward to view the monitor. Although the Claimant might be able to retrain himself to maintain a neutral posture that would take time and might be unrealistic where expectations of work speed are high. In

summary Mr. Winkelaar did not recommend a return to work as a visual effects artist. The Claimant was willing to retrain if it would assist in obtaining employment. A BCIT diploma program for a CNC machinist technician was discussed with the suggestion that the Claimant take the opportunity of the "spend a day program" to find out more about the program.

109. Continued physiotherapy was recommended as well as improvements to his cardiovascular condition. A regular walking program combined with reduced caloric intake, and use of a recumbent bicycle were suggested, as were adaptive aids such as an adjustable iPad tablet stand, a high back Obus Form support and laptop riser.

*Second Report (August 2016)*

110. Mr. Winkelaar obtained a subjective history of constant aching over the posterior neck, constant aching over the left side and mid-back area, constant aching over the left sided low back and occasional tingling in the upper left thigh. The Claimant reported improvement in his symptoms attributable to participation in a regular independent exercise program under the guidance of a kinesiologist. His physical therapy treatments (IMS injections) had been reduced to one treatment every eight weeks. The Claimant reported an aggravation of symptoms following an earlier FCE at the end of June 2016. There was continued reported difficulty with prolonged sitting and the necessity to regularly adjust positions to manage back symptoms. His walking pace had improved but the Claimant could not jog or run for any significant length of time. He was able to drive 1.5 hours from Nanaimo to Courtenay without need of a rest stop. He was now researching a program in Montana to become a taxidermist.

111. On testing, the Claimant used rest breaks on a more regular basis and for longer durations and made greater use of alternate postures to manage his pain symptoms. Comparative early versus late day results indicated the Claimant was able to maintain consistent and often improved work speeds in spite of increase pain reactivity and other signs of decline on tests involving his neck and back. He used alternate postures and micro breaks on a more regular basis. These findings support the Claimant's report of increased symptomology and indicate that he may have difficulty tolerating a full day's work at present.

112. The Claimant displayed high effort levels on testing and the results were considered generally reliable. Mr. Winkelaar concluded that the Claimant was not capable of return to work as a visual effects artist on a durable basis.

113. With respect to taxidermy as an occupation, it is defined in the NOC as requiring medium strength and the Claimant was not well suited to work involving regular periods of sustained neck or trunk flexion repetitive reaching and medium strength limits. It was recommended that he job shadow a local taxidermist and continue an exercise program under the guidance of a kinesiologist and continue with IMS treatment sessions.

Christiane Clark

114. Ms. Clark is an economist with Associated Economic Consultants Ltd. She provided two reports dated April 22, 2016 and July 28, 2016 setting out tables for the estimation of past and future loss of earning capacity based on stated assumptions. In the first report the valuation date was May 2, 2016 (a mediation date). In the second report the valuation date was the arbitration commencement date of October 31, 2016. For her without Accident calculations, Ms. Clark used occupation earnings and unemployment rates for the NOC 5241 category of Graphic and Designers and Illustrators. She also provided estimates of earnings for BC males working as taxidermists based on occupation earnings and employment rates for NOC 5212 Technical Occupations related to Museums and Art Galleries. She provided a further table of estimates of earnings for BC males working as horticultural technicians. By a further letter dated October 25, 2016 she provided additional estimates of without Accident earnings using different assumptions of the earnings levels of visual effects artists.

**WITNESSES FOR THE RESPONDENT**

Dr. John le Nobel

115. Dr. le Nobel is a duly licensed and qualified specialist in physical medicine and rehabilitation. He saw the Claimant on one occasion, March 27, 2012, on referral from Dr. Lee. The reason for the referral was patient management. Dr. le Nobel obtained a history of “ongoing headache, neck and upper back pain.” He described in some detail his typical physical exam. He wrote a consultation letter to Dr. Lee recommending increased exercise to increase the cardio workout and strengthen the trunk and limbs. Dr. le Nobel did not obtain a complaint of low back

pain and agreed that in his observation of patients with soft tissue injuries to the neck and back, it is common to have fluctuation of symptoms, both in terms of severity and in terms of where the patient reports pain along the spinal column.

Dr. Kulwant Riar

116. Dr. Riar is a duly licensed and qualified forensic psychiatrist who examined the Claimant on one occasion on April 4, 2016. His report is Exhibit '61'. He diagnosed the Claimant's low mood and anxiety as an adjustment disorder with anxious and depressed mood. At the time of examination the intensity of the disorder was quite mild. The Claimant said that he was doing better both physically and emotionally than he had been previously. Dr. Riar was in basic agreement on diagnosis and causation with Dr. O'Shaughnessy. The adjustment disorder was initially brought on by the pains and the Claimant's inability to do work and later on by not having a job to return to as well as the pains. These got into a vicious cycle but fortunately the cycle was broken by 2015 and he was doing much better, as his pains were minimal as was the adjustment disorder. The Claimant was excited about the prospect of retraining in taxidermy. Dr. Riar found the Claimant to be somewhat quiet and shy in his life, a worrier, somewhat of a perfectionist and analytical and somewhat vague in describing his history. He attributed the vagueness to anxiousness rather than a failure to be forthcoming.

Samantha Gallagher

117. Ms. Gallagher is a duly qualified expert in vocational rehabilitation. She examined the Claimant on one occasion on November 5, 2015. Her report dated August 4, 2016 is Exhibit '58'. She concluded that but for the Accident the Claimant would likely have been able to continue with his job at ██████. Her report assumes that a visual effects artist falls under the occupational group of Other Technical and Coordinating Occupations in Motion Printers and Broadcasting. She agreed that this occupational group was incorrect and the correct NOC classification for visual effects artists is NOC 5241.

118. The Claimant described current symptoms as follows:

39. *At the time of our assessment in November 2015, Mr. W█████ reported headaches that have become less frequent over time. He reports that his neck pain is improving but it is still exacerbated by looking down for prolonged*



*periods or using his arms in front of his body. Shoulder checking can also exacerbate his shoulder pain. Mr. W[REDACTED] reports constant mid-back pain that is worse with using his arms in front of his body. He reports low back pain with prolonged walking, sitting, exercise and bending. He experiences pain down his right leg and in his left buttock.*

119. She concluded that the Claimant would unlikely be able to work as a visual effects artist. Since the Claimant's prior training was specific to a visual effects artist she further concluded that employment options without any further training would be significantly limited. In testing for interest and aptitude she found the Claimant's general learning ability score in the low average range, suggesting he would be best suited to on-the-job training or short, practically based training programs of less than one year duration. His occupational interests indicated a preference for the objective, innovative and methodical scales and the realistic theme. She included a chart showing a list of 11 potential occupations and related wage rates for occupations for which the Claimant had either expressed an interest at one time or occupations which her testing indicated were suitable. She was aware that the Claimant had previously worked with a vocational consultant but the Claimant considered that the ideas generated were either incompatible with his physical abilities or not in line with his interests. She had access to the FCE of Mr. Winter and accordingly assumed that the Claimant could handle medium strength occupations.

120. Her testing took three hours in total. The Claimant was not chatty. The Claimant was best suited to working with his hands or machinery and was not suited to the position of sales person. It is important to match a particular job with the client's interest wherever possible. Ms. Gallagher recommended that the Claimant continue to work with a vocational consultant because finding a new career path can be overwhelming and stressful. Taxidermy is within the Claimant's abilities academically as it is an occupation where training is often through mentorship.

121. Some of the occupations on her chart are examples of jobs that could be done without further training although they would not be the Claimant's idea of a great career. They would be

available as a stopgap. The 2011 National Household Survey from Statistics Canada is the best statistics available to look at wages.

122. In summary, she concluded as follows:

63. *In summary, as a result of Mr. W[REDACTED] ongoing symptoms he will likely be unable to return to his previous work as a visual effects artist. Consequently, he will need to explore the other options available to him. As Mr. W[REDACTED] training has been focused on visual effects, his employment options without undertaking any further training will be limited. Therefore, as the vocational test scores achieved at this assessment suggest that Mr. W[REDACTED] is capable of short, practically based training, I would suggest that he explore the training options to him with a vocational counsellor in order to determine a new vocational goal.*

Mark Gosling

123. Mr. Gosling is an economist who provided an expert report dated September 16, 2016 (Exhibit 50') providing estimates of the Claimant's past and future loss of earning capacity. Mr. Gosling used the NOC classification 5226 for visual effects artists which he agreed was incorrect. Reducing his loss projections by about 3% would accord with the correct NOC classification. Mr. Gosling also provided earnings projections based on BC males with a college diploma requiring between three months and less than one year study. He provided earnings figures as well for BC males in the various occupations listed in Ms. Gallagher's report.

124. NOC 5212 is the occupational category that includes taxidermists. The number of taxidermists is likely small relative to the number of individuals working in that occupational group; hence it is not clear that earnings for this group would necessarily be representative of the earnings of taxidermists. Similarly it is not possible to tell what the average earnings of a visual effects artist in NOC 5241 is from among all of the other job titles within that classification. The occupational groupings within the NOC classification are based mostly on job skills and the educational requirements to do the job rather than similar income level.

Timothy Winter

125. Mr. Winter is an occupational therapist who conducted an FCE of the Claimant on June 28, 2016. His report dated July 15, 2016 is Exhibit '69'. He was not called as a witness. He confirmed high physical effort levels, good clinical consistency during testing such that the results are considered representative of the Claimant's physical capacities and limitations. Objective measurements revealed discrepancies between the Claimant's reports of limitation and his demonstrated functioning. There were lesser levels of restriction than the Claimant reported. This fact did not imply intent but suggested a degree of caution be utilized when interpreting the Claimant's subjective reports.

126. Mr. Winter obtained subjective complaints as follows:

- (1) Constant tightness to the left side of the thoracic spine region with pain increasing with activity each day and the severity dependent upon the activity;
- (2) Intermittent neck stiffness and pain with activity each day;
- (3) Headache symptoms at times described as occurring weekly and being annoying;
- (4) Low back soreness and numbness and tingling to the left medial thigh region which symptoms come and go and only emerge with activity such as walking or exercising at times.

127. The Claimant demonstrated limits in his ability to perform outer range reaching (i.e. upper arms held away from the body) as well as overhead reaching functions. He was capable of short to moderate distance walking intermittently within the day. He had a functional neck range of motion but had difficulty using repetitious or sustained neck extension postures. There was a limit to his ability to perform work tasks requiring prolonged periods of mild to moderate stooped upper body alignment. He demonstrated the ability to tolerate short periods of continuous sitting (i.e. repeat periods of 30 - 50 minutes at a time). He does not demonstrate robust sitting tolerance required of some competitive employment positions.

128. The Claimant possesses the ability to manage prolonged standing demands (primary posture for up to two hours at a time). He is able to perform all tasks in the sedentary and light strength capacity categories and most aspects of the medium strength capacity category.

129. He has weak fitness of his trunk musculature. He has adequate energy, enthusiasm and selective productivity to be gainfully employed in regular work hour shifts (eight hour day) so long as the functional demands of the work are within the restrictions noted. During testing the Claimant looked uncomfortable under various work conditions but did not require unscheduled breaks. He was noted to lay down on two occasions to stretch. The Claimant reported several days of elevated spinal symptoms and functional decline for two to three days after the FCE.

130. The Claimant is capable of full-time employment. Remaining entirely out of the work force has adverse health consequences including decreased overall strength and cardiovascular capacities, and a fear associated with a return to work.

131. The demands of work as a visual effects artist exceed the Claimant's current capabilities and although his tolerance for work intensive sitting or standing postures would improve to some degree with ergonomic considerations, intensive sitting or standing while working on the computer would be poorly tolerated. Periods of static spinal postures contribute to neck, upper and lower back symptoms reactivity. This is not a suitable vocational target.

132. Mr. Winter was not confident that the occupation of conservation officer was suited to the Claimant's capabilities as it requires prolonged periods of driving and working from a vehicle, and continuous periods of walking while carrying a load.

133. The occupation of taxidermist which can be performed sitting or standing would be a reasonable vocational target. The Claimant should continue to participate in active regular exercise as part of a lifelong routine.

#### Dr. Robin Rickards

134. Dr. Rickards is an orthopedic specialist who conducted an IME of the Claimant in 2016. A medical/legal report was prepared and served. No evidence from Dr. Rickards was given at the hearing.

135. The Claimant asks that an adverse inference be drawn from ICBC's failure to call Dr. Rickards who was on ICBC's witness list until near the end of the hearing. Realistically, the inference sought is that Dr. Rickards would not have supported ICBC's submission (said to come as a surprise to the Claimant) that the Claimant had not proven causation of a mid-back injury.

136. Through scheduling necessities, the Claimant's cross-examination did not conclude until the 8<sup>th</sup> day of the hearing. Dr. Rickards was on the witness schedule to give evidence on the 9<sup>th</sup> and last day of the hearing, together with one other defence witness. The evidence of 3 other defence witnesses had already been given. Prior to the conclusion of the Claimant's cross-examination, ICBC's counsel advised Claimant's counsel that he would not be calling Dr. Rickards.

137. I have received and considered the detailed written submissions of the parties with respect to this issue.

138. Although I agree with the Claimant that an adverse inference may be drawn against either party, and not just a plaintiff, I decline to draw an adverse inference against ICBC in his case. I agree with the ICBC submission that there is no onus on a defendant to assist in establishing a plaintiff's case, whether the plaintiff's expert evidence is internally inconsistent (as in *Love v Lowden* (2007 BCSC 1007)), or obviously unpersuasive (as in *Shobridge v. Thomas* (1999) 47 CCLT (2<sup>nd</sup>) 73). I am influenced by the additional factors here that an explanation has been given (defence counsel was satisfied with the state of the expert evidence called against ICBC) and the Claimant had Dr. Rickards' report and had the opportunity to call him as his witness (as was done with Dr. Yoneda) prior to the closing of the Claimant's case.

#### **SUBMISSIONS OF THE CLAIMANT**

139. The Claimant submits that he has suffered head and back injuries with accompanying headaches, sleep disturbance and depressed mood, all of which were proximately caused by the Accident. The Claimant was qualified and established to continue his nascent career as a visual effects artist. He has been rendered completely unable to pursue that occupation. Having lost his "dream job" it has understandably taken him some time to accept the fact that he can no longer be a visual effects artist and to find some other occupation within his physical capabilities and for which he has an interest. He has acted reasonably in this regard as he is now set to pursue training to become a taxidermist. With respect to his without Accident earning potential, the Claimant submits that the wage rates given in the evidence of Ms. Pearson, Caleb Clark and Ms. Paul should be utilized as the average earnings in the NOC 5241 classification are not accurate for the work of visual effects artists in the Vancouver marketplace.

140. The Claimant seeks general damages of \$130,000, net past income loss of \$309,000, and loss of future earning capacity after taking into account residual income as a taxidermist, of \$2,256,542, as well as future cost of care/retraining expense of \$51,700, and special damages of \$12,820.26, plus costs and interest.

#### **SUBMISSION OF ICBC**

141. ICBC acknowledges that the Claimant suffered soft tissue injuries to his neck and low back in the Accident, but says that the symptoms were intermittent by February, 2012 and the Claimant was cleared to return to work in April, 2012.

142. The Claimant has not established causation with respect to his complaints of headaches and mid-back pain, injuries for which there is no record of contemporary complaint to Dr. Kennedy and for which there is no medical opinion relating these complaints to the Accident.

143. As the Claimant was fit to return to some employment in April, 2012, the past loss of income claim should either terminate at that time or be very modest thereafter.

144. The Claimant has failed to mitigate his losses by failing to follow medical advice to exercise vigorously and by failing to obtain any new employment. With respect to loss of future earning capacity, ICBC submits that as the claimant was fit to return to work in April 2012, there should be no award for loss of future earning capacity. Had the Claimant followed medical advice, there was a possibility that he could have returned to work as a visual effects artist. Alternatively, if he is not able to do so, ICBC says that the average earnings for visual effects artists as set out in NOC 5241 should be used as the evidence of Ms. Pearson, Caleb Clark and Ms. Paul is unreliable as it is based upon no scientific database, a very small percentage of the visual effects artists working in the Vancouver marketplace and hearsay. If the Claimant is unable to work as a visual effects artist, ICBC submits that the average earnings of someone with a college certificate involving more than 3 months and less than 1 year education largely equates to the average earnings of a visual effects artist based on the NOC 5241. The Claimant fits this educational category and hence, apart from a delay for further retraining, his residual earning capacity equals his without Accident earning capacity.

145. In addition, the Claimant is not a credible witness because of the many inconsistencies between his own evidence and what he has reported to different healthcare providers over time.

146. ICBC submits that general damages should be assessed in the range of \$50,000 to \$60,000, the past income loss should be \$15,600 gross (for a period of 6 months post-Accident), and if any amount is awarded for loss of future earning capacity, it ought to be a very modest amount, assessed on a loss of capital asset approach.

147. ICBC contests all of the claims for cost of future care/retraining.

#### **CREDIBILITY OF THE CLAIMANT**

148. ICBC submits that the Claimant is not a credible witness. It points among other things to the evidence below:

- a) Although the Claimant maintains that he has had headaches and mid-back pain continuously from the time of the Accident, the first report of headache in Dr. Kennedy's records is November 2014, and the first report of mid-back or thoracic pain in Dr. Kennedy's records is August, 2015;
- b) The Claimant's evidence was that he did not suffer low back pain sufficiently serious to complain about it until he commenced vigorous exercises with Ms. Law in May, 2015. This evidence is obviously incorrect as Dr. Lee, Mr. Oldham and Dr. Kennedy all record complaints of low back pain prior to the Claimant seeing Ms. Law;
- c) The Claimant maintained a pain journal but it cannot be a reliable record of symptoms because some entries are cut and pasted verbatim from prior entries and the journal entries conflict with what the Claimant reported to healthcare providers on the same date as a journal entry;
- d) The Claimant only grudgingly accepted in evidence the improvement in symptoms recorded in clinical records;
- e) The Claimant reported to Dr. Kennedy that he was looking for work when all he was actually doing was researching physical requirements of other occupations;

- f) At the same time the Claimant was reporting limited sitting ability, he was travelling from North Vancouver to Ladysmith by car and ferry from April 2012 to approximately April 2013;
- g) The Claimant claimed he could not afford \$15 for a yoga class recommended by Mr. Butt in 2014 when he was receiving TTD benefits of about \$1300 per month and received at the end of 2015 a lump sum payment of \$47,612.15 from ICBC;
- h) The Claimant's evidence that he did work overtime at [REDACTED] conflicts with the [REDACTED] records of hours submitted by the Claimant which show no overtime;
- i) The Claimant's evidence is contradictory on why he left [REDACTED]; and
- j) The Claimant maintained he could not hunt or golf, but reported doing so to others.

149. The Claimant responds that the suggestion he did not have headache and mid-back pain following and caused by the Accident amounts to an allegation that the Claimant is a liar who has deceived all of his healthcare providers. It contradicts the evidence of Mr. Oldham and Mr. Butt that the Claimant's subjective complaints were consistent with their objective findings and contradicts the conclusions of the two functional capacity evaluators on three FCEs that the Claimant was demonstrating genuine effort.

150. I find that the Claimant is not a reliable historian. He did himself agree that generally what was recorded in records was likely more accurate than his recollection of events over the last 5 years. Significantly, sometimes the discrepancies are to his disadvantage where, for example, he does not recall multiple complaints to different healthcare providers of low back pain prior to seeing Ms. Law and did not report low back pain to Dr. Yoneda. There is no self-interest that I can identify in his not reporting to Dr. Kennedy what he had reported and was reporting regularly to other healthcare providers. Multiple witnesses have expressed difficulty in obtaining a full, detailed history because of the Claimant's reticence.

151. While I find the Claimant to be an unreliable historian, I do not find that he is generally an unreliable witness. Whether he was not paid for overtime work at [REDACTED] is complicated by the fact that the existence of a "time bank" was not put expressly to Ms. Paul. Similarly, Ms. Paul



was not able to say exactly what language was used in the termination of the Claimant's employment. The reason was clear; the Claimant was not able to put in the hours necessary to fulfill the job requirements. He could have been told as a "softer" message that there was no longer work available for him. Effectively, he was "let go" which Ms. Paul conceded could be regarded as being fired. Other potential inconsistencies (post-Accident hunting and golfing) were not put to the witnesses who recorded those statements and the evidence suffers from a failure to comply with the rule in *Browne v. Dunn* ((1893) 6 R. 67 (HL)).

152. Although the Claimant does occasionally exaggerate (looking for work when only researching; unable to afford \$15 yoga class fee; unable to sit, stand or walk more than 15-20 minutes at a time), overall I find that he is not a dishonest witness and his evidence is entitled to be weighed with that of other witnesses and other relevant circumstances in order to determine whether on a balance of probabilities it should be accepted on any particular point.

**DR. BRUCE YONEDA**

153. Dr. Yoneda's opinion that the Claimant is totally disabled permanently from any employment is starkly out of sync with all the other evidence. It is contrary to the view of the Claimant, Dr. Kennedy and both functional capacity evaluators. It is in my view primarily based upon the history that the Claimant could not "stand, sit, walk more than 15 – 20 minutes at a time" and the FCE dated December 29, 2014. The report was of course obtained for a different purpose. The history of an inability to sit, stand or walk for more than 15 – 20 minutes if true, and if a permanent condition, might well render the person permanently unemployable. That however is not the evidence in April, 2016 nor significantly was it the evidence in the December, 2014, FCE (The December FCE Report). The December FCE Report noted an inability to reasonably sustain a seated posture for periods of up to 60 minutes; an inability to stand dynamically for periods of up to 60 to 75 minutes at a time and walking for up to an hour. Moreover, the December FCE Report sets out the physical limitations for prospective employment without any suggestion that the Claimant is permanently disabled from any employment.

154. In addition, Dr. Yoneda did not have the benefit of a great deal of other relevant information prior to giving evidence. He did not have either of the 2016 FCE reports nor Dr.

Kennedy's clinical records nor the treatment records of other healthcare professionals. For these reasons I place no weight on Dr. Yoneda's opinion regarding the Claimant's employability.

#### **CAUSATION OF MID-BACK, HEADACHE COMPLAINTS**

155. Generally, ICBC argues the necessity of the utmost scrutiny of soft tissue claims where symptoms last longer than customary (as here) and where there is little or no objective evidence of continuing injury citing *Price v. Kostryba* (1982) Carswell BC 415. While there is evidence that most soft tissue injuries do gradually improve and resolve, there is also evidence that a small percentage of such injuries do not do so. Moreover, in this case, there is objective evidence to support the Claimant's continuing injury and multiple examiners agreed that the Claimant's subjective complaints were consistent with objective findings. Both functional capacity evaluators considered that the Claimant had genuine complaints supported by objective restrictions.

156. Specifically, ICBC argues that the Claimant has not proven that the complaints of mid-back injury and headache were caused by the Accident. The submission is based upon two propositions. The first is that these injuries/symptoms were not recorded by Dr. Kennedy until August, 2015 in the case of mid-back pain and until November, 2014 in the case headaches. ICBC argues that these injuries/symptoms either arose too long after the Accident to be proximately related or else were not sufficiently significant to be reported until they are recorded in which case, in the absence of any explanation for their becoming more significant, they cannot be proximately caused by the Accident. The second proposition is that in his summary, Dr. Kennedy refers to "soft tissue injuries affecting his neck and lumbar spinal areas" without separate reference to the mid-back or to headaches. This is consistent with his clinical notes, which are largely reproduced appointment by appointment in his medical/legal report in which the main areas of reported complaint and treatment were the neck and low back.

157. ICBC relies in particular on the decision in *Deo v. Wong* (2008) BCCA 110. *Deo* was a particularly unusual case on its facts. The issue was whether a knee problem ultimately resulting in a diagnosis of meniscal tear and surgery was caused by a car Accident. The initial injuries diagnosed by the family doctor were soft tissue injuries to the neck, back and shoulder. Approximately 2 months post-Accident there was brief mention of knee pain as a result of a "pop" or "crunch" during the course of carrying a weighted box upstairs. The first report of knee

pain was 6 months post-Accident. By then the knee had “given out” on 4 or 5 occasions although there was no history of trauma. At the trial, the orthopedic surgeon who first treated the knee problem was called as a witness, qualified as an expert but asked no further questions. Medical reports of two treating orthopedic surgeons included in a Book of Documents tendered at trial were extracted from the Book before the plaintiff closed his case. As the Court of Appeal noted at para 14:

*As a result of this curious presentation and withdrawal of evidence, the Plaintiff was left with no medical opinion evidence as to the cause or even the possible causes of either knee problem.*

Thus the Court of Appeal concluded at para 18:

*There was no evidence that the Plaintiff received any trauma to the knee in the Accident. In the absence of any medical opinion, there was no evidence linking the meniscal tear to the Accident. The evidence did not permit any conclusion as to how or when the tear occurred, or even what a meniscal tear is. There was no evidence as to the possible causes or mechanics or expected progression of such a condition. There was no basis for concluding that the slight difficulty with the knee during rehabilitation more than two months after the Accident was connected to the diagnosis (of meniscal tear).*

158. The present case is quite different. First, headaches and back pain are the usual rather than the exceptional consequences of a whiplash injury.

159. There are multiple references in the records of other healthcare providers of complaints by the Claimant of mid-back or thoracic spine pain prior to Dr. Kennedy’s first record of August 2015. These prior references include the following:

- |            |                  |                                      |
|------------|------------------|--------------------------------------|
| a) Dr. Lee | October 14, 2011 | intrascapular (mid-back) pain        |
|            | October 23, 2011 | Mild thoracic muscle spasm           |
|            | November 8, 2011 | Moderate thoracic spine muscle spasm |

- |                         |                                                                                                 |                                      |
|-------------------------|-------------------------------------------------------------------------------------------------|--------------------------------------|
|                         | November 22, 2011                                                                               | moderate thoracic spine muscle spasm |
|                         | December 23, 2011                                                                               | x-ray of the thoracic spine          |
|                         | February 3, 2012                                                                                | upper back pain                      |
|                         | March 9, 2012                                                                                   | moderate thoracic spine spasm        |
| b) Mr. Oldham           | 15 references to thoracic symptoms or treatment between November 23, 2011 and February 14, 2013 |                                      |
| c) Dr. le Noble         | March 27, 2012                                                                                  | ongoing upper to mid-back pain       |
| d) Community Therapists | December 14, 2012                                                                               | pain in middle back                  |
| e) Mr. Butt             | 5 references to thoracic symptoms or treatment between February 20, 2014 and December 1, 2014   |                                      |
| f) Mr. Winkelaar        | December 2014                                                                                   | constant mid-back pain               |

160. Both Dr. le Noble (March 27, 2012) and Mr. Butt (February 20, 2014) record complaints of headache.

161. At the hearing, an issue arose respecting the use that could be made of clinical records. However, it was agreed that records of the Claimant's reported symptoms were admissible for the fact that the complaints were made. Accordingly, I accept the above evidence which comprehensively rebuts any suggestion that a mid-back (thoracic spine) injury and headaches were first reported so distant in time from the date of the Accident that they could not be proximately caused by the Accident.

162. The next question is why headaches and the mid-back (thoracic spine) pain are not recorded by Dr. Kennedy until November, 2014 and August, 2015, respectively. First, I note that in each case, the first record indicates that the symptom was not new. The November, 2014 note is that the Claimant's "headaches had lessened" (emphasis added). The August, 2015 note is that the Claimant "still had some discomfort in the lower thoracic spine area" (emphasis added).

163. Second, Dr. Kennedy acknowledged that headaches may have been mentioned previously but not recorded by him, although he does not know for certain.

164. Third, Dr. Kennedy referred to the overlap of symptoms referable to the cervical/thoracic spine area and the thoracic/lumbar spine area and the difficulty of totally separating injuries from specific areas. He does concede that his treatment was focused on the cervical and lumbar spine areas because those were the areas that the Claimant was most focused on.

165. Fourth, Dr. Kennedy noted that Dr. Lee had previously obtained an x-Ray of the thoracic spine which was normal.

166. Fifth, the structure of office visits to Dr. Kennedy is to fit appointments into a 10-15 minute time frame so there is a tendency to address primarily major complaints.

167. Sixth, Dr. Kennedy gave evidence that it is not unusual with soft tissues affecting the spine for symptoms to ebb and flow and for different parts of the back to be symptomatic at different times. Dr. le Noble agreed.

168. Seventh, there are multiple references from different health care providers commenting upon the Claimant's reticence as an historian. The Claimant himself says that he tends to focus on what hurts most at any particular appointment.

169. I think the above combination of factors accounts for the absence in Dr. Kennedy's records of specific reference to headaches and mid-back (thoracic spine) pain until November, 2014 and August, 2015. I decline to infer that the Claimant did not have those symptoms prior to when Dr. Kennedy recorded them, as I decline to conclude that the symptoms were not genuine when they were reported to other health care professionals. In this regard I accept the Claimant's evidence of the presence of these symptoms.

170. The principles for establishing causation are well known. The Claimant must prove on a balance of probabilities that the Claimant's negligence caused or materially contributed to an injury. Causation need not be determined by scientific precision (*Athey v. Leonati* (1996) 3 SCR 458).

171. The primary test for causation asks: but for the defendant's negligence, would the Claimant have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the Defendant's conduct is present (*Resurface Corp v. Henky* 2007 SCC 7; *Clements v. Clements* 2012 SCC 32). The "but for" test must be applied in a robust, commonsense fashion (*Clements*, supra).

172. I find that the Claimant has established causation for his mid-back symptoms, headaches, and left thigh symptoms. Dr. Kennedy does in his clinical note from March 17, 2016 presumptively relate the left thigh symptoms to the low back injury. Headache is a symptom, rather than an injury, and is encompassed in the reference to neck injury. There is nothing in Dr. Kennedy's report to suggest that the Claimant's mid-back pain and headaches were attributable to any cause other than the Accident. That possibility was never put to Dr. Kennedy in cross-examination. Dr. Kennedy's medical/legal report is comprised largely of his clinical record notes, appointment by appointment. I find that all of the injuries and symptoms referenced in his report, including mid-back pain, headaches, and left thigh symptoms are included in Dr. Kennedy's description of "chronic pain and stiffness ... soft tissue injuries affecting his neck and lumbar spinal areas". Had it been otherwise, I would have expected Dr. Kennedy to make the distinction.

173. In the alternative, if I am in error in interpreting Dr. Kennedy's summary opinion so broadly, I find that the Claimant has nonetheless proven on a balance of probabilities that but for the Accident he would not have sustained mid-back symptoms, headaches and left thigh symptoms. This conclusion is reached on a robust commonsense basis in the circumstances in which ICBC does not deny the presence of the symptoms nor does ICBC allege they were caused by any other event.

174. I find that as a result of the Accident, the Claimant has sustained soft tissue injuries to his neck and back with symptoms affecting the cervical, thoracic and lumbar spine areas. He has experienced headaches and disturbed sleep and for a period of time, suffered an adjustment disorder with anxious and depressed mood. Initially, he had constant neck and back pain and stiffness. Within a few months post-Accident, his symptoms became intermittent, although still daily, and there has been gradual improvement over time with fluctuations and fall backs

primarily occasioned by an increase in physical activities. The symptoms have particularly been aggravated by prolonged sitting. He has undergone an extensive regime of treatment including prescription medication, physiotherapy, IMS injections, participation in the CBI program, self-directed exercises as well as an exercise program under the supervision of a kinesiologist. It is now 5 years post-Accident. He continues to experience chronic infrequent headache, intermittent neck and low back soreness and mid-back aching largely dependent on activity level, as well as left thigh tingling. He has limited tolerance for sitting and standing for extended periods of time as well as for prolonged overhead activity. In his day to day activities, the Claimant has worked out accommodations for these physical restrictions largely by pacing his activity or altering body postures.

175. With respect to prognosis, Dr. Kennedy's opinion is guarded. He expects the Claimant will continue to have pain and stiffness in his neck and back in the long term but holds out the prospect of some further improvement. The fact the Claimant is no longer requiring prescription medication is a good sign. The Claimant's own evidence is that his symptoms have plateaued 18 months ago. After 5 years of near constant treatment, I think that the prospect of further significant improvement in physical symptoms is very limited. Mentally, the Claimant would benefit from finding new employment, an opinion shared by Doctors Kennedy, O'Shaughnessy and Riar. Finding employment may incidentally reduce the Claimant's focus upon his physical symptoms.

176. As a further result of the Accident, I find that the Claimant has lost his "dream job". His mood became depressed and he became irritable. This has adversely affected his relationship with Ms. [REDACTED] and restricted his social and recreational activities.

#### **NON-PECUNIARY DAMAGES**

177. The purpose of non-pecuniary damages was summed up by Madam Justice Ker in *Trites v. Penner* 2010 BCSC 882 as follows:

*Para 188 Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair and reasonable to both parties.*

*Para 189 For the purposes of assessing non-pecuniary damages, fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts.*

178. In *Stapley v. Hejslet* (2006 BCCA 34) the Court set out the non-exhaustive list of factors to be considered in an award of non-pecuniary damages. The factors include:

- i. Age of the plaintiff;*
- ii. Nature of the injury;*
- iii. Severity and duration of pain;*
- iv. Disability*
- v. Emotional suffering;*
- vi. Loss of enjoyment of life;*
- vii. Impairment of family, marital and social relationships;*
- viii. Impairment of physical and mental abilities;*
- ix. Loss of lifestyle; and*
- x. Plaintiff's stoicism as a factor that should not, generally speaking, penalize the plaintiff.*

179. The Claimant seeks damages of \$130,000 and relies upon the decisions in *JD v. Chandra* 2014 BCSC 466; *Morlan v. Barrett* (2010 BCSC 1767); and *Kirkham v. Richardson* (2014 BCSC 1068).

180. ICBC submits that general damages should be assessed in the range of \$50,000 - \$60,000 and relies on the decisions in *Noon v Lawlor* (2012 BCSC 545); *Williams v. Loverock* (2013 BCSC 153); *Smith v. Evashkevich* (2016 BCSC 1228); and *Espinoza v. Espinoza* (2016 BCSC 762).

181. I have carefully considered all of these authorities.

182. *Smith* is readily distinguishable as the plaintiff had no period of total disability; her acute problems lasted a maximum of 6 weeks; and she had not missed any work in the two years prior to the trial at a better job than the one she had at the time of the Accident. Similarly, in *Espinoza* the plaintiff was able to continue working post-accident as a cement mason.



183. In *Noon*, the Claimant was unable to perform the heavier aspects of installing and maintaining water sprinkler fire protection systems post-accident but accepted a less physically demanding job working as an assistant business agent for his labor union, Local 324, at no loss of pay.

184. In *Williams* the plaintiff was unable to return post-accident to work as a metal fabricator but became a welding supervisor. In that case, the plaintiff sought non-pecuniary damages between \$60,000 to \$80,000 and the defendant's range was \$10,000 - \$20,000 and the award was \$50,000. All of ICBC's cases in my view involve residual outcomes for the plaintiff that are significantly less serious than what is faced by the Claimant.

185. On the other hand, the cases relied upon by the Claimant involve more serious symptoms. In *Morlan*, the plaintiff's fibromyalgia resulted in constant pain, controlled in the sense of made endurable by the ingestion of vast amounts of drugs, principally Gabapentin and Flexirol.

186. Similarly, in *Kirkham*, the plaintiff developed myofascial pain syndrome, chronic pain syndrome, cervical outlet atrophy and left hip girdle pain. A significant factor in the award to Ms. Kirkham was that she lost her "dream" of competing as an elite triathlete which was found to have a devastating effect. This is a factor that I think is common to the Claimant's case, namely, the loss of a "dream", in this case his dream job. I likewise find that he has been devastated by that loss, as evidenced by his perseverance in sitting at a computer at home, post-Accident, which evidences an unwillingness or inability to accept that he could not return to work as a visual effects artist.

187. Based on the injuries and effects of those injuries summarized in paras 174 – 176 above, I assess the Claimant's general damages at \$100,000.

#### **EMPLOYMENT ISSUES**

##### What would the Claimant have done in the Absence of the Accident?

188. I am satisfied that, but for the Accident, the Claimant intended to continue his nascent career as a visual effects artist in the Vancouver area. His commitment to obtaining a visual effects artist certification from Lost Boys is evidenced by his long daily commute to and from Courtenay, B.C. and his occasional sleeping overnight on Lost Boys' premises. His suitability

for the occupation is demonstrated to some degree by the high marks he achieved at Lost Boys. He himself describes being a visual effects artist as his "dream job". To some extent his long delay post-Accident in actually selecting alternative employment is in my view because he could not accept losing forever the ability to be a visual effects artist.

189. ICBC submits that the Claimant had not been attached to this occupation for very long and there is much speculation involved in concluding that this would have been permanent occupation. I address this question below.

Is the Claimant Disabled from Working as a Visual Effects Artist?

190. I find that the Claimant is permanently disabled from employment as a visual effects artist. That is the unanimous opinion of Dr. Kennedy, Mr. Winkelaar and Mr. Winter.

191. Although Mr. Winkelaar in his December 2014 FCE raised the possibility that with workplace modifications the Claimant might be able to retrain himself to work as a visual effects artist, even at that time it was not recommended. He added that the Claimant's "head thrust" posture was difficult to correct. Both 2016 FCEs agreed that the Claimant is not capable of returning to work as a visual effects artist on a durable basis.

192. ICBC submits that the opinions that the Claimant cannot continue to work as a visual effects artist are unreliable because they rely upon incorrect information from the Claimant regarding the extent of overtime and the long hours at a computer required. While I accept that [REDACTED] attempted to limit as much as possible overtime for its contract employees and I accept that visual effects artists are not "tied to their desks" but are free to move around so long as they meet work deadlines, I am satisfied from the evidence of the Claimant, Caleb Clark, Ms. Pearson and Ms. Paul that the job does involve long hours sitting intensely at a computer and often working under the pressure of time deadlines. It is simply not an occupation for which the Claimant is now physically suited.

Is the Claimant Totally Disabled and if not When Was He Fit to Return to Work and at What Type of Occupation?

193. Dr. Yoneda is the only expert who considers that the Claimant is totally disabled from employment. In this respect his opinion is an outlier and, as explained earlier, because of the

incomplete information available to him I do not accept his opinion. Dr. Kennedy and both functional capacity evaluators agree that the Claimant is able to work.

194. ICBC submits that the Claimant has failed to mitigate his income loss because he was fit to return to some kind of employment as of April 2012. This date is based upon Dr. Kennedy's evidence that the Claimant was considering returning to work then which Dr. Kennedy encouraged. At the time there had been steady progress in improvement of symptoms, with full range of motion in the lumbar spine and almost full range of motion in the cervical spine. In June 2012 the Claimant reported to Dr. Kennedy that he was looking for new employment. Drs. Kennedy, O'Shaughnessy, Riar, Ms. Gallagher, Mr. Winkelaar and Mr. Winter all agree that a return to some gainful employment would benefit the Claimant psychologically.

195. ICBC relies upon the decisions in *Boysten-Barstow v. ICBC* [2015] B.C.S.C. 1740 and *Mullens v. Toor* [2016] B.C.S.C. 1645. In *Boysten-Barstow*, having returned post-accident to work at her pre-accident job, the plaintiff subsequently quit that job and worked as an interior designer for her husband's residential construction company at a considerably reduced income. The Court declined to calculate the plaintiff's loss of future earning capacity on the basis that her residual income was as an interior designer. While acknowledging that there may be an element of personal preference in seeking employment, the plaintiff's choice in that case was not a reasonable one as the plaintiff was obliged to take reasonable measures to mitigate her injuries by seeking other work that can be pursued, taking account of her injuries, and retraining if necessary.

196. In *Mullens v. Toor* the plaintiff did not return to work post-accident at her pre-accident employment, notwithstanding that the employer was willing to have the plaintiff return at least on a part time basis. The plaintiff considered that work beneath her. She decided to abandon her career in banking and to retrain as a counsellor, a plan which the court considered uneconomic. The Court found that the plaintiff ought to have at least attempted a return to work and that there was a better than even chance that she would have been successful. There was also good evidence that a return to work would have benefited her mood disorder. The Court further stated that the plaintiff was of course "free to pursue any career path she wishes. However the issue for the Court is whether she is entitled to require the defendants to compensate her for the

consequences of her decisions". The Court did not accept the plaintiff's evidence that she always wanted to attempt to return to work but was never able to do so.

197. ICBC says that these observations apply to the Claimant. He was medically fit to return to some kind of employment and although he professed a desire to return to work, he never even tried to do so.

198. Both the *Boysten-Barstow* and *Mullens* cases cite the passage from *Parypa v. Wickware* 1999 BCCA 88 at para 67:

*...There is a duty on the plaintiff to mitigate her damages by seeking, if at all possible, a line of work that can be pursued in spite of her injuries. If the plaintiff is unqualified for such work then she is required, within the limits of her abilities, to pursue education or training that would qualify her for such work.*

199. The *Parypa* case also cites the excerpt from *Palmer v. Goodall* (1991) 53 BCLR (2d) 44 as follows:

*A plaintiff is not entitled at the cost of the defendant to say, "The only sort of work I like is such and such. I cannot do that. Therefore, you must give me sufficient capital to replace the income I cannot earn on that sort of job."*

200. The Claimant submits that he has acted reasonably in his efforts to improve his health and to find other employment. ICBC is "cherry picking" selected excerpts from clinical records indicating improvement in his recovery process because on an overall view of the medical records, it is clear that increasing activity such as sitting longer hours at a computer and participating in functional capacity evaluations resulted in a worsening of the symptoms. He was entitled in his particular circumstances to persevere in his effort to increase his endurance for sitting at a computer in an effort to try to return to his dream job. He participated with the vocational consultant, Mr. Woodward, in trying to find alternative employment; he participated with Ms. Berg and Mr. Bhopal and underwent three vocational capacity evaluations (VCE) all in an effort to find other employment. He was entitled to assistance from ICBC for vocational counselling/retraining under his 'no fault' coverage. He expressed interest in retraining on

several occasions. Finally, the Claimant says that ICBC has the onus of demonstrating that the Claimant unreasonably turned down available employment.

### Discussion

201. I do not think that the Claimant has acted reasonably in his effort to obtain new employment. In June 2012 he told Dr. Kennedy that he was looking for employment. Between June and October, 2013 he was actually looking at prospective jobs with Mr. Woodward. He has repeatedly professed a desire to find new employment. He has researched various different jobs but the fact is that since June 2012, he has not had even a trial attempt to work at any job. Apart from Dr. Yoneda whose opinion on permanent disability I have not accepted, no doctor or healthcare provider has said that the Claimant was disabled from any work during this period.

202. I accept that the Claimant desperately wanted to work as a visual effects artist and it would have been very difficult for him to accept that he could no longer do so. I note that he told Dr. Kennedy in April 2012 that he would not return to work as a visual effects artist. In October, 2012 he said he was not optimistic that he would ever be able to return, implying that it was still a possibility. In October 2013 Dr. Kennedy recorded that the Claimant was gradually realizing that perhaps he would never go back to his previous employment. In his evidence at the hearing the Claimant readily agreed that he did go back and forth over time in his own mind, sometimes thinking that he could return to his former job and other times thinking he would never be able to do so. I think the Claimant is entitled to the benefit of the doubt in the sense of continuing to persevere through to the end of 2013 with his efforts to extend his comfortable sitting time at a computer. However, when one is capable of work I find it is not reasonable to fail to obtain any employment for a further 3 years. I find that the Claimant had limited transferable skills; was losing his dream job; and may well have found the prospect of finding new employment overwhelming. He had assistance however from Mr. Woodward, and subsequently by way of the initial functional capacity evaluation and the assistance of Ms. Berg and Mr. Bhopal. The Claimant was not entitled to sit back and wait for ICBC to find him a suitable job. Even if he could not immediately select a new career, he ought to have obtained some interim employment. There is some evidence from Mr. Winter that the Claimant's perception of his limitations were greater than his demonstrated functioning. He told Ms. Gallagher in November 2015 that because his injuries had not plateaued, he could not decide on a new occupation. The Claimant

may have been waiting for the perfect job. In evidence, he said he did not consider trying a small freelance job as a visual effects artist because smaller studios would be doing “crappy things” and he wanted to work on blockbusters. He also said he was excited when told of the appointment of Mr. Bhopal to assist him in job finding because he hoped that Mr. Bhopal would find him “the miracle job”. I note that Dr. Riar thought that the Claimant tended to be a worrier and somewhat of a perfectionist. None of the above are sufficient excuses. Where Dr. Kennedy has been encouraging the Claimant to return to work since April – June, 2012, and all of the medical evidence indicates a return to any employment would be beneficial psychologically, I do not think the Claimant has acted reasonably in not following that advice for some 3 – 4 years whilst apparently waiting for the perfect job to appear.

203. The date at which the Claimant should have found some alternative employment is somewhat arbitrary. ICBC’s reliance on Dr. Kennedy’s note of April 25, 2012 does not tell the full story. Dr. Kennedy was encouraging any attempt to return to some work, but he was not saying or recording that the Claimant was recovered. Mr. Oldham’s records include entries as follows:

- a) April 17, 2012 “...half day pain-free. Can settle pain predictably with rest”
- b) May 17, 2012 “...with 9 hours rest pain climbs and with 14-15 hours rest pain is controlled”
- c) June 7, 2012 “...can be 5 hours pain free and can control pain with rest”
- d) August 9, 2012 “...2 days after last (treatment) woke with thoracic pain, severe one day and settled.

204. Bearing in mind that Mr. Oldham was advocating rest as a treatment and these recorded symptoms which I accept as true, I do not think that the Claimant failed to act reasonably in not finding alternative work at that point. I would fix the date by which he should have found alternate employment of some kind as the end of 2013. He had apparently finally accepted his inability to work as a visual effects artist. He had been actively looking at potential jobs with Mr. Woodward. I do not accept the Claimant’s evidence that there was nothing suitable for him at that time.

## LOSS OF FUTURE EARNING CAPACITY

205. From a review of the applicable case law, I set out below the principles that guide the assessment of claims for loss of future earning capacity as follows:

- a) The most basic principle is that the plaintiff is entitled to be put in the position he would have been in but for the Accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away. (*Rosvold v. Dunlop* [2001] BCCA 1);
- b) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation (*Athey v. Leonati* [1996] 3 S.C.R. 458);
- c) It is not loss of earnings but rather loss of earning capacity for which compensation must be made (*Andrews v. Grand & Toy* [1978] 2 S.C.R. 229);
- d) There are two equally acceptable ways of assessing a claim for loss of future earning capacity. One is the real and substantial possibility or earnings approach (*Steenblok v. Funk* [1990] 46 B.C.L.R. (2<sup>nd</sup>) 133); the other approach is the capital asset approach (*Pallos v. ICBC* [1995] 100 B.C.L.R. (2<sup>nd</sup>) 260 BCCA); *Brown v. Golaiy* [1985] 26 B.C.L.R. (3<sup>rd</sup>) 353;
- e) The factors to be taken into account using the capital asset approach, are:
  - i. Whether the plaintiff is been rendered less capable overall from earning income from all types of employment;
  - ii. Whether the plaintiff is less marketable or attractive as an employee to potential employers;
  - iii. Whether 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

- iv. Whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labor market.
- f) Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award (*Morgan v. Galbraith* 2013 BCCA 305).
- g) When one approach is preferable to the other is addressed in *Perren v. Lalari* (2010 BCCA 140) at paras 12 and 32 as follows:

[12] *These cases, Steenblok, Brown, and Kwei, illustrate the two (both correct) approaches to the assessment of future loss of earning capacity. One is what was later called by Finch J.A. in Pallos the 'real possibility' approach. Such an approach may be appropriate where a demonstrated pecuniary loss is quantifiable in a measurable way; however, even where the loss is assessable in a measurable way (as it was in Steenblok), it remains a loss of capacity that is being compensated. The other approach is more appropriate where the loss, though proven, is not measurable in a pecuniary way. An obvious example of the Brown approach is a young person whose career path is uncertain. In my view, the cases that follow do not alter these basic propositions I have mentioned. Nor do I consider that these cases illustrate an inconsistency in the jurisprudence on the question of proof of future loss of earning capacity.*

[32] *A plaintiff must always prove, as was noted by Donald J.A. in Steward, by Bauman J. in Chang, and by Tysoe J.A. in Romanchych, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in Steenblok, or a capital asset approach, as in Brown. The former approach will be more useful when the loss is more easily*



*measurable, as it was in Steenblok. The latter approach will be more useful when the loss is not as easily measurable, as in Pallos and Romanchych. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both Pallos and Parypa. But, as Donald J.A. said in Steward, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.*

- h) The task of the court is to assess damages, not to calculate them according to some mathematical formula (*Mulholland v. Riley Estate* [1995] 12 B.C.L.R. (3<sup>rd</sup>) 241 CA); the valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not the end of the enquiry. The overall fairness and reasonableness of the award must be considered taken into account all the evidence (*Rosvold*); if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them and a failure to do so may result in reversible error (*Jurczak v. Mauro* [2013] BCCA 507);
- i) The court should first enquire into whether there is a substantial possibility of future income loss before embarking on assessing the loss under either approach (Perren at para 26);
- j) A plaintiff is not entitled at the cost of the defendant to say "the only sort of work I like is such and such. I cannot do that. Therefore, you must give me sufficient capital to replace the income I cannot earn on that sort of job". A claimant is not entitled to compensation solely for losing a job, (*Palmer v. Goodall* [1991] 53 B.C.L.R. (2nd) 44 (BCCA));
- k) In catastrophic injury cases the whole of the capital asset is lost. But there may be much less serious injuries which cause permanent impairment although the loss

cannot be determined with any degree of exactitude (*Earnshaw v. Despins* [1990] 45 BCLR (2<sup>nd</sup>) 380 (CA)); and

- l) The inability to work at occupations that the plaintiff had no intention of pursuing is not compensable because there is no substantial possibility of actual future loss (*Steward v. Berezan* [2007] BCCA 150));
- m) A party may be forced to default to a capital asset approach where the loss is not easily quantified (*Villing v. Husseini* 2016 BCCA 422).

206. With these principles in mind I consider the facts of this case.

207. I find that the Claimant is permanently restricted in his capacity to work. I further find that he is permanently disabled from working as a visual effects artist. He will have chronic pain and stiffness in his neck and back and there is unlikely to be any significant improvement. None of Dr. Kennedy, Mr. Winkelaar or Mr. Winter believes that the Claimant is capable of working as visual effects artist. Both functional capacity evaluators agree that the Claimant has limited tolerance for a continuous sitting, overhead reaching, stooped upper body alignment and distance walking. He is now only capable of light strength capacity and most aspects of medium strength capacity demands. The Claimant has a high school education and one year of specialized training for an occupation that he can no longer perform. He has not worked since the Accident. He is now intending to retrain for the occupation of taxidermist. In these circumstances I conclude that the Claimant has demonstrated a real and substantial possibility of loss of future earning capacity.

208. I now turn to look at the economic evidence. The Claimant relies upon the evidence of Ms. Clark in support of the earnings approach. Ms. Clark has provided three calculations. The first calculation is of without Accident earnings based upon the NOC 5241 average earnings for visual effects artists, allowing for average contingencies and calculated to age 70. The present value of that future income is \$1,013,578.00. The same loss calculated to age 65 is \$995,176.00.

209. Ms. Clark's second calculation for without Accident earnings is based upon earnings for visual effects artists in the ranges according to the evidence of Ms. Pearson, Caleb Clark, and

Ms. Paul, allowing for average contingencies, to age 70. The present value of that future income is \$2,521,634.00 (both calculations assume full time full year earnings.)

210. Ms. Clark's third calculation is of post-Accident earnings of the Claimant as a taxidermist based on the NOC 5212 average earnings, allowing for average contingencies and to age 70. The present value of that future income is \$722,158.00. The same calculation to age 65 is \$703,623.00.

211. Thus the calculation of the loss is either \$291,420.00 (calculation #1 minus calculation #3) or \$1,799,476.00 (calculation #2 minus calculation #3).

212. The Claimant submits that with the addition of a factor of 18.125% for over time income, the future income loss after deducting the residual income as a taxidermist is \$2,256,542.00.

213. ICBC also introduced economic evidence through Mr. Gosling. He also provided a calculation of without Accident earnings to age 70 using NOC classification 5226 and average contingencies. He agreed that the correct NOC classification for visual effects artists was NOC 5241 so that his estimate was high by about 3%. Nonetheless, his calculation of without Accident earnings to age 70 was close to \$1,000,000.00, and therefore very close to Ms. Clark's first calculation.

214. Mr. Gosling also provided a with Accident calculation to age 70 using average contingencies based on full time full year earnings for a B.C. male with a college diploma requiring between three months and one year to attain. This data was also based on the 2011 national household survey. This calculation is based upon educational qualification without reference to any particular occupation. The present value of the estimated future income is \$1,027,877.00.

215. Mr. Gosling also provided full time full year earnings for B.C. males in a variety of different occupations based on the 2011 national household survey. The occupations included those listed in Ms. Gallagher's report as well as others considered by Ms. Clark. The average annual income of the NOC classification which includes taxidermists was \$34,231.00. It is the lowest average income of all the occupations listed in Ms. Gallagher's report. The weighted

average of the occupations listed in Ms. Gallagher's report is \$53,750.00 annual income. Not all the occupations listed in Ms. Gallagher's report are necessarily suitable for the Claimant.

216. Consideration of the above data indicates an exceptionally wide variation in outcome depending upon the comparators used in the earnings approach. On the one hand, if one assumes without Accident earnings based on the evidence of Ms. Pearson, Caleb Clark, and Ms. Paul and post-Accident earnings as a taxidermist the estimated loss is about \$1.8 million, without taking into account overtime. On the other hand, if one assumes without Accident earnings based on NOC 5241 and post-Accident earnings based on the Claimant's educational capability, there is no mathematical loss at all.

217. I have concluded that the earnings approach is not the preferred method in this case as it is not reliable. My reasons for reaching this conclusion are the following.

218. With respect to the without Accident earnings for a visual effects artist, I am not satisfied that either the average earnings from the NOC classification 5241 nor the evidence of hourly rates for visual effects artists in Vancouver from Ms. Pearson, Caleb Clark, and Ms. Paul are reliable. With respect to the NOC5241 data, there are 103 separate job titles within this classification. Curiously, visual effects artist is not one of them although some of the things the evidence indicates visual artists do are included. Moreover the job titles are classified by similarity of skills rather than similarity of income.

219. Second, it is impossible to separate out the average earnings of any one of the 103 job titles and, as Mr. Gosling said "it would be unthinkable that they would all have the exact same distribution of earnings within each one of these occupational titles."

220. Third, the evidence of Ms. Pearson, Ms. Paul, and Caleb Clark at a minimum suggests that at least some visual effects artists in Vancouver are earning substantially more than indicated by the NOC classification 5241.

221. Fourth, although the data from Statistics Canada is based on a good cross reference of the population, is accurate, and is a pretty good base line for determining statistical averages, as Ms. Clark said, it is not infallible and does not apply in every situation.

222. I also conclude that the evidence from Ms. Pearson, Ms. Paul, and Caleb Clark is not reliable for the general category of visual effects artists. This evidence is based on a very small portion of a comparatively small local visual effects artists market in Vancouver. At best it is based on a few hundred artists out of a working population of between two and three thousand. Unlike the confidential survey of Vancouver law firms in the *Danicek v. Alexander Holburn* (2010 BCSC 1111) which was found to be sufficiently objective and reliable, the evidence from these witnesses was not based on a survey of major visual effects studios or a survey of any kind. It was based on limited first-hand information and then anecdotal evidence. Mr. Gosling's evidence based on the 2011 household survey was that 90% of graphic designers earned less than \$88,000.00 per year in 2016. Although graphic designers are not identical to visual effects artists, this puts a perspective on the evidence of visual effects artists earning \$130,000.00 to \$150,000.00 per year and suggests it would be exceptional. Unlike *Tremblay v. McLaughlan* (1999 47 CCLT (2d) 177), this is not a case where industry evidence from other workers can be readily transposed to the Claimant's career path. There is no evidence of the quality of the Claimant's work, and quality matters, and despite his modesty Caleb Clark appears to be exceptionally skilled.

223. I have a similar although less serious concern about the estimated earnings for taxidermists. Taxidermists are included in the NOC occupational group 5212 "Technical Occupations related to Museums and Art Galleries". Ms. Clark's report indicates that this occupational group is "very small and also includes museum registrars, painting restoration technicians, curatorial assistants, etc." It is unknown how representative the earnings in this occupational group will be for taxidermists in particular. She had to rely on Canadian data for this occupational group because there were very very few B.C. males in this occupational group. Mr. Gosling shares the concern. It is not possible to break out within this NOC category the average income for taxidermist vs museum occupations versus art gallery occupations.

224. I am also not satisfied that the Claimant but for the Accident would have worked as a visual effects artist for the rest of his working life. I accept that he was enthusiastic about this occupation which was his "dream job". However, some additional facts need to be considered. He had only actually worked as a visual effects artist for a little over a year prior to the Accident, 3 months' of which were without pay. There is no evidence of his ability or skill level. As Ms.

Paul rightly acknowledged, ability is a major factor in hiring. One of the requirements for a successful visual effects artist is the ability to communicate with others and to work as a team member, according to Caleb Clark. On the other hand, Mr. Winkelaar's December 2014 FCE and the Claimant himself indicate that he prefers to work alone. There is evidence of "burnout" among visual effects artists as well as studios closing on short notice from lack of or loss of production projects. There is evidence that some visual effects artists must work long hours, particularly to meet deadlines and spend more time with their computers than with family. This prospect has implications for someone with a goal of having a family.

225. Taking these factors into account I do not think one can fairly say that the Claimant was established in the occupation of visual effects artist to the degree that one can comfortably conclude that but for the Accident he would likely have spent the rest of his working career as a visual effects artist.

226. It is also self-evident that the Claimant is not yet established as a taxidermist. He is about to retrain for that occupation. He is interested in it and it is apparently within his physical capabilities. However, there are several factors to consider. He may find he does not enjoy it. He may find that he is not particularly skilled at it. He may find that he is not able to earn sufficient income as a taxidermist. If the Claimant is not successful in his pursuit of taxidermy and has to retrain yet again for another occupation, apart from the loss of income during the period of retraining, likely up to a further year, it is quite possible that in a different occupation he would earn more than as a taxidermist and potentially as much as he might have earned as a visual effects artist based on NOC classification 5241 average earnings.

227. In *Rosvold* an assessment of loss of future earning capacity based in part on the Claimant's estimate of what he expected to earn from a business that he was going to set up was set aside for the trial judge's failure to take into account the possibility that the proposed business would not be successful and the plaintiff would not be able to find a suitable new occupation.

228. The case law referenced earlier indicates that the earnings approach to the assessment of loss of future earning capacity is most appropriate for a demonstrated pecuniary loss that is quantifiable in a measurable way, such as where the plaintiff was clearly established in a particular occupation pre-Accident and where similarly the plaintiff post-accident was

established in a different less remunerative occupation. Those factors are not present here. Not only is there is uncertainty about the reliability of the average earnings of a visual effects artist and a taxidermist, the Claimant was not solidly established as a visual effects artist pre-Accident and nor is he yet even qualified to work as a taxidermist. In these circumstances I prefer to approach the assessment of loss of future earning capacity on the capital asset basis.

229. I set out again for convenience the four factors identified in *Brown v Golaiy*, namely whether:

- a) Whether the plaintiff is been rendered less capable overall from earning income from all types of employment;
- b) Whether the plaintiff is less marketable or attractive as an employee to potential employers;
- c) Whether 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
- d) Whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labor market.

230. The Claimant is less capable overall from earning income from all types of employment. Prior to working as a visual effects artist, he held a series of comparatively unskilled labor-intensive jobs. He is no longer able to perform work tasks in the heavy strength category and is able to perform most but not all of the work tasks in the medium strength category. From a strength point of view, he is now ideally suited to sedentary and light strength capacity occupations.

231. The Claimant is less marketable or attractive to potential employers. He suffers from chronic neck and back pain. He has limited tolerance for prolonged sitting and ideally requires an occupation with sit/stand opportunities. He needs to stretch and take breaks. These restrictions establish that he is less attractive to a potential employer. Prior to the Accident he was capable of working in heavier strength occupations but had obtained largely non-transferable skills to enable him to work at a sedentary occupation as a visual effects artist. Now, heavier

strength occupations and wholly sedentary occupations without significant accommodations are foreclosed to him.

232. The Claimant is less valuable to himself as is reflected in his past depressed mood and social isolation because he did not have anything positive to say about himself.

233. The above restrictions will adversely affect the Claimant for the balance of his working life of approximately 30 years.

234. I have previously mentioned the wide disparity of potential outcomes arising from the uncertainty of what the Claimant might have earned in the long term but for the Accident as well as the uncertainty as to what he will do in the long term post-Accident. The award must reflect that a large number of occupations are now foreclosed to the Claimant, although many remain available to him, including some at which he could earn significantly more than he is likely to earn as a taxidermist. In addition, the award must reflect some possibility that, if he could have followed a career track as a visual effects artist like Caleb Clark, the differential between pre and post-Accident earnings would have been very significant.

235. Taking these factors into account, and doing the best I can in circumstances that seem to involve more than the usual number of uncertainties, I fix the Claimant's the claim for loss of earning capacity at \$400,000.

#### **PAST LOSS OF INCOME**

236. I have previously concluded that the Claimant ought to have returned to some kind of employment by the end of 2013. By that date he had apparently finally accepted that he could not return to work as a visual effects artist. This date roughly coincides with the inception of Mr. Butt's treatment which the Claimant acknowledges produced significant improvement.

237. From the date of the Accident to end of 2013 and using Ms. Clark's table at p21 of her July 28, 2016 report, I find the gross loss of earnings to be \$51,109. From the beginning of 2014 until the commencement of the arbitration hearing, Ms. Clark calculates the gross loss of earnings at \$96,587. During this time, the Claimant ought to have been working at some job even if it was a temporary one whilst he tried to decide upon a permanent new occupation. I would arbitrarily attribute \$20,000 gross income per year during this period which, pro-rating the



year 2016, comes to a total of \$56,500 (rounded). Thus the gross loss from 2004 to the date of hearing is \$40,087. I find therefore the total gross past income loss to be \$91,196. I leave it to the parties to calculate the past net loss of income. Ms. Clark has provided in Appendix '2' of her report tables to determine the net income. On the assumption that the Claimant is in a two-person household where both persons earn income, it is not clear to me which table applies.

#### **COST OF FUTURE CARE**

238. The test for determining an appropriate award for cost of future care is an objective one based on medical evidence. There must be medical justification for claims for cost of future care and the claims must be reasonable (*Milina v. Bartsch* (1985) 49 BCLR (2nd) 33 (SC)). The Claimant seeks \$18,000 for kinesiology treatments, \$11,700 for IMS treatments for the next 30 years plus \$2000 for vocational counselling. The Claimant also seeks \$20,000 as the total cost of attending the taxidermy school in Montana.

239. There is no medical evidence to support the continuation of kinesiology or physiotherapy services for 30 years. Dr. Kennedy simply said says that the Claimant continues to benefit from his physiotherapy treatments. Mr. Winkelaar agrees with further sessions with the kinesiologist to assist in reviewing and progressing the treatment program. Mr. Winkelaar recommends continued to IMS physical therapy treatments with the frequency of sessions to be determined by his therapist. Medical recommendation need not come solely from a medical doctor. I award \$500 for kinesiology sessions, for final monitoring of the exercise routines and \$400 for physiotherapy (IMS treatment) with Mr. Butt. At the current frequency of once every 2 months, this will allow IMS treatments to continue for a further year.

240. I make no award for further vocational counselling. The Claimant has at long last selected his future occupation choice which hopefully will be successful. I do not think there is a need for further counselling.

241. The claim for the cost of attending the taxidermy school in Montana is not really a cost of care item but the cost of necessary retraining is a compensable claim. The Claimant requires retraining. The evidence of the cost of the Montana school comes solely from the Claimant and is somewhat vague. There is no evidence, documentary or otherwise, from the Montana school itself. Ms. Gallagher did locate a taxidermy school in Calgary that provided a six-week program

at a cost of approximately \$6000. The Claimant thought that the cost of the Montana course itself was around \$12,000 - \$13,000, excluding travel, accommodation and specimens. The Claimant expressed a determination to attend this program. Although the evidence of its cost is not very satisfactory, I award \$15,000 for retraining.

#### MITIGATION

242. I have previously dealt with the issue of mitigation respecting the Claimant's failure to obtain any employment post-Accident.

243. ICBC also submits that there should be a reduction in non-pecuniary damages for the Claimant's failure to follow recommendations from his health care professionals, in particular a failure to increase aerobic exercise, a failure to take up cycling, a failure to lose weight, and a failure to pursue yoga in a structured environment.

244. To succeed in a defence of mitigation the onus is on ICBC to prove that the Claimant could have avoided some part of the loss. Where the allegation is a failure to pursue a course of recommended medical treatment, ICBC must prove that the Claimant acted unreasonably in not taking the recommended treatment and the extent to which the Claimant's damages would have been reduced had he acted reasonably (*Chiu v. Chiu* 2002 BCCA 618).

245. The Claimant was somewhat deconditioned prior to the Accident as a result of a year of comparative inactivity whilst attending Lost Boys. Post-Accident Mr. Oldham at one time encouraged rest as much as possible. At one time the Claimant did lose a significant amount of weight. Whilst under the care of Mr. Butt and Ms. Law, he did engage in an exercise program under their supervision. Mr. Butt considered the Claimant to be at the high end of the scale for exercising and enthusiasm. He used a recumbent bicycle at the physiotherapist's office. Dr. Kennedy's evidence was that the chances of getting better would be improved if the Claimant followed his advice and a failure to do could hinder improvement over time. Bearing in mind that the Claimant was following treatment from physiotherapists or a kinesiologist almost continuously, I do not find he acted unreasonably in doing the exercises and physical activity that he did nor do I find Dr. Kennedy's evidence sufficiently strong to demonstrate an avoidable loss. I decline to reduce the non-pecuniary damages for a failure to mitigate.

**SPECIAL DAMAGES**

246. The Claimant seeks special damages of \$12,820.26. The supporting invoices are set out in Exhibit '49'. ICBC challenges 4 of those items. The first is the cost of \$816.30 for ferry fares between Horseshoe Bay and Nanaimo for the purpose of seeing Dr. Kennedy. Some of these fares are as a pedestrian and others are for vehicle expense. ICBC submits that the Claimant should have found medical care closer to where he lived. I disagree. Dr. Kennedy had been the Claimant's long time family doctor, who both knew him and in whom the Claimant presumably had confidence. It was not an unreasonable decision to seek treatment from Dr. Kennedy.

247. I disallow the claim for mileage of \$584.64 for the reasons in Mullens v Toor 2016 BCSC 1645 at para246.

248. I disallow the claim for the MRI scan as there is no evidence it was recommended by a medical doctor. This item was presented \$2,985.

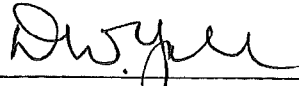
249. I allow the claim for the services of Mr. Woodward in the total amount of \$3,442.36. Mr. Woodward was retained by the Claimant's prior lawyers. Although his services did not result in finding a suitable job or occupation for the Claimant, it was in my view an appropriate step for the Claimant to take given that his job research up to the time of Mr. Woodward's retention had not produced employment. Accordingly, the special damages are reduced by \$3569.64 and are allowed at \$9,250.62.

**AWARD**

250. In summary, I assess damages as follows:

• General damages	\$100,000.00
• Past income loss	\$91,916.00 (gross)
• Loss of Future Earning Capacity	\$400,000.00
• Special Damages	<u>\$9250.62</u>
TOTAL	\$600,446.62

251. The parties are at liberty to arrange a further hearing if required to address tax gross-up, management fees, deductible amounts, and costs.



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Donald W. Yule, QC