IN THE MATTER OF AN ARBITRATION pursuant to s. 148.2(1)
of the Revised Regulation under the *Insurance (Motor Vehicle) Act*, (B.C. Reg. 44/83)
And the *Commercial Arbitration Act*, R.S.B.C. 1996 c. 55

BETWEEN:

L.D.

CLAIMANT

AND:

THE INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

Donald W. Yule Q.C., Arbitrator
Dates of Hearing: January 7, 8, 9 and 10, 2008
Place of Hearing: Victoria, British Columbia
Date of Award: January 30, 2008

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INTRODUCTION

1. Pursuant to the provisions of s. 148.2(1) of the Revised Regulation (1984) under the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996 c. 231 and the *Commercial Arbitration Act*, R.S.B.C. 1996 c. 55, the parties have submitted for determination the assessment of the quantum of damages attributable to the personal injuries sustained by the Claimant, L.D. ("Mrs. D.") arising out of a motor vehicle accident that occurred on April 21, 2003 in the City of Seaside, in the State of California, U.S.A. ("the Accident').

2. It is admitted that the Accident was caused solely by the operation of a motor vehicle driven by a Mrs. M. and owned by her husband, Mr. M. It is further admitted that the third party liability limits on the M. vehicle ($25,000.00 U.S.) have been paid to Mrs. D. It is further admitted that Mrs. D. is an insured person for UMP purposes.

3. The purpose of the arbitration is to determine the compensation payable to Mrs. D. under her own underinsured motorist protection coverage. At issue are general damages, past wage loss, future wage loss, loss of earning capacity, special damages and cost of future care.

BACKGROUND CIRCUMSTANCES

4. Mrs. D. was born December 14, 1969 and was 33 years of age at the date of the accident. On September 19, 2004 she married C.D. who also brings his own UMP claim arising out of the Accident. (I shall refer to the Claimants respectively as Mr. and Mrs. D.). The Ds. reside at----, V., BC. They have two sons, one almost 2 years of age and the other, one month old. Mrs. D. has been primarily employed as a hair stylist since 1988. She took her training in 1987 – 1988 at the V.I. School of Hairdressing. She has had various other jobs including fitness instructor, waitress, figure skating coach and rowing instructor but, since

1988, her main source of income has been hairdressing. From October, 1999 until mid-April, 2003 she was employed by The G. Salon ("The G."). She left that job and was on a two week motoring holiday with Mr. D. when the Accident happened. Upon her return to V. she was to commence full-time work at Salon M., a new hair salon that was just opening up.

5. The Accident occurred in the late afternoon on April 21, 2003. Mr. D's. 1999 Jetta motor vehicle was stopped in a line of cars at a red light and was rear-ended by the M. vehicle. Mr. D. had observed the approach of the M. vehicle in his rear view mirror, apprehended a collision, and shouted a warning to Mrs. D. In response to the warning, she had turned her head to the left, facing Mr. D. at the time of impact, which knocked the Jetta into the vehicle in front of it. Mrs. D. was wearing a seatbelt and her airbag did not deploy. The cost to repair the Jetta vehicle was $3,823.48. Mrs. D. got out of the vehicle as the M. Chevrolet pick up was in the process of leaving the scene. She was able to get its license plate number. At the impact Mrs. D. felt her head rock back and forth. Her neck felt sore and the discomfort extended to her back. A headache developed right away. The police and an ambulance attended the scene of the Accident. Mrs. D. declined to go to hospital because she thought she just didn't need to and because of concern about the cost of treatment in American medical institutions. The Ds. drove from Seaside to Monterrey, about half an hour away, where they stayed on the night of the Accident. Later that evening the Ds. attended the local police station where they identified Mrs. M. in a photo line up.

PRE-ACCIDENT ACTIVITIES

6. Prior to the Accident Mrs. D. was an extremely active woman in good health. In the 1990's, when she lived at C., B.C. she skied 60 to 80 days per season. Even after moving to V., she skied 12 to 20 times per season. She went on cycling trips of 2 to 14 days' duration on the Gulf Islands, in Washington State and in the

Interior of B.C. She cycled to the gym and to work daily. She went on kayaking trips. She worked out 5 days a week at Gold's Gym in V. which she joined early in the year 2000. Her workouts both with weights and with cardio lasted between 45 to 75 minutes. She was an avid runner. She participated in the N.B.I. Race Series which consisted of approximately 10 races between January and May of various distances, the shortest being the U.V. 5 K Fun Run and the longest being the C.V. Half Marathon. The races were run approximately every second Sunday. Ms. D. ran or trained for races every Sunday, Monday, Wednesday and Friday evening. She had run one half marathon race each year for the 3 years prior to the Accident. She ran the C. Half Marathon in March 2003. She ran an 8 km distance in the October 2000 R.V. Race in approximately 43 minutes, finishing 34 out of 119 for females in her age category. She ran the 10 k distance in the T.C. Race in April 2002 in 49+ minutes finishing 43 out of 550 for females in her age group. Her goal was to run a marathon by the time she was age 40. She also played squash, tennis and roller bladed. Physical exercise was an important part of her life from which she obtained much enjoyment and satisfaction.

7. In 1995 Mrs. D. experienced numbness and tingling in her right hand and noticed she was dropping instruments at work. She was diagnosed with carpal tunnel syndrome and there was some discussion about surgery. Ultimately she did not need the surgery but was prescribed and wore a splint at night on her right hand only. The symptoms apparently resolved. She brought the splint to V. with her when she moved but did not use it anymore. Someone at a gym suggested some exercises which she used and the symptoms got better.

8. Around 1999/2000 Mrs. D. was diagnosed with bi-lateral patellofemoral syndrome attributed to her extra-ordinarily provocative activities. She was prescribed a medication (which she did not take) and a brace for her left knee. It was recommended that she should stop running, but she continued to run, albeit wearing a knee brace.

9. Because of all her physical activities, Mrs. D. prior to the Accident received massage therapy treatments regularly once every 4-6 weeks as maintenance therapy.

OVERVIEW OF CHRONOLOGY AND TREATMENT

10. Immediately upon returning to V., Mrs. D. saw her family physician, Dr. Riddler on April 28, 2003. On May 2, 2003 she commenced work as a hair stylist for her new employer Salon M. With the exception of the month of September 2003 when she worked only part time, Mrs. D. worked full time as a hair stylist at Salon M. from May 2, 2003 until April 28, 2005. During those 2 years, by her own records, Mrs. D. missed 201 hours from work either to attend treatment appointments or because of pain/disability.

11. She received physiotherapy from McKenzie Physio on 21 occasions between May 2003 and December 2003. She received approximately 100 massage therapy treatments between April 28, 2003 and February 2005. In August/September 2003 she experienced an exacerbation of symptoms, including bi-lateral numbness and tingling in fingers of both hands. She was referred to Dr. James Filbey, a physical medicine and rehabilitation specialist, who concluded that she had a bi-lateral thoracic outlet syndrome. He referred her to Broadmead Orthopaedic Physiotherapy Clinic for intramuscular stimulation (IMS) therapy. Mrs. D. received treatment on 32 occasions between January 2004 and February 2005.

12. In late January 2005 Mrs. D. experienced another set back. During a massage treatment her neck began to really hurt, she had pain on the left side of her face and felt light headed and nauseous. She went home and lay down on the sofa thinking that she might pass out. She experienced heart palpitations and either that evening or the next day was taken to the emergency department at a hospital.

She underwent multiple tests and was referred to a cardiologist, Dr. Williams, who ultimately diagnosed functional mitral valve prolapse (a condition which Dr. Riddler says is not related to the Accident). Mrs. D. was also referred to a neurologist, Dr. Kemble, in March 2005. By the end of April 2005 Dr. Riddler told Mrs. D. she should stop work completely for a time and wrote a note to that effect. He found her, at that time, to be tearful, nauseous, experiencing muscle pain and loss of appetite, and depressed. He wondered if she was experiencing a major depressive episode. Subsequently, Dr. Riddler recommended that Mrs. D. stay off work until September 2005. In May 2005 Mrs. D. learned that she had become pregnant. In September 2005 she elected not to return to work. Had she not been pregnant she would have returned to work in September 2005.

13. Mrs. D. has not returned to work since having now safely delivered 2 children, the second born in December 2007. Her intention, everything else being equal, is not to return to work until the youngest child is in kindergarten. She would like to return to work as a hair stylist. In 2005 Mrs. D. commenced to see a new general practitioner, Dr. Neilson, primarily to look after her during her pregnancy. For a time there was a bit of overlap between Drs. Riddler and Neilson, but Dr. Riddler has ceased his private practice and Dr. Neilson has become Mrs. D.'s family physician.

INJURIES – MRS. D.'S EVIDENCE

14. The day following the Accident Mrs. D. felt horrible and unwell. She was very, very stiff with a bad headache and pain especially in the neck and low back. These symptoms persisted throughout the balance of their trip. The Ds. continued their vacation to their original destination, Santa Monica. Mrs. D. did not see any doctor in the U.S. For the balance of the trip they took more breaks during the driving and did not go for runs on the beach or work out at gyms as they

otherwise would have done. Mrs. D. was apprehensive about the traffic in Santa Monica.

15. On returning to V. she immediately saw her family physician, Dr. Riddler, on April 28, 2003. At that time, her symptoms consisted of mid to lower back pain, pain between the shoulders, pain on the left side of the neck extending into the head, headaches, tingling on the left side of the nose, stiffness, and some bruising to the left leg. Dr. Riddler prescribed an anti-inflammatory, recommended massage therapy treatments and generally encouraged her to try and keep active. She also commenced physiotherapy treatment with McKenzie Physio. Around August 2003 she developed really bad tingling in some fingers of both hands. She was referred to Dr. Filbey who diagnosed bi-lateral thoracic outlet syndrome and recommended intramuscular stimulation (IMS). She took a course of such treatments at Broadmead Orthopaedic Physiotherapy Clinic commencing January 2004 over a period of 13 to 14 months. This therapy was painful but beneficial, particularly initially. It involved placing needles deep into muscles and moving the needle around. Sometimes electrodes were attached. The treatments lasted about half an hour. The needles were placed into muscles in the mid back, shoulders, neck and head. The tingling and the numbness substantially improved after about 3 months treatment and was completely resolved by approximately February 2005.

16. The low back symptoms consisted of pain, tightness and soreness particularly on the left side. The symptoms had subsided quite a bit by the end of 2003. This area was aggravated with work, particularly bending over washing hair, and with heavier forms of housework. The low back symptoms did resolve within 2 years after the Accident. By two years post-Accident the symptoms in the right shoulder had improved to being an occasional twinge or annoyance. The left leg bruising resolved uneventfully. The upper mid-back symptoms also resolved quickly.

17. The primary persistent symptoms were neck pain at the base of the neck on the left side mostly extending from the occipital bone to the left shoulder. There was right sided neck pain that was not as severe. The neck pain was constant for a period of time. Accompanying the neck pain were headaches which were constant for two to three months. When Mrs. D. returned to work she had daily headaches that lasted for hours. Neck pain and headaches caused sleep disturbance which contributed to tiredness. In the spring 2004 she began to get migraine headaches. She had 3 – 4 migraines in 2004. She never had migraines prior to the Accident. She has not had any migraines since the birth of her son. There was substantial improvement in these symptoms by September 2005, although being off work for the 4 preceding months made a big difference. Between September, 2005 and the summer of 2007 there has continued to be a very slow steady improvement. Mrs. D. feels that she plateaued about 6 months ago. She continues to suffer headache and neck pain. She gets headaches all the time, lasting from a few hours to extending into the following day. The headaches are not as intense as previously and are always at the base of the neck extending into the back of the head. Headaches and neck pain are exacerbated by heavy housework activities and by trying to resume running and by cycling with the head being thrust forward and tilted up.

MEDICAL EVIDENCE

18. Dr. Riddler prepared 2 medical legal reports dated April 17, 2004 [Exhibit 28] and June 13, 2006 [Exhibit 29]. In his first report he concluded that Mrs. D. suffered a Grade III whiplash associated disorder and a myofasial pain syndrome to her cervical thoracic area as well as a Grade II lumbro sacral strain type of injury. He also documented the post accident onset of symptoms of bi-lateral numbness and tingling in the fourth and fifth fingers of both hands. In prior office visits on the

occasions when he did a physical exam, Dr. Riddler found tenderness to palpation through the entire cervical spine and the paravertebral tissues as well as increased tone in the paracervical tissues and the trapezius muscles. There was reduced range of motion of the cervical spine and reduced extension of the lumbosacral spine. Significant sleep disruption and irritable mood were also noted. By December 2003 Mrs. D. was reported as working 5, sometimes 6 days per week for as many as 9 to 11 hours per day which had led to prolonged and severe discomfort in the neck and shoulder ridges. As of March 2004 the hand tingling had resolved completely. Dr. Riddler's opinion was that Mrs. D. would continue to show slow gradual improvement over the next 10 months but he was unable to state with any certainty what the eventual level of recovery would be. As of April 2004 there was a reasonable probability that she might not recover to pre-Accident level.

19. In his second report (June 13, 2006) Dr. Riddler's diagnosis was a Grade II/Grade III whiplash associated disorder to the cervical thoracic area with cervical tension type headaches and mysofacial pain syndrome in the shoulder ridge areas. These injuries had not fully resolved three years after the Accident. Dr. Riddler noted that with a period off work from April to September 2005 there had been significant improvement in the shoulder and neck symptoms. As of his last assessment on April 18, 2006, the primary concern was ongoing headaches occurring approximately three times per week with quite severe and incapacitating headaches occurring 2-3 times per month. There was also persisting muscular tension and discomfort in the mid scapular and inter scapular areas often radiating upwards to the lower neck. This discomfort developed with activities such as walking, prolonged time on her feet or doing chores and while breastfeeding. Mrs. D. had returned to the gym where she was working out with light weights and she estimated that she was at approximately 40% of her pre Accident abilities. She was not able to engage in jogging, tennis, recreational cycling, skiing or kayaking or heavier house chores such as cleaning tubs, floors, fridges and vacuuming. As of April 18, 2006 Mrs. D. continued to have some

reduced range of motion of her cervical spine and also had tenderness on palpation at C4-T1 and the paracervical tissues. In connection with the cardiology and neurology consultations following recurring bouts of chest discomfort, dizziness and heart palpitations in late 2004/early 2005, Dr. Riddler's impression was that throughout much of this time Mrs. D. was experiencing anxiety symptoms (for which he recommended trying anti anxiety medication and referral to a counselor, both options ultimately declined by Mrs. D.) Although it was difficult to state whether the Accident was the main cause of her anxiety symptoms, Dr. Riddler's opinion was that the injuries were quite significant in impacting upon Mrs. D.'s quality of life. Apart from noting that Mrs. D.'s injuries were not fully resolved three years post-Accident, Dr. Riddler did not provide any prognosis. Dr. Riddler had not seen Mrs. D. for treatment of her motor vehicle accident injuries since June 27, 2005 when he had written a medical note extending her time off work until September 2005.

20. In his medical legal report dated October 9, 2006 [Exhibit 40] Dr. Filbey noted that, on his first examination on September 12, 2003, he found tightness in the upper trapezius and levator scapular area, tenderness in the paravertebral muscles, mild impingement findings in the right shoulder, and positive thoracic outlet maneuvers bilaterally. An electro diagnostic test gave evidence of right ulnar neuropathy. Dr. Filbey concluded that Mrs. D. had a bilateral thoracic outlet syndrome (more so on the right), right ulnar neuropathy at the elbow and myofacial pain and whiplash associated disorders WAD III (positive neurological findings). Dr. Filbey suggested botulinum injections which Mrs. D. declined. On December 1, 2003 he recommended intramuscular stimulation treatment which Mrs. D. took at Broadmead Physiotherapy. By March 2004 the numbness and tingling of the hands had stopped as had the elbow symptoms. There was less pain around the cervical and trapezius regions. She was to continue with intramuscular stimulation. Dr. Filbey last saw Mrs. D. on August 30, 2004. She was continuing to do well. Continuing with IMS treatments was not an absolute requirement although Dr. Filbey renewed a prescription for continued IMS as

Mrs. D. found it helpful. Dr. Filbey considered that Mrs. D.'s bilateral thoracic syndrome and cervical scapular pain syndrome were caused by the Accident based on the information available to him. With respect to prognosis Dr. Filbey stated:

> "I am unable to give a definitive prognosis as the patient has been out of my care for sometime. When I saw her, based on her response to treatment to date, I would have expected her symptoms to continue to improve with time. She would likely have some level of residual symptoms but she had been returning to her normal activities and I would have not seen any reason to think that this was not going to continue."

21. In the medical legal report dated July 12, 2004 [Exhibit 38] Richard Burman a registered physiotherapist noted at the time of his initial assessment (January 5, 2004) that Mrs. D. had ongoing neck, shoulder and low back pain with significant fatigue to activities of daily living and difficulties performing her job as a hair dresser. He also found reduced range of motion in the cervical spine and hypersensitivity to touch and significant tightness in the paraspinal muscles. He provided treatment up to the date of his report on 17 occasions, the treatment including IMS and postural exercises. As of June 14, 2004 Mrs. D. had essentially a full range of motion of the cervical spine but left sided neck pain at some end of range movements and continued pain and tightness over the paraspinal muscles. Mr. Burman recommended ongoing treatment for a further 3-6 months and was hopeful that a full recovery would be achieved.

22. In a medical report dated July 16, 2004 [Exhibit 39] Attila Apt, a registered massage therapist with Coy Treatment Centre Inc. noted various head, neck, shoulder, thoracic and lumbo pelvic symptoms on an initial visit on April 28, 2003. Gradually at around 9 months post accident Mrs. D. started to make more obvious net improvements in her symptomology and it was not until April 2004 that she was able to make successful forays into the resistant training realm. By then she was training with 10-12 pound dumbbells compared to using up to 65 pound dumbbells prior to the accident. As of July 2004, her recovery was

progressing slowly. She was able to exercise at approximately 35% of her pre-Accident levels. The range of motion at her neck, shoulders and back was usually 90% to 100% of normal, although with pain or discomfort at the end ranges. She was working consistently full time hours although still suffering from pain and fatigue. Overall recovery was estimated to be at about 50%. Massage therapy at bi-weekly intervals was recommended for the next 18-24 months. With respect to prognosis Mr. Apt stated:

> "I do not believe that Mrs. D. has a risk of suffering any permanent disability, in terms of her ability to be gainfully employed and participate in what are considered to be normal activities of daily living. I cannot, however, at this early stage confidently state that she will regain the high level of physical function that she enjoyed previous to the MVC. Therefore there is a risk of her not achieving complete recovery based on her pre-collision ability levels."

In his summary, Mr. Apt concluded that Mrs. D. was a highly motivated individual who continued to work hard to bring about her recovery. He believed it was "likely" that she would regain most or all of her pre-collision abilities. In an addendum dated July 11, 2005, after Mrs. D. had stopped working, Mr. Apt stated that his previous assessment was overly optimistic.

SUBMISSION OF THE CLAIMANT

23. The Claimant submits that she was an active young woman in excellent health for whom physical exercise was her hobby. No pre-Accident injury or condition was preventing or would have prevented her from continuing a very physical lifestyle for the foreseeable future. As a result of the Accident, Mrs. D. has been left with neck and shoulder discomfort, aggravated by activity and weekly headaches. She can no longer sleep on her stomach. She cannot lift heavy items or do thorough cleaning nor breastfeed her 4 week old son without precipitating symptoms. She has undergone extensive physio and massage therapy including an extended and

painful course of IMS. She struggled to continue to work full-time for 2 years after the Accident and has made every effort to promote her recovery. Mrs. D. says that there has been no change in her symptoms over the last 6 months and accordingly believes she has plateaued. The Claimant thus invites the conclusion that her current symptoms will most likely last for the rest of her life and proposes general damages of $65,000.00.

SUBMISSION OF THE RESPONDENT

24. The Respondent submits that the Claimant was largely recovered from her injuries by September 2005. There is no evidence of any treatment for Accident injuries after that date. Mrs. D. would have returned to work full-time as a hair stylist in September 2005 but for her decision to choose not to return to work because of her first pregnancy. The Respondent invites the drawing of an adverse inference for the Claimant's failure to provide any evidence from Dr. Neilson. In any event, there is no medical evidence to support a finding of any permanent disability. The Respondent submits that the heart palpitations and related symptoms that occurred in late January and early February 2005 are not causally related to the Accident. The Respondent submits that Mrs. D. has failed to mitigate by not following medical advice. The Respondent proposes non-pecuniary damages be assessed in the range of $30,000 to $40,000 before a reduction for the adverse inference and the failure to mitigate.

ANALYSIS AND DISCUSSION

25. The Respondent points to a number of pre-Accident injuries or medical conditions that it says did or would have affected Mrs. D.'s ability to maintain her pre-Accident level of physical activity or work. The first condition is the right hand carpal tunnel syndrome diagnosed in the mid-1990's when she lived in C. There was some discussion then about the possibility of surgery and she put in a claim to WCB which was denied. She was prescribed a splint which she wore for

quite a while at night on the right hand only. The symptoms of numbness and tingling resolved and she ceased wearing the splint. She brought it with her when she moved to V. but did not use it. Since Mrs. D. had been working full-time as a hair stylist from October 1999 up to the date of the Accident in April 2003, and, in the absence of any medical evidence suggesting that symptoms of carpal tunnel syndrome would likely reoccur in any event, I am unable to attach any significance to this prior diagnosis.

26. The second condition is bilateral patellofemoral syndrome An orthopaedic specialist prescribed a left knee brace and evidently suggested that she stop running. Mrs. D. wore the brace and took some strength training exercises which reduced symptoms. She wore the brace for a half marathon at C. but otherwise had not worn it for quite some time prior to the Accident. In the spring, 2003 Mrs. D. was participating in a program of regular distance running together with her gym training and other activities. Again, there is no medical evidence that this condition would have prevented Mrs. D. in any event from maintaining her level of physical activities. Physical recreation was such an important part of her life that I apprehend that she would have continued with her activities using a brace or braces if it became necessary, tolerating mild discomfort and resorting, if necessary, to non-invasive treatment.

27. The third condition is shortness of breath. Mrs. D. reported these symptoms to her family doctor in C. on an occasion when she got up too fast, felt dizzy and fell striking her head on a bathtub and dislocating her thumb. This history is presumably relevant to the chest discomfort, dizziness and intermittent palpitations that Mrs. D. experienced commencing the late fall, 2004 and exacerbated by the incident during massage therapy at the end of January 2005. Dr. Riddler referred Mrs. D. to a neurologist, Dr. Kemble (who ruled out vertebral artery injury) and to Dr. Williams, a cardiologist whose opinion, which Dr. Riddler accepted, was that the symptoms were consistent with functional mitral valve prolapse, not related to the Accident. I find that the chest discomfort

and heart palpitations in the late fall, 2004 and early spring, 2005 were not related to the Accident but I also find that Mrs. D. was, during the same time, suffering from anxiety for which the injuries caused by the Accident and their impact upon her both at work and in her daily activities were a significant contributing factor. In this regard I accept the opinion of Dr. Riddler.

28. In summary I do not consider that any pre-existing injury or medical condition was or would have reduced Mrs. D.'s physical recreational activities in the absence of the Accident. Mrs. D. readily admitted that having two small children under the age of 2 would affect the time otherwise available to engage in personal recreational activity. However, I accept that, but for the Accident, injuries she would have channeled her interest in healthy physical activity into running and cycling with her children in an appropriate push buggy or "chariot" as much as possible. As with Mr. D., although more so in the case of Mrs. D., the inability to engage in recreational physical activity at pre-Accident level has been a major loss of an ability that did and would have continued to contribute substantially to Mrs. D.'s enjoyment and quality of life.

29. With respect to the Claimant's failure to adduce evidence from Dr. Neilson, her family physician for the last two years, the Respondent submits that an adverse inference ought to be drawn and cites in support *Collyer v. Leonardon* (1998) B.C.J. 2050 and *Vezmarovic v. Kamal* (1998) B.C.J. 530. Both these cases refer to the summary of law by Burnyeat J. in *McTavish v. MacGillivary* (1997) 38 B.C.L.R. (3rd) 306. The starting point for the analysis is that a plaintiff who seeks damages should ordinarily call all doctors who have been consulted (*Barker v. McQuahe* (1954) 49 WWR 685). A plaintiff may provide an explanation as to why a doctor does not provide evidence and the trier of fact may draw an adverse inference but is not required to do so. In the present case, in my view, Mrs. D. has provided an explanation as to why no evidence was adduced from Dr. Neilson. The reason is that Dr. Neilson did not treat her for her Accident injuries. In May 2005 Mrs. D. discovered she was pregnant. She came under Dr.

Neilson's care initially primarily to oversee her pregnancy. 2005 was a year of transition in which Mrs. D. saw both Dr. Riddler and Dr. Neilson. Once she left the regular care of Dr. Riddler she did not really consult anyone else about her Accident injuries. Her approach was "Why dwell on it? My life is my life." What I discern from this evidence is that by roughly mid 2005, a little more than 2 years after the Accident, Mrs. D. had concluded that there probably wasn't much more medical treatment that she could receive that would significantly improve her ongoing symptoms and she resolved to live with and adapt her activities to her then existing symptoms. She had never been keen to take medication. She had ceased regular physiotherapy by the end of 2003 because it was of limited benefit. The incident that occurred in late January / early February at a massage therapy session had caused her to curtail massage therapy treatments. She had also the prospect of the birth of her first child to anticipate. Accordingly, given the explanation provided by Mrs. D., no adverse inference should be drawn.

30. With respect to mitigation the Respondent submits that Mrs. D. failed to follow medical advice in three respects. She did not receive botulinum injections when suggested by Dr. Filbey in September 2003. On the other hand, Dr. Filbey then recommended IMS and that treatment, which commenced in January 2004, was apparently successful in resolving the bilateral thoracic outlet syndrome symptoms. I understand from Dr. Filbey's report that the botulinum injection was a treatment that he suggested for Mrs. D.'s consideration, and when she was not enthusiastic about it, he recommended a different treatment which proved effective. There is no medical evidence to support the conclusion that the symptoms of thoracic outlet syndrome would have resolved earlier had the injections been instituted when initially suggested.

31. In the spring, 2005 Dr. Riddler diagnosed Mrs. D. as suffering from significant anxiety symptoms. He recommended that she consider trying anti anxiety medication and consider a referral to a counselor. He provided the names of

several counselors. Whilst Mrs. D. was considering whether to take anti anxiety medication, she discovered she was pregnant which made it ill advised to take the medication. Dr. Riddler no longer suggested it. Mrs. D. does not recall discussing the counselling option with Dr. Riddler but I accept his evidence on the matter, supported as it is by his clinical chart notes. Ultimately, Mr. and Mrs. D. talked between themselves about her state of health and there is no medical evidence nor evidence from Mrs. D. indicating that any anxiety or possible depression lasted more than a very short time. At the end of April 2005 she ceased working temporarily; in May she discovered she was pregnant; in September she elected not to return to work in view of her pregnancy. In the result I conclude that other events combined to relieve the state of anxiety and apprehended depression. There is no medical evidence to suggest that the resolution of these problems would have occurred earlier had counseling been instituted.

32. There were a few instances in which Dr. Riddler offered or prescribed other medications that Mrs. D. did not take. She was philosophically predisposed not to take medication. She did, however, take Ativan to help with sleep disturbance. I would not fault Mrs. D. for trying to do without prescription medication as much as possible, particularly in the absence of medical evidence respecting the consequence of not taking any particular medication.

33. I find that in the Accident Mrs. D. suffered a Grade III whiplash associated disorder injury, bilateral thoracic outlet syndrome and right ulnar neuropathy, a Grade II lumbosacral spinal strain injury and myofacial pain in her shoulder ridge areas, and bruising to the knee. These injuries caused headaches, interference with sleep, fatigue, irritability and anxiety. The bruising resolved in short order. The low back symptoms resolved within 2 years. Headaches, and neck pain extending into the shoulders, while significantly improved by September, 2005, have nevertheless persisted to the date of hearing.

34. Mrs. D. is a completely credible witness. She persevered trying to work full-time in her occupation as a hair stylist for 2 years after the Accident before finally having to stop work temporarily. She had followed medical advice to try and be as active as possible. She was extraordinarily physically active prior to the Accident. Her recreational activities were the principal focus of her non-work life. The Accident has had a tremendous impact on her ability to engage in rigorous physical activity. It has been a major cause of loss of enjoyment of life. The injuries have also resulted in time off work and income loss. The occupation of hair stylist which involves long hours of standing with arms and hands extended forward is particularly ill-suited for someone with neck and shoulder symptoms. As previously noted I conclude that the heart palpitations that occurred in late January/early February 2005 are not caused by the Accident but I also accept Dr. Riddler's opinion that in the spring, 2005, Mrs. D. was suffering from anxiety, which was significantly contributed to by her ongoing Accident injuries and symptoms and her struggle to remain working full time. The conclusion that the neck and shoulder symptoms and headaches were significantly improved by September, 2005 is consistent with Mrs. D. not having sought any medical treatment for Accident injuries after September, 2005. It is also consistent with a number of trips the Ds. took out of British Columbia, to Ontario in June, 2005, to New York in April, 2006, to San Diego in April, 2007 and 3-4 trips in the last few years to visit friends in Vancouver, Washington.

35. I also accept Mrs. D.'s evidence that she is continuing to have headaches although they are not as intense as before. They last for a few hours and sometimes longer. She also has neck and shoulder discomfort precipitated by activities such as heavy housework, lifting heavy items (such as her 2 year old son), breastfeeding her new born son (because of holding her head in a fixed position) and jogging. The question, however, is whether the evidence establishes a permanent injury or residual disability. No medical doctor has said that these current symptoms are unlikely ever to resolve. The last actual medical assessment of Mrs. D. was done by Dr. Riddler in April, 2006. Dr. Riddler's second report concluded that the

injuries had not fully resolved at that point, but the report contains no prognosis. Dr. Filbey in his report based on visits up to August 30, 2004 was unable to give a definitive prognosis. I do not think that this gap in the evidence can be filled by the opinions of physiotherapists and in any event, the opinions of Mr. Burman and Mr. Apt are provisional not final, conflicting, and based on assessments in 2004. Nor do I think the gap can be filled by the functional capacity evaluation of the registered kinesiologist Mr. Tetreault [Exhibit 33]. His report relies upon the medical legal reports and clinical records of medical doctors; his report quite properly does not contain a medical prognosis. The Claimant submits that symptoms that have not resolved 4-3/4 years after the Accident will most likely last for the rest of her life. That conclusion, however, requires medical evidence to support it and there is an absence of such evidence in this case. I am also mindful of the fact that the last medical physical assessment of Mrs. D. was by Dr. Riddler in April, 2006. Accordingly the Claimant has not proven on the evidence that she sustained a permanent injury. I assess damages on the basis that her neck and left shoulder symptoms and headaches had improved substantially by September, 2005 and that these symptoms have lingered on to the present date but are not permanent.

36. I have reviewed the case authorities provided by the Claimant, namely: *Lo v. Thompson* [2007] B.C.S.C. 1330; *Sidi v. Ainscough* [1997] B.C.J. No. 1045; and *Klein v. Dowly* [2007] B.C.S.C. 1151. Each case must be decided on its own particular facts, but other cases do provide an indication of the range of monetary compensation that is appropriate. There are a number of similarities between this case and *Lo v. Thompson* in which non-pecuniary damages were assessed at $65,000.00. However, in *Lo* there was a finding of permanent partial disability which I have been unable to make in this case. I assess Mrs. D.'s non-pecuniary damages at $55,000.00.

PAST WAGE LOSS

37. The Claimant advances a past wage loss claim for $24,606.00. This amount is derived as follows:

Net Wage loss for hours of work missed:	
- April 21, 2003 to December 31, 2003	$ 1,068.00
- January 1, 2004 to December 31, 2004	$ 1,111.00
- January 1, 2005 to December 31, 2005	$23,553.00
Lost Tips	$ 5,730.00
Subtotal:	$31,462.00
Less EI benefits (2005)	$ 6,856.00
TOTAL	**$24,606.00**

38. The wage loss calculation for the year 2005 is divided into three different components. The first component is the period from January 1 to April 28, 2005 when the loss is based on recorded hours missed from work. The second component is the period from April 28 to September 1, 2005 when Mrs. D. was on a medical leave of absence because of Accident injuries. The third component is for the period from September 1 to December 31, 2005 where the loss is based on the assumption that had Mrs. D. returned to work during this time she would only have been able to work at 80% capacity.

39. The Respondent disputes whether the Claimant has proven any income loss prior to April 28, 2005; challenges the adequacy of the documentation of hours missed from work; concedes that the Claimant is entitled to wage loss from April 28, 2005 to September 1, 2005; but disputes any recoverable wage loss thereafter.

40. I am satisfied that there is medical support for interference with ability to work fulltime as a hair stylist as a result of the injuries sustained in the Accident. Indeed, as early as May 12, 2003 Dr. Riddler recommended that Mrs. D. take time off work. Mr. Burman connected Mrs. D.'s difficulties performing her job

as a hair stylist with the requirement to use her hands in an elevated position which placed a large demand on the muscles of the neck and upper back. Ultimately, Dr. Riddler considered that Mrs. D. needed to stop work entirely for a period of months and wrote the medical leave notes to that effect in April and May, 2005.

41. On her return from the motoring holiday to California at the end of April, 2003, Mrs. D. was scheduled to start work as a hair stylist for a new employer, Salon M. operated by J. and M. W. Ms. W. and Mrs. D. had both previously worked at The G. and left at the same time for the new venture. Mrs. D. was to work 5 days a week (compared to 4 days at The G.) and to work longer hours. She was paid at both salons on a strictly commission basis of 55%. She also received some income from product sales and tips. As of April, 2003 Mrs. D. had an established list of clients having been in the hair styling business since 1988. A three page typed list of clients was introduced into evidence [Exhibit 10]. Apart from the month of September, 2003, Mrs. D. worked full-time at Salon M. up until April 28, 2005. In late July/August, 2003 she developed symptoms of thoracic outlet syndrome and on Dr. Riddler's recommendation worked part-time only in September, 2003. This change was not met with enthusiasm by her employer who reduced her commission to 50%. In October, 2003 Mrs. D. resumed full-time employment. Although working full-time, between the date of the Accident and April 28, 2005 Mrs. D. missed a total of approximately 200 hours from work either to attend treatment appointments or because the symptoms prevented her working. A four page handwritten list of time lost from work prepared by Mrs. D. was introduced into evidence [Exhibit 9]. This was compiled some time in 2005 from smaller notes Mrs. D. made each week keeping track of her hours missed. She can no longer locate those notes and believes she must have discarded them after compiling Exhibit 9. There are some inconsistencies with Exhibit 9, for example September 4, 2003 appears twice (once out of chronological order) and shows a different time loss for each entry. During the Hearing, and pursuant to a request by counsel for the Respondent, Mrs. D. made a

further search at home overnight and located an additional hand written list prepared by herself which is more comprehensive (it commences at April 28, 2003 rather than at May 15, 2003) and enabled Mrs. D. to correct some apparent errors in Exhibit 9. In addition, three letters from Salon M. dated August 31, 2003, August 9, 2006 and January 7, 2007 were entered into evidence [Exhibit 12] by agreement of counsel. These letters record Mrs. D.'s absences from work. No one from Salon M. was called to give evidence. The employer's list and Mrs. D.'s are not identical although neither counsel made much of the differences. No attempt was made by the Respondent, for example, to challenge the accuracy of items on her list for work absence due to physiotherapy or massage therapy treatment where there was no corresponding visit recorded in the physiotherapy or massage treatment records at Exhibit 14. In these circumstances I find that Mrs. D. did miss approximately 200 hours from work at Salon M. between the Accident and April 28, 2005 because of her Accident injuries.

42. The Respondent submitted that even though Mrs. D. may have missed time from work, she had not established that she lost income as a result. Mrs. D. was not able to identify anyone who ceased to be her client because of her periodic absence. Moreover, Mrs. D.'s reported income from employment increased from approximately $35,000.00 in 2002 to approximately $49,000.00 in 2003 to approximately $61,000.00 in 2004, before dropping to approximately $16,000.00 in 2005. It would, of course, be expected that her employment income would increase in 2003, over 2002, because for two-thirds of 2003 she was working an extra day per week and longer hours at Salon M. It would further be expected that her income from employment in 2004 would exceed that in 2003 because 2004 would be the first full year working the longer days and hours. However, I agree with Claimant's counsel that it is counter intuitive to conclude that no income would be lost from missing 200 hours at work, particularly for someone who was regularly booked 6-8 weeks in advance. In addition, Mrs. D.'s evidence was that if she were unavailable, then her clients were directed to a junior employee. To the extent that happened, the work and resulting income was truly

lost by Mrs. D.. At the same time, I accept the Respondent's submission that the determination of income lost from hours of work missed is not a mathematical calculation as it might be for a salaried employee.

43. I also find that Mrs. D. was off work from April 28, 2005 to September 1, 2005 because of her Accident injuries. Although it was put to Mrs. D. that she asked Dr. Riddler for a the medical leave note (a suggestion she denied) Dr. Riddler's evidence was clear that he finally told her she had to stop work completely for a period of time to try to recover from her Accident injuries.

44. I find however Mrs. D. is not entitled to an award for wage loss for the period from September 1 to December 31, 2005. Mrs. D. did not work during this period but her own evidence was that she elected not to return to work but to take early maternity leave. She would have taken maternity leave in January, 2006 in any event. But for her being pregnant Mrs. D. says she would have returned to work full-time at Salon M. in September, 2005 although she believes she may not have been able to work full-time. There is no medical evidence specifically addressing her ability to work in the fall, 2005. In his second report Dr. Riddler does not relate the symptoms that he found on his April 18, 2006 examination to Mrs. D.'s capacity to work in the fall, 2005. The claim is advanced on the basis that had Mrs. D. returned to work she would only have been able to work at 80%. Although I do not think the evidence supports this conclusion, the claim also fails on the basis of causation. Mrs. D. does not say that she could not work because of her injuries, nor that she did not work because her injuries; rather she chose as she was able and entitled to do to go on early maternity leave. Thus in my view the Claimant is not entitled to wage loss during this period of time.

45. In assessing the loss attributable to time missed from work, and while appreciating that from the nature of Mrs. D.'s employment this is not a straight mathematical calculation, I nevertheless think it useful to calculate the loss on the assumption that she would have been fully booked for every hour missed from

work. I draw assistance in these calculations from the report of Mr. Young of Discovery Economic Consulting dated November 2,2007 [Exhibit 41]. For the approximate 200 hours of time missed between the date of the Accident and April 28, 2005 I make the same assumptions as Mr. Young did, namely: 45 minute appointments, payment of $45 per appointment, and Mrs. D. receiving 55% as commission. 200 hours at 45 minutes per appointment equals 266 appointments. 55% of $45 per appointment equals $24.75 per appointment. 266 appointments times $24.75 per appointment equals $6,583.50. From this one would subtract approximately 25% for income tax purposes ($1,645.87) leaving a net wage loss of $4,937.63.

46. For the period from April 28, 2005 to September 1, 2005 (4 months) the assumptions are the same except that the charge per appointment is increased to $48.00 On the assumption Mrs. D. worked from 9 am to 6 pm on average, with a 45 minute lunch break, there were eleven – 45 minute appointments per day. Based on 22 working days per month, she had 242 appointments per month and over 4 months at 55% of $48 per appointment, the gross income would have been $25,555.00. From this amount I deduct $3,400.00 as EI benefits leaving the amount $22,155.00 (I do not know the exact amount of EI benefits paid between April 28 and September 1, 2005. [Exhibit 7] shows that $6,856.00 was paid during the year 2005. I have assumed this equates to an eight month period and reduced the deduction by half to reflect the four months during which Mrs. D. was not able to work because of her Accident injuries). This amount must be reduced for income tax at 25% ($5,538.00) leaving a net loss for the period from April 28, 2005 to September 1, 2005 of $16,617.00.

47. In addition to her 55% commission, Mrs. D. also received gratuities. On average, after sharing a portion with a junior stylist, Mrs. D. lost approximately $5 in tips per haircut appointment. The Claimant calculates that she missed approximately 1,150 appointments attributable to the 200 missed hours between the date of the Accident and April 28, 2005 and during the time from April 28, 2005 to

September 1, 2005. This amounts to approximately $5,730.00. Reducing this amount by 25% for income tax leaves a net loss for tips of $4,297.50.

48. Adding together the mathematical calculations for the 200 hours missed up to April 28, 2005 ($4,937.63) and the loss for the period between April 28, 2005 and September 1, 2005 ($16,617.00) and the amount for tips ($4,297.50) makes a total loss of $25,852.13. I would reduce this sum by an arbitrary 15% to take into account possible chair vacancy. This comes to the sum of $21,974.00, and I award $22,000.00 for past wage loss.

FUTURE WAGE LOSS / LOSS OF EARNING CAPACITY

49. In her written submission the Claimant advanced claims for $103,134.00 as future wage loss and an additional amount of $65,000.00 for loss of future earning capacity. The future wage loss claim was based upon her having a permanent injury that would permit her only to work 80% in the future as a hair stylist. Mr. Young calculated this loss assuming a return to work on September 1, 2013 and a 20% loss of work capacity to age 65. The loss of earning capacity claim was advanced on the basis that Mrs. D. met the factors cited in *Brown v. Golaiy* (1985) 26 B.C.L.R. (3d) 353 for that head of damage. In her oral submission, the Claimant resiled from the position that she was entitled to compensation under both headings, advancing as her first proposition the future wage loss as calculated by Mr. Young, and as an alternative position an award based on the factors in *Brown v. Golaiy*.

50. The Respondent's position is that the Claimant has not proven any permanent residual injury and according is not entitled to any award for loss of future earning capacity.

51. Mrs. D.'s evidence is that she does not intend to return to work until her youngest son is at kindergarten i.e. by 2012 or 2013. She then intends to return to work as

a hair stylist, a profession that she has always enjoyed. The claim for future loss is based on the assumption that in 4 – 5 years' time she will only be able to work as a hair stylist at 80% capacity.

52. In support of this claim, Mrs. D. relies heavily upon the functional capacity evaluation conducted by Mr. Tetreault of Viewpoint Medical Assessment Services Inc. on September 29, 2006. Mr. Tetreault was qualified as an expert in "kinesiology and clinical evaluation for functional capacity" and his report put into evidence [Exhibit 33]. The essence of Mr. Tetreault's opinion was that Mrs. D. was able to return to her pre-Accident employment as a hair stylist but with limitations. The limitations relate to her ability to maintain sustained neck postures when using her hands at or above eye level. Mr. Tetreault thought that Mrs. D. would likely require frequent micro breaks during prolonged tasks and might require additional time off. He recommended reduction of hours to some fraction of full-time equivalency such as 0.8 full-time equivalency.

53. The Respondent challenged this opinion on a number of grounds. First, there were not insignificant factual inconsistencies between Mrs. D.'s evidence and what was recorded as history in the report respecting current symptoms and the progress of symptoms post accident. Second, the Valpar 9 test, which assesses whole body range of motion agility and stamina produced scores above 100%. 100% is an average worker's ability. Thus Mrs. D. performed above average on this important test. On the Arcon MTM Functional Abilities test that involved pushing and pulling a cart containing varying weights, Mrs. D. performed at a lower level pulling a cart with 30 lbs than she did pulling a cart with 60 lbs. Mr. Tetreault did not notice this discrepancy, and although discrepancies are not unheard of, he could not explain it in this case. Finally, the result of a rapid exchange grip test used to assess the reliability of effort in the standard grip test indicated a probable indication of sub-maximal or unreliable effort in the standard test. For these reasons among others the Respondent submitted that little or no weight should be given to the functional capacity evaluation report. Mr. Tetreault

defended his conclusions but in the view that I take of the matter I need not resolve this issue. Simply put, Mr. Tetreault's opinion is based upon Mrs. D.'s performance during the September 29, 2006 evaluation. It is being used however to support a loss of future earning capacity claim commencing in 2012 or 2013. In order to be used for that purpose there is an assumption that Mrs. D.'s capacity will not change in the 6-7 years after the assessment. Put another way, it assumes that any functional restrictions demonstrated in September, 2006 are permanent. In his evidence, Mr. Tetreault rightly acknowledged that he would defer to the medical opinions of medical doctors. There is no reference in the functional capacity evaluation report itself to Mrs. D.'s intention to stay out of the work force until 2012 or 2013. I have previously observed that there is no medical evidence to support the conclusion that Mrs. D. suffered any permanent injury in the Accident. Mr. Tetreault's report properly does not attempt to express an opinion on the symptoms or restrictions that Mrs. D. might experience in 2012-2013. It cannot be assumed that the symptoms that Dr. Riddler found still persisting in April, 2006 will be present in 2012 – 2013. That is a matter that must be the subject of medical evidence which is not present here. Accordingly, I make no award for future wage loss or future loss of earning capacity.

SPECIAL DAMAGES

54. Mrs. D. advances a claim for special damages in the amount of $18,110.38. It is comprised of $744.00 in physiotherapy expenses, $2,819.86 in massage therapy expenses, $18.21 in prescription expenses, $168.31 for miscellaneous expenses, and $14,360.00 for house keeping expenses. The amounts claimed for physiotherapy, a portion of the massage therapy after Mrs. D. was enrolled in her husband's extended medical plan and the prescription expense represent 20% of the total expense i.e. the portion not covered by Sunlife. The Respondent says that there is no documentary evidence to support a medical necessity for hiring domestic help and the other expenses are all payable under Part 7 and are deductible amounts in an UMP claim.

55. I agree that physiotherapy, massage therapy and prescription expenses are all payable under Part 7 and not compensable under UMP. I allow the amount of $168.31 in miscellaneous expenses, receipts for which are at page 70 of Exhibit 14. They are not clearly payable under Part 7.

56. With respect to domestic help, the Ds. hired “W.” in the spring, 2003. She was the mother of a friend. She came once a week and was paid $60. She was paid in cash and did not provide a receipt. W. moved to C. sometime in 2005 and her surname and current whereabouts are unknown. The Ds. replaced W. with P. P. who has provided once a week housecleaning services at $70 cash (no receipt) from August, 2005 to the present.

57. Dr. Riddler does refer in both of his reports to Mrs. D.’s difficulty in performing heavy housework and the hiring of domestic help. In his first report he recorded that as of June 23, 2003 Mrs. D. was unable to manage major cleaning chores. That report concludes with the observation that as of April 2004 she was still unable to perform some activities of daily living such as house chores involving heavy cleaning. In his second report Dr. Riddler notes that as of April 18, 2006 prolonged time “doing chores” precipitated symptoms and that Mrs. D. had had to hire help because she could not tolerate heavy house chores. There is nothing in Dr. Riddler’s report’s that suggests that he thought obtaining domestic help was not warranted; I infer from his description of physical injuries and symptoms, and his reports and evidence, that he did consider obtaining limited domestic help for heavy household chores was appropriate in the circumstances. I observe that for the first two years after the Accident Mrs. D. continued to work full-time, with occasional time off; had she attempted to carry a full load of heavy house work, she may well have exacerbated her symptoms and missed more time from work at greater cost, ultimately, to the Respondent.

58. The next question is whether Mrs. D. has established that such domestic help has been medically necessary up to the date of the Arbitration Hearing. Given that Dr. Riddler identified continuing symptoms exacerbated by heavier household chores in his second report in June, 2006, I award the expenses for domestic help up to the end of June, 2006, but not thereafter. By June, 2006 Mrs. D. had one infant to look after and in 2007 she was pregnant with her second child, born in December, 2007. In such circumstances there are other reasons for which the Ds. might choose to hire domestic help and I do not think any award should go beyond the period of time for which there is medical support for the services in the evidence. I calculate this loss as follows:

Mid-May, 2003 until the end of June, 2005	
@ $60.00 per week	$6,360.00.
August, 2005 until June, 2006	
@$70.00 per week	$3,080.00
Total housekeeping expenses:	**$9,440.00.**

59. The total award for special damages then is $9,608.31.

COST OF FUTURE CARE

60. Mrs. D. advances a claim for cost of future housekeeping expense in the amount of $15,000.00. For the reasons discussed previously, I do not think there is support in the medical evidence in this case for such future loss.

SUMMARY AND CONCLUSION

61. In summary, I have assessed Mrs. D.'s damages as follows:

Non-pecuniary damages	$55,000.00
Past wage loss	$22,000.00

Special damages	$ 9,608.31
Future wage loss/loss of future earning capacity	$ 0
Future cost of care	$ 0
Total damages	**$86,608.31**

62. It is agreed that Mrs. D. has already received, from the liability insurer of the M. vehicle the sum of $25,000.00 (U.S.), being the available third party liability limits. Those limits are also a deductible amount. Mrs. D. did not, in fact, receive the full amount of $25,000.00. She had to retain a U.S. attorney to advance and ultimately achieve settlement of her tort claim. After deduction of legal fees and disbursements, Mrs. D. received net settlement proceeds of $16,054.51 (U.S.). ICBC, however, submits that the correct deductible amount is what the M.'s liability insurer was obliged to pay, namely $25,000.00 (U.S.). The Respondent's position is supported by the decision of Arbitrator Paul Fraser, Q.C. in *Cederberg v. ICBC* (May 18, 1995). Mr. Fraser's decision was based upon the definition of "deductible amount" in the Regulations in s. 110(1)(d) and (g). Although s. 110 of the Regulations is now s. 148.1 of the Regulations, the wording of ss. (d) and (g) has not changed. As Mr. Fraser concluded, the obligation to pay attorney's fees arose out of a separate and independent contract with the attorney which, in no way, reduce the amount paid by the tortfeasor or payable by the tortfeasor's insurer. I agree with his analysis. The full amount of the settlement of the M.'s liability insurer is therefore a deductible amount. The conversion rate of U.S. dollars into Canadian dollars of the settlement date of October 12, 2005 was 1.1707. Accordingly, the Canadian dollar equivalent was $29,267.50. When this amount is deducted from the total assessed damages, the balance is $57,340.81.

63. I award $57,340.81 to Mrs. D. as her entitlement for UMP compensation.

DATED at the City of Vancouver, this 30 day of January, 2008

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Donald W. Yule, Q.C., Arbitrator