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

BETWEEN:

A.P.S.

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

ARBITRATOR	**JOSEPH A. BOSKOVICH** Arbitrator 1800-1095 West Pender St. Vancouver, BC V6E 2M6
COUNSEL FOR THE CLAIMANT	**WILLIAM A. FERGUSON** MacKenzie Fujisawa LLP Barristers & Solicitors 1600-1095 West Pender St. Vancouver, BC V6E 2M6
COUNSEL FOR THE RESPONDENT	**ROBERT A. DEERING** Brown Benson Barristers & Solicitors 1450-701 West Georgia St. Vancouver, BC V7Y 1K8

The parties have agreed, pursuant to Section 148.2 of the Revised Regulations (1984) of the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231 ("the Regulations") and *The Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 to submit this matter to arbitration.

The arbitration was held on November 24 and 25, 2008. On November 27, 2008, the Respondent tendered written submissions regarding the deductible amounts. The Claimant's response submissions were delivered on November 28, 2008.

For the purpose of this arbitration, the parties submitted an Agreed Statement of Facts which outlines, amongst other things:

Agreed Statement of Facts

1. The Claimant, A.P.S., is retired and lives in Nelson, British Columbia.

2. On March 27, 2004, the Claimant was travelling as a right front seat passenger in a vehicle operated by her husband, A.S., on Highway 93, in the State of Nevada, USA. At or near the LN 160 mile marker, their vehicle was struck head-on by a motor vehicle owned and operated by W.J., who was a resident of Idaho, USA. W.J., his wife and A.S. were all killed. The Claimant was the only survivor.

3. Liability for the accident has been admitted and there is no contributory negligence on the part of the Claimant.

4. The Claimant suffered serious injuries including orthopaedic fractures to her upper and lower limbs and a fractured pelvis. Treatment entailed multiple surgeries which resulted in serious complications, including her contracting Hepatitis B.

5. The Claimant remained in a Las Vegas hospital from March 27, 2004 through to April 15, 2004.

6. On April 16, 2004 the Claimant was airlifted by Mega Assistance Services to Vancouver General Hospital where she remained from April 16, 2004 through to September 7, 2004.

7. Upon the Claimant's return to BC she underwent further surgeries and also underwent rehabilitation at G.F. Strong. When the Claimant finally returned home to the Kootenays she continued to receive therapy and rehabilitation treatments.

8. At the time of the accident the tortfeasor, W.J. ("the tortfeasor"), carried private automobile liability insurance with American Commerce Insurance Company ("ACIC"). That policy provided for an aggregate of $500,000.00 USD with no one person being able to receive more than $250,000.00 USD regardless of the number of claims.

9. Litigation against the tortfeasor was brought in Nevada by the Claimant in her capacity as Executrix of the Estate of A.S., as an heir of the Estate, as well as, in her personal capacity as an injured person.

   The three children of the deceased A.S. also brought actions against the tortfeasor as heirs of the estate of their father and also in their individual capacities.

10. During the course of the Nevada litigation, it was determined that the tortfeasor's estate had no meaningful attachable assets that could satisfy any payment or judgment exceeding the available insurance policy limits.

11. The Claimant is a person "insured" for the purposes of entitlement to an Uninsured Motorist Protection ("UMP") compensation claim.

12. The Claimant's damages for her personal injury claim exceed $1,000,000.00.

13. The parties reached a settlement with ACIC whereby the policy limits were paid as follows: $250,000.00 USD to the Estate of A.S.; $150,000.00 USD to the Claimant and the University Medical Centre; $33,333.33 USD to both the daughters of A.S., and $33,333.34 USD to his son.

14. At the hearing, the parties agreed that the $250,000.00 USD received by the Estate of A.S. was distributed equally to the Claimant and her three children, with each of them receiving $62,500.00 USD.

15. The Claimant's pecuniary damages for medical expenses that accrued while she was treated in Nevada totaled $450,223.39 USD.

16. The only issue for determination is the quantum of applicable deductions to be made pursuant to the Regulations outside of those agreed to which include:

A.	ICBC Part 7 coverage	$150,000.00
B.	ICBC additional Part 7 benefits TTD	$4,380.00
C.	ICBC Road Star benefits	$6,753.58
D.	Pacific Blue Cross Insurance – scooters and orthotics	$5,000.00
E.	Tortfeasor's payment to the Claimant ($150,000.00 USD)	$167,550.00

Total agreed deductible amounts: $333,683.58 Cdn.

ISSUES TO BE DETERMINED

A. Whether the Respondent is entitled to deduct all or any part of the settlement proceeds paid by ACIC to the heirs of the Estate of A.S. in the claim brought herein by the Claimant, regardless of whether or not an UMP claim has been advanced on behalf of A.S. as an insured person.

B. Whether the Respondent is entitled, pursuant to Regulation Section 148.1(1)(i), to deduct the following:

1. $22,580.00, paid to the Claimant by the Respondent as a death benefit;

2. $2,500.00, paid by CPP to the Claimant as a death benefit;

3. $196,723.00, paid/payable to the Claimant as additional retirement pension benefits from CPP and from her husband's retirement pension private policy;

4. $197,263.00, paid by the BC Hospital Insurance Fund for the care, services and treatment rendered to the Claimant following the accident; and

5. $276,223.39 USD, which is the shortfall of the Nevada medical expenses incurred as a result of the Claimant's treatment following the accident and the alleged compromised settlement reached between the Claimant and the Nevada healthcare provider.

THE LEGISLATION

1. Part 10 First Party Coverage, Division 2, Section 148.1 of the Regulations, applies to Underinsured Motorist Claims.

2. Section 148.1(5) provides that "the liability of the Corporation for payment under an owner's certificate or a driver's certificate of **all claims arising out of the same occurrence**, including (a) prejudgment interest....b) post-judgment interest..... and (c) costs awarded by a court or an arbitrator shall not exceed (d) the total amount of damages awarded in respect to all persons insured under that owner's certificate or driver's certificate, (e) the amount determined by Section 148.2(1) or (f) the applicable amount set out in section 13 of Schedule 3". [emphasis added]

3. The applicable amount set out in Section 13 of Schedule 3 is "[f]or the purpose of Division (2) of Part 10, the limit of coverage for underinsured motorist protection is $1 million **per insured person**". [emphasis added]

4. An insured as defined by Section 148.1 means

(a) an occupant of a motor vehicle described in the owner's certificate,

(b) a person who is

(i) named as the owner or renter in the owner's certificate where that person is an individual, or

(i.1) an assigned corporate driver, or,

(ii) a member of the household of a person described in subparagraph (i)

or (i.1) or

(b.1) a person who is

(i) an insured as defined in Section 42 and who is not in default of premium payable under section 45, or

(ii) a member of the household of an insured described in subparagraph (i)

or

(c) a person who, in the jurisdiction in which the accident occurred, is entitled to maintain an action against the underinsured motorist for damages because of the death of a person described in paragraph (a) or (b) or (b.1)

and, for the purpose of the payment of compensation under this Division, includes the personal representative of a deceased insured.

5. Section 148.1(1) provides the following:

"deductible amount" means an amount:

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

(b) payable under section 148,

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

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

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

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

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

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

> (g) **payable to the insured under a certificate, policy or plan of insurance providing third party legal liability indemnity to the underinsured motorist,**
>
> (h) payable under a policy of insurance issued under the Insurance Act or a similar law of another jurisdiction providing underinsured motorist protection for the same occurrence for which underinsured motorist protection is provided under this section, or
>
> (i) **payable to the insured under any benefit or right or claim to indemnity.**
>
> [emphasis added]

6. Section 148.1(2) provides "the corporation shall...compensate **the insured, or a person who has a claim in respect of the death of the insured, for any amount he is entitled to recover from the underinsured motorist as damages for the injury or death".** [emphasis added]

7. Section 148.2(1) provides "the determination as to whether an insured provided underinsured motorist protection under Section 148.1 is entitled to compensation and, if so entitled, the amount of compensation, shall be made by agreement between the insured and the corporation, but any dispute as to whether the insured is entitled to compensation or as to the amount of compensation shall be submitted to arbitration under the Commercial Arbitration Act".

8. Section 148.2(1.1) provides "a dispute about whether a person is an insured under this Division may be submitted to arbitration under the Commercial Arbitration Act regardless of whether there has been a determination that the injury or death of the person was caused by the use or operation of a vehicle driven by an underinsured motorist".

9. In any UMP claim the starting point is for a Claimant to establish that he/she is (1) an insured as defined in Section 148.1 and (2) that he/she is the victim of an underinsured motorist. **Unless both requirements are satisfied, ICBC has no requirement to pay any compensation.**

Issue A - Proceeds of the ACIC Settlement

Submissions of the Respondent

10. The Respondent submits that the $500,000.00 USD paid by ACIC in the underlying actions brought by the Claimant, the Estate of A.S. and by the three children of the deceased should be deducted pursuant to Section 148.1(1)(g).

11. The Respondent submits that the Claimant has brought an UMP claim for personal injuries only. No claim has been brought for the death of A.S. The Respondent says that the Claimant's personal injury claim cannot be "hived off" from the overall claim arising from the motor vehicle accident which its counsel describes as "the occurrence". The suggestion being the Claimant's claim for UMP compensation must not only include her own personal injuries but also a claim pursuant to Regulation Section 148.1(1)(c).

12. The Respondent admits there is no mechanism in the Regulations that mandates this but submits that the term "insured" outlined in the definition section Regulation 148.1(1) should, for the purpose of this claim, have only one meaning and that is the "Claimant and the Estate" and that to read the definition any other way would cause mischief and would deny the Respondent the benefit of the ability to deduct the full underlying third party policy payment.

13. The Respondent states the mischief that would be created if the Claimant is allowed to simply proceed with her claim for personal injury damages, while not incorporating a claim associated with the death of A.S., includes the following:

    a) The estate of A.S. bringing a subsequent UMP claim for that portion of the claim not dealt with in the Claimant's personal injury action;

    b) The "insurer" being denied the ability to deduct the payments made under Sections 148.1(1)(g) in their entirety;

    c) A situation where the estate takes the position that there is a separate $1,000,000.00 UMP coverage policy; and

d) The Claimant denying that all deductible amounts which were payable to the Claimant as a direct result of the death of A.S., are not deductibles and would only be if the Estate was part of the UMP claim.

14. The Respondent also submits that the motor vehicle accident in question represents a single occurrence and refers to Division 1, Section 148(3) which states, "The liability of the corporation for payment of all claims under this section arising out of the same occurrence..." On that basis the Respondent submits the injuries that the Claimant suffered and the death of A.S., both resulted from the accident which is the occurrence as defined above.

15. In support of its position, the Respondent relies on the case of *Koski et al v. Insurance Corporation of British Columbia*, a decision of Arbitrator G.R. Schmidt dated August 7, 1996, and *Lougheed v. The Co-Operator General Insurance Company*, B.C.C.A., [2007] BCJ No.: 2264 (October 18, 2007). It submits that these decisions stand for the proposition that the Claimant's personal injury claim and her claim for damages associated with the death of her husband are to be treated as one claim, subject to one UMP fund of $1,000,000.00. Further the Respondent is entitled to all deductions related to both heads regardless of whether the Claimant has chosen to include any claim by the Estate.

16. The Respondent argues that not including a claim for the death of her husband amounts to nothing different than what happened in *Piechotta v Bennett*, where a Claimant did not advance a tort claim for past and future wage loss, then argued that the long term disability benefits and CPP disability benefits he was receiving were not deductible amounts from his UMP award. I, as Arbitrator in *Piechotta*, found them to be applicable deductions as such benefits were specifically particularized in 148.1(1) and deductible pursuant to Section 148.2(5).

17. The Respondent further submits that, applying the law of British Columbia to the facts at hand, the accident gave rise to both a personal injury claim on the Claimant's part and also a *Family Compensation Act* claim for the death of her husband. The latter being on behalf of the Claimant and her three children. The Respondent submits that the Claimant has

"crafted" her UMP claim to avoid the deductions associated with the death of her husband and that such conduct "flies against the intent of the scheme" which it says is "for one overall fund for all claims arising, including all deductions giving rise to one absolute number".

18. The Respondent further submits that it had no control over the tort settlement reached and the payment allocations made therein and that the only rational way to deal with this situation on a fairness basis is to allow for a deduction of the complete payment made in the underlying tort settlement from the single $1,000,000.00 UMP fund.

Submissions of the Claimant

19. The Claimant submits that the purpose of UMP coverage is to "protect an innocent claimant who is not able to receive compensation from liable tortfeasors" and in this regard relies upon *McVea (Guardian ad Litem of) v British Columbia* AG 2005 BCCA 104 and *Mazur v The Citadel General Assurance Company* 2005 BCSC 1371.

20. The Claimant states that the UMP Legislation should be given a fair, large and liberal construction and interpretation and that the language used should not be interpreted in such a manner as to defeat or undermine the legislative purpose.

21. The Claimant submits the deductions outlined in Section 148.1(1) are there to avoid "both excess recovery and no proper recovery" and in this regard refers to *Hosseini-Nejad v. Insurance Corporation of British Columbia,* a decision of Arbitrator Yule dated December 21, 2000.

22. The Claimant submits the onus is on the Respondent to establish the type and amount of any deductible items. The Claimant further submits that the legislation provides, at Section 148.1(2), for compensation "for any amount he is entitled to recover from the underinsured motorist as damages". The Claimant relies on *Cederberg v. Insurance Corporation of British Columbia*, a decision of Arbitrator Fraser dated May 18, 1996, for the proposition

that "the purpose of underinsured motorist protection is to make Mr. Cederberg whole for his losses...nothing more and nothing less".

23. The Claimant states that any amount presented as deductible by the Respondent, based on the death of the Claimant's husband, is not an applicable deductible amount as against the Claimant's UMP claim because a claim for compensation associated with his death has not been brought. The Claimant points to the letter dated November 26, 2007 (Tab 11 of the Claimant's Arbitration Brief) from Respondent's counsel in support of her position that the Respondent consented to the tort settlement and to the Claimant proceeding with an UMP claim exclusively for her own personal injuries. That letter references A.S. and reads in part,

> Basically, the Insurance Corporation of British Columbia has agreed your client is entitled to coverage under the Underinsured Motorist Protection Program.
>
> As you know, there are a number of deductible factors to be taken into consideration in determining what your client's actual entitlement might be.

In that letter Respondent's counsel referenced the Claimant's entitlement to benefits from Blue Cross, Part VII of the Regulations and also queried whether or not she had settled the US hospital account. No other issues were raised with respect to "deductible factors".

24. The Claimant submits that in the underlying tort actions there were claims associated with the death of A.S. brought by way of his Estate for its four beneficiaries and that these claims were settled, with the consent of the Respondent, for $250,000.00. There were also independent claims advanced by each of the three children of A.S., that were settled for additional payments of $33,333.33 respectively. Again these claims were settled with the consent of the Respondent and in this regard there was no basis to bring an UMP claim by his heirs as the claims had been satisfied by the tort payment.

25. The Claimant further submits that the Respondent has the onus of showing that "a death UMP claim was advanced against ICBC by any personal representative of [A.S.]... and that ICBC would have accepted a death UMP claim by any personal representative of [A.S.]".

26. The Claimant's position is that a "death UMP claim" would not have been accepted by the Respondent because of the payments made by the tortfeasor. To advance deductibles attributed only to the death of A.S., simply as a basis to reduce the Claimant's UMP claim is not permitted by the Regulations nor is the argument supported by any case authorities.

27. The Claimant states that Regulation 148.1(2) grants her the right to recover UMP compensation for her personal injuries as an "insured" and also grants personal representatives the right to advance an UMP claim for the death of an "insured" where such a claim is maintainable against the liable tortfeasor. The Claimant submits that the *Koski* decision referred to by the Respondent simply stands for the proposition that the "beneficial maximum amount payable by UMP coverage is $1,000,000.00 per insured" and not, as the Respondent submits, for the deductibility of one claim against another.

28. The Claimant submits there is no "death UMP claim" because UMP is a fund of last resort and the Estate has been adequately compensated through the settlement of the tort proceeding. The Claimant says, however, that she does have an "injury UMP claim" on the basis that she has not been adequately compensated. In this regard, the Claimant relies on the Respondent's admission that her own personal injury damages exceed $1,000,000.00.

29. The Claimant further submits that there is nothing in the Legislation that requires or compels an UMP claim, be it for personal injuries, death or both, to be brought against the Respondent and states the rights of the parties are governed by the Regulations and in this regard cites *Vezer v. ICBC,* a decision of Arbitrator Wallace dated March 23, 1999.

30. With respect to the Respondent's submission that the existing claim is similar to the claim, or lack thereof, in *Piechotta v. Bennett*, the Claimant submits the existing case can be distinguished on the basis that the Claimant here advanced all possible claims against the tortfeasor in the underlying action in Nevada and the recovery from the tortfeasor for her personal injury damages left her significantly undercompensated.

31. The Claimant states that even if her personal injury claim was combined with a "death UMP claim" on behalf of her husband the amounts related to the death of A.S. would still not be deductible on the basis that the payment by the tortfeasor's insurer cannot be applied solely against the Claimant as the total amount recovered was for the entire Estate, apportioned between its four heirs. With respect to the $33,333.33 received by each of the children/heirs of A.S., as settlement of their individual actions, none of those funds are attributable to the Claimant.

Discussion – The Nature of the Claim

32. Fundamental to determining the issues before me, is reconciling the nature of the claim being advanced. The parties agree that the Claimant is an "insured" pursuant to the Regulations and that her personal injury damages, regardless of any *Family Compensation Act* type claim, exceeds $1,000,000.00. The parties also agree that given the policy limits and restrictions with respect to the insurance held by the tortfeasor, the Claimant was the victim of an underinsured motorist.

33. Where the parties disagree is in the interpretation of what the definition of "insured" encompasses under the Regulations.

34. The Respondent submits that for the purpose of this Arbitration, the term "insured" can have only one meaning and that is "Claimant and the Estate" and to interpret it any other way would create a "mischief".

35. The Claimant submits that she is an "insured" for the purpose of her personal injury claim and that there is no claim being advanced on her behalf pursuant to the *Family Compensation Act* and/or through her by the Estate of A.S.

36. As outlined at paragraph 4, a person acquires the status of an insured in three distinct ways. In the Claimant's situation, she would fit all three of the definitions of the word insured under the Regulations. Although not outlined in the Agreed Statement of Facts,

my notes indicate that this claim was being advanced through the Claimant's owner's certificate of insurance. This point is important because Sections 148.1(7) and (8) provide that where more than one certificate provides underinsured motorist protection to an insured, the insured shall be compensated only under one such certificate and in the case where there is both an owner's and driver's certificate then the insured shall be compensated under the owner's certificate.

37. The Regulations place no such restrictions or limitations where an insured has access to underinsured motorist protection and may also be the beneficiary of an estate entitled to advance a claim for the death of another insured arising out of the same occurrence. This type of situation was dealt with by Arbitrator Schmitt, Q.C., in *Koski et al v. Insurance Corporation of British Columbia* a case, which as outlined above, was referred to by both Counsel in this proceeding.

38. *Koski* dealt with issues of UMP coverage arising from a car accident in which the insured mother, who was the driver of the car, died. The insured's daughter, a passenger in the car, suffered catastrophic injuries.

39. In *Koski,* Arbitrator Schmitt was asked to determine what UMP coverage was available for the claims arising from the death of an insured, to whom such coverage was available, and how the amount payable should be calculated **given that one person entitled to a portion of the deceased's estate would also be receiving money for personal injuries she suffered in the accident.**

40. In *Koski,* Arbitrator Schmitt noted "**both Coti and her mother's estate have $1,000,000 UMP coverage.** The precise question to be decided is whether Coti's claim pursuant to the *Family Compensation Act* is part of "her overall claim" or really a claim by her mother's estate for money of which Coti will be the beneficial owner. If the former then her million dollars of UMP coverage will be available to cover her claims; if the latter then her mother's million dollars UMP coverage could be used to cover the *Family Compensation Act* part of her claim; if necessary".

41. In *Koski,* counsel for the Claimant argued "the fact one of the *Family Compensation Act* claimants may have been injured in the same accident should not affect the UMP coverage available to the estate or a representative of the deceased insured".

42. As is the situation here, in *Koski* counsel for the Respondent was arguing that in a case where an insured entitled to UMP coverage also has a *Family Compensation Act* claim the only UMP coverage available is the $1,000,000.00 available to the insured as an injured person to cover that insured's entire claim as an injured party and *Family Compensation Act* claimant.

43. In *Koski*, Arbitrator Schmitt found the Claimant, Coti, happened to be an insured under two different definitions and would be entitled to the benefits of her UMP coverage for both her claims (personal injury and *Family Compensation Act*) up to the $1,000,000.00 limit available to her. He also held that the deceased's estate was, "**likewise entitled to the benefit of UMP coverage up to $1,000,000** but the mother's estate claims do not include the claims of survivors under the *Family Compensation Act* which belong beneficially to those survivors".

44. Arbitrator Schmitt further stated that one **should not** regard the right of action which Coti has as a right of the estate and that to suggest that claims under the *Family Compensation Act* fall under the UMP coverage of the deceased is actually an argument for reducing the scope of the UMP coverage which, under Section 148(1) **accrues to each person who has a claim under the Act since each of them has the right to sue.**

45. At this hearing counsel for the Respondent submitted that the Claimant stands in the same situation as Coti Koski and that her UMP entitlement is restricted to $1,000,000.00 for both the personal injury portion of her claim and pursuant to her right to advance a claim pursuant to the *Family Compensation Act.*

46. The Claimant submits there is no *Family Compensation Act* component to her claim and that her claim is simply as an insured person who suffered personal injuries, the quantum of which (as agreed) exceeds $1,000,000.00, and who did not receive satisfactory compensation from the liable tortfeasor rendering her the victim of an underinsured motorist.

47. The Claimant further submits that there is no claim being advanced by a person entitled to bring an action against the liable tortfeasor for damages for the wrongful death of another insured, A.S. The Claimant states that if there were such a claim, it could be brought by one or all of her children as the survivors of A.S., and points out that each of them had independent actions in this regard against the tortfeasor in Nevada. The children were also the beneficiaries of the Estate of the deceased which also had its own action against the tortfeasor in Nevada.

48. I note that in *Koski,* Arbitrator Schmitt held that the deceased's estate was entitled to the benefit of UMP coverage of $1,000,000.00 but that this did not apply to the claims advanced by or through the Estate on behalf of survivors such as Coti Koski and others under the *Family Compensation Act*. He further held that **Coti Koski as an insured was entitled to the benefit of her own UMP coverage of $1,000,000.00 with respect to her claim for personal injuries and her claim for damages under the Family Compensation Act notwithstanding the fact that she was also likely to receive some or all of the proceeds of the separate UMP coverage available to the Estate as a beneficiary**.

49. Throughout the course of this Arbitration, I was invited by counsel for the Respondent to treat the Claimant as being in the same situation as Coti Koski, namely an insured entitled to damages for personal injuries **and** a person entitled to advance a *Family Compensation Act* claim for the death of her husband, and in doing so that I should treat her entire UMP entitlement as being $1,000,000.00. While I have absolutely no difficulty with that assertion having regard to the findings outlined in *Koski*, that fact **does not** extinguish the right of a personal representative of the deceased, A.S., from maintaining an UMP action,

assuming the representatives can establish the deceased was the victim of an underinsured motorist in which case that representative would also have an UMP entitlement of $1,000,000.00 less applicable deductible amounts.

50. Having regard to the wording of the Legislation and the comments outlined in *Koski*, I find that "insured" for the purposes of the case at hand refers to the Claimant in her claim for damages for personal injury and as a person entitled to advance a *Family Compensation Act* claim. It does not, as submitted by the Respondent, encompass the Estate as it would be an insured itself pursuant to Section 148.1(c).

The Claimant's Standing & Payments by the US Tortfeasor

51. The evidence tendered indicates the Estate of A.S. received $250,000.00 USD from the third party liability policy held by the tortfeasor. In addition, each of the children of A.S., as heirs, received $33,333.33 (or $33, 333.34 as the case may be) from that policy with respect to their individual claims. The Claimant received $150,000.00 USD from the policy.

52. Counsel for the Respondent suggests that because the Claimant, who is an insured in her own right, and is also the executrix of the Estate of the A.S., must advance as part of her UMP claim, the damages associated with his death and that her failure to do so entitles the Respondent to seek a reduction of any amount payable to her under UMP for items such as funeral, death and survivor pension benefits as, to use the words of the Respondent, "an amount payable to the insured under any benefit or right or claim to indemnity".

53. I note that I have not, as was the case in *Koski*, been asked to make a determination as to whether the Estate or a personal representative of the deceased A.S. is an insured entitled to compensation pursuant to UMP.

54. Obviously, had that been an issue before me, it would be easy to conclude by way of the definition section in Regulation Section 148.1 that the Estate or personal representative would be considered an insured. The more difficult conclusion to reach would be finding that the Estate and the persons entitled to advance a claim for wrongful death (not only the Claimant but also her three children) were the victims of an underinsured motorist.

55. While I have no evidence as to the nature of the Estate's claim and bearing in mind the type of damages recoverable in British Columbia pursuant to the *Family Compensation Act* and *Estate Administration Act*, it is difficult to imagine that the Estate would have been insufficiently compensated by virtue of the $250,000.00 USD tort payment having regard to the age of the deceased and the fact, as per the evidence tendered, he was retired.

56. I agree with the Respondent's submissions (page 7, paragraph 1) that the only rational conclusion for the Claimant's decision not to include the Estate is that at the time the underlying tort action was settled she was satisfied that the allocation to the Estate and heirs was satisfactory and that by bringing her UMP claim for personal injuries, she was obviously dissatisfied with respect to the tort allocation to herself.

57. That position is further supported by the Respondent's submission at the commencement of these proceedings, that the Claimant's personal injury damages exceed $1,000,000.00, notwithstanding any claim she might have associated with the death of her husband pursuant to the *Family Compensation Act*, hence eliminating the need for me to hear any evidence with respect to the quantum of her damages.

58. As previously stated, to say that the Claimant's personal injury action is inexorably connected to the claim of the Estate of her deceased husband or any personal representatives entitled to advance a claim for his wrongful death is not supported by the wording of the Legislation nor by the *Koski* decision. That is not to say there is no relationship between her claim and the death of her husband. As outlined above, she is an

insured and is entitled to bring a personal injury claim and a *Family Compensation Act* claim.

59. I have been asked to decide what the applicable deductions from the Claimant's UMP claim are and this must be done in the context of the Agreed Statement of Facts. Aside from the issues discussed above as to the meaning of the term "insured", the Respondent further complicates this matter by raising factual matters that are clearly beyond the scope of what I have been asked to deal with here. The suggestion from the Respondent seems to be that I should be drawing an adverse inference from the fact that a non-arms length relationship exists between the Claimant, the Estate of A.S. and the three children who are beneficiaries of the Estate. At page 7 of the Respondent's written Argument he states:

> ICBC had no control over the allocation of policy. The allocation was structured by the Claimant's US attorney and the US attorney representing the insurer of the underinsured tortfeasor. The only rational way in which to deal with this situation is to allow for a deduction of the complete Estate related allocation provided for in the underlying tort settlement as against the single $1 million UMP fund.

At page 8 he continues:

> Ultimately, it was the insured who determined the allocation of the underlying policy as among herself, the Estate and the three children. How that came about and why that came about is no concern of the Respondent for the purposes of UMP provided full deduction of the underlying tort policy is allowed.

60. The Claimant submits that all five tort actions were settled with the consent of the Respondent.

61. The only evidence of the settlement is a letter from the Respondent's handling examiner to the Claimant's Nevada counsel dated 17, July, 2006, which reads in part,

> Further to our telephone discussion of 13, July/06, I wish to confirm that the Insurance Corporation of B.C. consents to your settlement of the policy limits

> from the insurer of J [deceased]. ...I trust this confirmation is what you require to proceed with your tort settlements.

62. Other than the submissions of counsel, no other evidence was tendered regarding the settlement with the tortfeasor's insurer. Nor was there evidence setting out the legal nature of A.S.'s Estate that would define the equities of the beneficiaries. I note that both the Respondent's handling Examiner and the Claimant attended at this hearing, but did not testify to these matters. I know nothing else about this issue other than that the four beneficiaries, the Claimant and her three children, shared equally the $250,000.00 USD proceeds paid to the Estate of A.S.

63. While the Respondent may not, as submitted, have had control over the allocation of the tortfeasor's policy limits which provided for an aggregate payment of $500,000.00 USD with no one person being able to receive more than $250,000.00 USD, it had exclusive control over whether or not the settlement would be approved and the Claimant's UMP claim accepted.

64. For example, it would have been relatively simple for the Respondent, upon receiving notice that the tortfeasor's insurer was willing to remit payment of policy limits, to say that its position was that the maximum payable under the policy ($250,000.00 USD) should be allocated to the Claimant for her personal injury damages and that if the parties allocated the funds contrary to that, that it would be done at the peril of the Claimant as such a deduction would be sought pursuant to UMP.

65. I find it very difficult to reconcile the suggestion made by the Respondent that the entire payment by the tortfeasor ($500,000.00 USD) should be deducted in the claim brought by the Claimant as an insured person when the most she could have received from the tortfeasor was $250,000.00 USD.

66. No evidence was tendered explaining the nature of the claims advanced in Nevada and whether or not such claims are similar to the types of claims advanced in British Columbia pursuant to the *Family Compensation Act* or *Estate Administration Act.*

Further, no evidence was tendered indicating that the payments made under the settlement were unfair or improper.

RULING

67. The portion of the tortfeasor's payment to the Estate of A.S., that was allocated to the Claimant ($62,500.00 USD) is not deductible pursuant to Section 148.1(1)(g). That being said, given the payment of the funds to the Estate and ultimate distribution to the Claimant was triggered by the death of A.S., as a result of the accident, or occurrence to use the words of the Respondent, I do find that the portion of the funds received by her deductible as a benefit pursuant to Section 148.1(1)(i).

Issues B – Deductible Amounts Pursuant to Regulation S.148.1(1)(i)

Amounts Related to the Death of A.S.

68. The Respondent submits that the following items are deductible from the Claimant's UMP claim pursuant to Regulation Section 148.1(1)(i) because they relate to the death of her husband which resulted from the accident, or the occurrence as it was referred to at this hearing:

a) $22,580.00 paid by ICBC as a death benefit;
b) $2,500.00 paid by the Canadian Pension Plan as a death benefit; and
c) $196,273, in additional pension benefits payable to the Claimant because of the death of her husband.

69. Regulation Section 148.1(1)(i) provides that the term "deductible amount" includes "an amount payable to the insured under any benefit or right or claim to indemnity".

70. The Respondent submits that each of the above are benefits payable to the Claimant directly as a result of the occurrence of the accident and that subsection (i) does not distinguish between differing heads of damages or causes of action. It adds that there is

no matching requirement within Section 148.1, such that these benefits should be deducted as they are rationally connected to the accident.

71. The Respondent further submits that despite the fact that there are a number of Arbitration decisions that state some constraint must be placed on the meaning of the word "benefit" that a plain reading of the legislation tends to indicate that subsection (i) is very generally constructed and is a catch-all clause which avoided the legislature having to list further specific exceptions.

72. The Respondent relies on *Cederberg v. Insurance Corporation of British Columbia,* a decision of Arbitrator Fraser dated May 18, 1995, where in dealing with sub-paragraph (i), he noted that while the wording of the language was very broad it did not render the provision ambiguous in law.

73. With respect to each of the deductions sought by the Respondent for amounts accruing to the Claimant as a result of the death of A.S., counsel for the Claimant submits that such payments are not related to the "injury UMP claim brought and accepted" by the Respondent. The Claimant submits the Respondent's position is not supported by the Regulations, which provide for "separate and distinct UMP claims for persons sustaining injuries and UMP claims by the personal representatives of those that die in an accident". The Claimant states that the Respondent's suggestion that there can only be one insured in connection with the accident is "an unsupportable fiction".

74. The Claimant further submits that even if her "injury UMP claim is combined with a non-existent UMP death claim based upon the death of A.S.", the deductibles sought by the Respondent as benefits paid in connection with his death are not applicable deductible amounts as they are not deductible in their own right pursuant to the Regulations. The Claimant relies upon *Vezer v. Insurance Corporation of British Columbia,* a decision of W.J. Wallace dated March 23, 1999, and *Lake v. Insurance Corporation of British Columbia,* a decision of D. Yule dated January 28, 2001.

75. With respect to the cases cited by the Respondent supporting the position that the death benefits received by the Claimant are applicable deducible amounts, I note that *Cederberg* dealt with whether or not legal fees paid by an insured for tort recovery were deductible amounts and also whether UIC and CPP amounts received were deductible amounts (this case predated the revisions to the Regulations specifically providing for the deduction of UIC and CPP benefits). Subsequent authorities have clarified that such benefits as they relate to disability resulting from an accident are applicable deductible amounts in an UMP claim. Payments of CPP benefits after the age of 65 and which relate to retirement are not applicable deductible amounts as they do not relate to injury/disability.

76. In *Cederberg*, the Arbitrator held that the total amount of the tort settlement/payment, regardless of the fact that the sum paid to the insured was ultimately reduced for legal fees, disbursements and taxes, was an applicable deductible amount.

77. With respect to the UIC and CPP payments, the Arbitrator held that because there was no specific sub-paragraph that dealt with them in the definition of "deductible amount" that they would only be deductible if they fit within sub-paragraph (i) as amounts "payable to the insured under any benefit or right or claim to indemnity".

78. The Arbitrator held that UIC and CPP payments did fall under sub-paragraph (i) and in dealing with the intention of UMP stated "here the insurer has not caused the injuries or loss to Mr. Cederberg. ICBC has simply agreed to indemnify him for the damages which he has sustained but is **unable to recover either from the tortfeasor or other third party sources**. The deductibility of amounts received from these other sources is clearly set out in the legislation…**therefore the legislature must be taken to have intended different considerations to apply in the circumstances of underinsured motorist protection than to the traditional tort damage award**".

79. *Lake v Insurance Corporation of British Columbia*, dealt with whether or not all Part 7 payments made were deductible and whether CPP payments were deductible to age 65 or

for life. In *Lake,* the parties agreed that the Claimant's claim exceeded $1,000,000.00, which was the amount of the third party liability policy held by the liability tortfeasor and which was paid out. The Claimant submitted that the Respondent in consenting to the tort settlement and agreeing his claim for damages exceeded $1,000,000.00 minus statutory deductions, must mean that it accepted the judgment which would have been awarded would have been net of Part 7 benefits.

80. In *Lake*, the Claimant submitted that Part 7 benefits that had been paid, which basically amounted to the maximum provided for ($150,000.00) should be regarded as already having been deducted in the tort action pursuant to Section 25 and to deduct them in the UMP award would be wrong because it would amount to a double deduction and also because there was no possibility of the Claimant receiving double compensation.

81. In *Lake,* counsel for the Respondent submitted that UMP was a fund of last resort and that the starting point for the calculation of UMP entitlement is set out by Regulation Section 148.1(5) and where there is an agreed statutory limit of $1,000,000.00, all applicable deductible amounts must be subtracted from that starting point by the clear and express language of Section 148.1(5). Further, it was irrelevant whether Part 7 benefits would have been deducted from an assessment of damages against the tortfeasor as the Regulation itself mandates the deduction of Part 7 benefits as there was no judgment but rather a settlement with the tortfeasor.

82. The Arbitrator found that the meaning of the word "payable" in Section 148.1(1) refers to entitlement according to the criteria for the payment of no fault benefits rather than to the timing of the payment of any actual benefits. The Arbitrator also found that the deduction of Part 7 benefits in the UMP action would not amount to a double deduction as that argument is premised upon Section 25 of the *Insurance (Motor Vehicle) Act* which applies only to judgments and not settlements of actions. The Arbitration held that all Part 7 payments were deducible.

83. With respect to whether CPP Benefits were deductible to age 65 or for life, the Arbitrator noted the Claimant's CPP disability payments would end at age 65 and thereafter he would receive a retirement pension from CPP. The Arbitrator also noted that the Regulation did not make any distinction between benefits payable before or after age 65 nor does it make reference to different types of benefits that are payable under the CPP plan.

84. In *Lake*, counsel for the Claimant submitted that there was no rational connection between the accident and CPP pension payments after age 65 as the Claimant would be entitled to such payments regardless of the accident. This was in contrast to the disability benefit he had received, and would continue to receive to age 65, which resulted from his injuries. The Claimant also submitted that CPP pension payments were akin to payments under an ordinary life insurance policy, which are not deductible, and that even if there was some connection between the retirement pension benefits and the accident, the Claimant has not received any benefit, since the pension entitlement had not increased in any way because of the accident.

85. The Arbitrator in *Lake* noted that the retirement pension benefits were not in any way related to the underlying accident and resulting injuries and claim and that to deduct such an amount would fail to pay sufficient regard to the purpose of the overall compensation scheme.

RULING

86. In the Claimant's situation she has suffered personal injuries and the wrongful death of her husband as the result of the negligence of an underinsured tortfeasor. She is entitled to be compensated for the amounts she is unable to recover from the tortfeasor or any other third party source for the loss related to her injuries and the death of her husband and the losses that flow from them.

87. I pause to note that Regulation Section 148.1(1)(c) provides that an "amount payable under Part 7 or as accident benefits under another plan of automobile insurance similar to Part 7" is an applicable deductible amount and that, in this regard, I find the $22,580.00 paid by ICBC as death benefits, which falls under Part 7 of the Regulations, is a deduction specifically provided for (these benefits being paid from the deceased's Part 7 benefits to the Claimant). If that finding is incorrect then such payments would be deductible, as submitted by the Respondent, pursuant to Regulation Section 148.1(1)(i).

88. The death benefit payable by CPP, as outlined in the materials submitted, is "a onetime lump-sum payment made to the deceased contributor's estate. If there is no estate, the person responsible for funeral expenses, the surviving spouse or common-law partner or the next of kin may be eligible in that order".

89. It is agreed that the Claimant received the death benefit from CPP as the surviving spouse of A.S. While the Respondent is seeking to have this payment deducted pursuant to Regulation Section 148.1(1)(i), I note that Regulation Section 148.1(1)(f.2) provides for a deduction of "any amount to which the insured is entitled under Canadian Pension Plan". As has been stated in previous Arbitrations, this section does not distinguish the types of benefits paid by CPP.

90. The $2,500.00 death benefit paid by CPP was, much like the Part 7 death benefit payment, payable directly to the Claimant as a result of the death of her husband in the accident. In this regard, it is deductible pursuant to Section 148.1(1)(f.2). If I am wrong about these findings, then such payment would still be deductible, as submitted by the Respondent, pursuant to Regulation Section 148.1(1)(i).

91. The more difficult question is with respect to the CPP and private survivor's pension benefits, which are payments of the deceased's retirement pensions and which are based on, inter alia, the pre-accident earnings and contributions made by the deceased A.S.

92. I note that had A.S. lived and advanced his own UMP claim, his retirement pension payments from both sources would not have been an applicable deductible amount as these were and would continue to be paid regardless of whether or not there had been an accident.

93. In much the same token, regardless of the cause or manner of the death of A.S., had the Claimant survived him, she would be entitled to receive the survivor's pension benefits. The question becomes whether or not, having regard to the intention of the legislation, such survivor's pension benefits become deductible as a benefit or right or claim to indemnity simply because their payment has been triggered as a result of this accident or occurrence to use the words of the Respondent.

94. It seems clear by the nature of the survivor's pension benefit payments that these could on their face be benefits pursuant to Section 148.1(1)(i). As stated by Arbitrator Yule in *Lake v. ICBC*, while the Regulations are not drafted so as to require a direct match between any particular head of damage and deductible amount, when the scope of the insuring agreement in Section 148.1(2) is kept in mind, all of the deductible amounts must at least have some relationship to the accident and resulting injuries and claim against the tortfeasor. The payment of the pension benefits are related to the accident as they are triggered by it having taken place and resulting in the death of A.S., which established the Claimant's entitlement to seek *Family Compensation Act* type (and other) damages as against the tortfeasor.

95. UMP compensation is not a substitute for the tortfeasor's inadequate insurance coverage in the sense that the compensation it attracts is assessed as though the tortfeasor had a higher third party liability policy limit. UMP compensation is not measured the same way that tort damages are assessed. Under UMP the deductible amounts make no distinction between different heads of damage and it is completely irrelevant whether any particular head of damage has been paid in full or in part. In the Claimant's situation those comments would apply to any *Family Compensation Act* claim. It is for this very

reason that the claim advanced here, as previously stated, is by the Claimant, an insured who is entitled to personal injury and *Family Compensation Act* damages.

96. Having said that, I am not so convinced that in dealing with these survivor's pension benefits, that the deduction should be calculated for the life of the Claimant as submitted by the Respondent, as these would have been payable to her at some point regardless of the cause and manner of the death of A.S. While no evidence was tendered with respect to the life expectancy of A.S., I assume that such evidence must exist as it was requested by the Respondent's handling Examiner prior to her calculating the lump sum payment of the Part 7 death benefits.

97. I find that the CPP and private survivor's pension benefits being received by the Claimant are applicable deductible amounts pursuant to Regulation 148.1(1)(i) with the limitation that these deductions should be calculated on the basis of the natural life expectancy of A.S., absent the accident and not for the life expectancy of the Claimant.

98. If the parties are unable to agree to a calculation period and corresponding deductions then they will be at liberty to come back before me to address that issue. If the parties do come back before me then I expect, unlike was done here, that they will have opinion evidence dealing with the life expectancy of A.S. from the appropriate source and in this regard I will require them to agree upon a joint expert to avoid duplication of efforts and unnecessary additional disbursements.

BC Hospital Payments

99. Counsel for the Respondent submits that the $197,263.00 paid by the British Columbia Hospital Insurance Plan for the medical care the Claimant received in British Columbia following the accident is deductible as a benefit as defined in Regulation Section 148.1(1)(i). The Respondent says that this publically funded healthcare program was created for the benefit of the citizens of the province and that, because such payments are recoverable pursuant to Section 25 of the *Hospital Insurance Act*, RSBC 1996, c.286 as

against a wrongful act or omission of another, that this "creates a right or claim to indemnity entitling the beneficiary to a benefit or right or claim to indemnity "payable" to the insured by the tortfeasor".

100. The Respondent further submits that regardless of whether or not the Claimant pursued that type of claim against the tortfeasor it remains a benefit or right or claim to indemnity payable to her pursuant to Regulation Section 148.1(1)(i). The benefit, the Respondent submits, is receiving medical treatment for the injuries she suffered in the accident.

101. Counsel for the Respondent states that a similar concept was dealt with by Arbitrator Yule in *Mardesic v. Insurance Corporation of British Columbia*.

102. In *Mardesic*, Arbitrator Yule found that he was not in a position to determine the Claimant's entitlement to community home support services. He rejected the Respondent's submission that the third party exclusion outlined in the community policy could not be applied as ICBC's involvement was not as a third party insurer of the tortfeasor but as a first party insurer. Arbitrator Yule found that the term third party liability was not a phrase being used in the tort sense of liability. Arbitrator Yule pointed out that the situation before him represented two public institutions, ICBC and the public health system, each of which was attempting to be the payer of last resort. Arbitrator Yule noted that none of the cases cited by the Respondent involved a situation where a third party payer has said it has not and will not pay its benefits to an insured.

103. Arbitrator Yule refused to deduct the value of home support service benefits as an applicable deductible amount on the basis that "no benefits under the plan have been paid to date; the Program Administrators have declined to even conduct a medical assessment of the Claimant; the Program Administrator says that no benefits will be paid to the Claimant in the future".

104. In the existing action, counsel for the Respondent submits that the facts are even stronger than those outlined in *Mardesic* in the sense that the medical benefits had already been

received by the Claimant, and because under Section 25 of the *Hospital Insurance Act* the Claimant has the right to recover the sum paid by the Medical Service Commission from the tortfeasor and therefore the funds would be payable to the Claimant satisfying the analytical criteria outlined by Arbitrator Yule.

105. Counsel for the Claimant submits that the amounts paid for the Claimant's health care in British Columbia is "a strange deduction" as none of it was payable to her as an insured under any benefits or right or claim to indemnity.

106. The Claimant further submits that because the BC Hospital Insurance Plan amount is not provided for as a specific deductible amount in the Regulations that it cannot be advanced as being deductible.

Discussion

107. In the Claimant's situation, her underlying tort action was brought in the State of Nevada and was settled for payment of the policy limits as apportioned amongst each of the actions stemming from the accident. The settlement was consented to by ICBC, in the summer of 2006 (as per the letter from S.F. at Tab 13, page 2 of the Respondent's Arbitration Brief referred to at paragraph 61 herein).

108. I note that while the British Columbia's *Hospital Insurance Act* provides for a right of recovery by the Provincial Government with respect to hospital services paid from the hospital insurance fund and specifically refers to provincial services and reciprocating provinces there is no reference to other reciprocating jurisdictions.

109. Section 25 of the *Hospital Insurance Act* states:

> **If** as a result of the wrongful act or omission of another, a beneficiary suffers personal injuries for which the beneficiary **has the same right to recover the sum paid for the services against the person guilty of the wrongful act or omission as the beneficiary would have had, had the beneficiary been**

> **required to pay for the services personally**...the beneficiary on recovering the sum or part of it...must pay it at once to the Minister. [emphasis added]

110. Counsel for the Respondent did not direct me to anything in the *Hospital Insurance Act* or supporting legislation that outlined the procedure to be followed where the liable third party wrongdoer is from outside of Canada, nor were any authorities or evidence provided showing me that the Claimant had the right in Nevada to recover the sum paid for the hospital services she received (but did not pay for) as against the liable US tortfeasor.

111. Counsel for the Respondent did not refer to anything in the *Hospital Insurance Act* or supporting legislation or case authorities which outlined what, if any, recovery the Hospital Insurance Fund might have with respect to a first party policy of insurance like UMP.

112. No evidence was tendered from the British Columbia Hospital Insurance Program stating it is seeking to recover the costs of the Claimant's hospital and rehabilitation care. I must say that I find the Respondent's submission that the amounts paid by the BC Hospital Insurance fund were recoverable by the Claimant pursuant to Section 25 of the *Hospital Insurance Act* somewhat curious in light of the comments made by the handling Examiner in her letter dated March 8, 2005 to the BC Hospital Insurance fund (Tab 5, of the Respondent's Book of Deductible Amounts). There, she advised them "ICBC cannot respond to any bchp claims. The accident occurred in Nevada. The person responsible is American and will not have sufficient insurance coverage to pay for all the damages. ICBC may be faced with an underinsured motorist claim and **Ms. S's ump claims will not respond to any bchp claims**".

113. The comments made by the Examiner suggest to me that Section 25 of the *Hospital Insurance Act* may not apply where there the liable wrongdoer is from outside Canada, nor does it extend to Underinsured Motorist Claims which fall under a first and not a third party policy of insurance.

114. There was no evidence tendered at this hearing indicating that the Hospital Insurance Program, upon receipt of S.F.'s letter in March 2005, advised the Claimant that it had a subrogated interest in her claim as against the underinsured motorist and that she would be required to pursue recovery of the amounts expended for her medical care upon her return to Canada and further that she was not at liberty to settle this matter without its consent.

115. I cannot reconcile how the Respondent, on one hand, advises the BC Hospital Insurance Program that UMP does not respond to claims for hospital services in these circumstances, and then in this proceeding seeks to deduct such amounts as an applicable deductible amount under UMP.

116. With respect to the Respondent's argument that the wording and interpretation to be given to subsection (i) "payable to the insured under any benefit or right or claim to indemnity," allows it to claim a deduction for hospital services in the context of the medical services or benefits outlined, I find the rationale applied by Arbitrator Boyd in *Pham v. Sutherland and ICBC* (November 5, 1999) and Arbitrator Yule in *Podovinkoff v. Insurance Corporation of British Columbia* (October 5, 1994) of great assistance,

> **There must be some limit to the meaning of "benefit" or "right"** as otherwise, inheritances or lottery winnings might fall within the definition of deductible amounts. **In my view the limitation must be that there be some rational connection between the benefit or right and the type of loss for which damages are claimed in the law suit.** [emphasis added]

117. In *Vezer v. Insurance Corporation of British Columbia*, Arbitrator Wallace, when dealing with the meaning of the word "benefit" agreed with both counsel that some limitation had to be placed on its meaning. Otherwise any item of value passing to the insured upon the death of her husband in the accident could be construed as a benefit including such items as property held in joint tenancy, registered retirement savings, joint savings, etc.

118. While Arbitrator Wallace agreed that some constraint should be placed on the meaning of "benefit", he found the often cited phrase "rationally connected" to be vague and subjective and of no assistance in construing the meaning of the legislative intent of the regulation. Arbitrator Wallace found the usual principles of statutory interpretation should be used when reading the regulations.

119. Arbitrator Wallace found in looking at the term "benefit" in the context of Regulation 148.1(1) that the word would have to be given a more restricted meaning than simply looking to the definition of the word in the dictionary. Arbitrator Wallace further held that to determine the meaning of the word "benefit," one had to look at the section 148.1(1)(a) to (i) which refer to "payments received from other sources, which payments are similar in nature to the losses for which the insured would be compensated under UMP coverage and which would be recoverable pursuant to such coverage" and concluded that the word "**must be limited in its application to the kind of amount which, unless excluded, would result in double indemnity for specific losses sustained by the insured**". On this basis Arbitrator Wallace held proceeds from life insurance policies and proceeds from accidental death policies are not deductible amounts pursuant to subsection (i).

120. With respect to the word "right" Arbitrator Wallace found that it included a legal entitlement to enforce the terms of a contract of insurance or any other contract, but that the proceeds of such would not be deductible amounts **unless the receipt of the amount would result in double recovery for a specific loss sustained by the insured for which a claim is advanced in the action.**

121. With respect to something payable pursuant to a benefit or right or claim to indemnity, Arbitrator Wallace found that this spoke to the idea of compensation or paying funds to someone for a loss sustained. It is, in fact, on this premise that previous Arbitration decisions and rulings have found life insurance policies or accidental death insurance payments are not applicable deductible amounts pursuant to subsection (i) as they do not compensate an insured in whole or in part for an actual pecuniary loss as they are non-

indemnity payments of predetermined amounts based on the proof of a specified event regardless of whether there is a pecuniary loss, as is the case here.

122. While counsel for the Respondent indicated in his submissions that he did not feel the findings of Wallace in *Vezer* were good law, he did not tender any authorities that would suggest to me that the reasoning applied has been challenged or set aside.

123. The underlying tort pleadings were not produced in this proceeding. However, having regard to the information outlined in the Agreed Statement of Facts, and as presented at this hearing, whereby counsel for the Respondent stated the quantum of the Claimant's damage for personal injuries, including non-pecuniary damages, special damages, loss of housekeeping and cost of future care exceeds $1,000,000.00, I would assume the heads of damages claimed in the underlying tort action would have included the items referred to, as well as any other form of compensatory damages provided for pursuant to the laws of Nevada.

124. At this hearing the Claimant, through her counsel, advised that no claim was advanced for the BC Hospital Insurance Program payments and that no such claim would stand as the payments were made by the government for services rendered to the Claimant and not expended by her personally. Therefore, she could not claim them as a special damage as against the tortfeasor. If that position is incorrect, and such an amount was or could have been advanced by the Claimant against the US tortfeasor, then I would have expected such evidence to have been tendered by the Respondent upon whose shoulders proving the applicable deductible amounts falls.

125. In *Mardesic v. Insurance Corporation of British Columbia*, the issue before Arbitrator Yule was a narrow one dealing with the benefit of community home support services as a deductible amount. What is being asked by the Respondent herein is much more far reaching.

126. Arbitrator Yule found that for the purpose of future arbitrations that any issue affecting the quantum of any tort judgment to which an insured would have been entitled against the underinsured motorist ought to be addressed in an "assessment hearing" **and not** left solely to be dealt with as a deductible amount. I concur with his comments and find they are somewhat applicable here.

127. Arbitrator Yule cited *Jones v Rostvig* [2003]17 CCLT (3d) 253 (BCSC), where Mr. Justice Goepel, in dealing with a tort quantum assessment, commented on the state of the medical services provided by the government, as follows:

> The defendants do not have to pay for services the government makes available to the plaintiffs, as they are not costs the plaintiffs must bear. This [tort] award is not intended to duplicate or replace existing government programs or support. The amounts are in addition to the amounts the plaintiffs are entitled to receive from government programs.

128. Justice Goepel awarded a 5% contingency fund against the possibility that existing government programs assisting the plaintiffs might cease to be available to them. This decision was based on the fact that past and continuing payments were being made and with opinion evidence that such payments would continue. No duplicate award was made for those services in the tort action.

129. My understanding is that the *Hospital Insurance Act* is not only a mechanism to prevent hospitals from charging for their services, but also provides for the delivery of a universal comprehensive social medical program. Hospitals are merely the vehicles the legislature has chosen to deliver this program. While the word insurance is used in the Act, it is common knowledge that the services and benefits provided under our public medical system are not in the form of insurance. The clearest evidence of this comes from the fact that the premiums collected for such benefits and services do not reflect a realistic insurance premium related to exposure, risk and the cost of delivering medical care to any one particular person. The premium paid is a fraction of what is actually spent by the government from public tax dollars.

130. The services and benefits covered under our universal compulsory medical coverage, which are incurred in almost every underinsured motorist action, cover amounts paid in the past and those to be paid in the future. Given the catastrophic nature of many of the cases that result in UMP claims the costs are often considerable. Had the Legislature intended for UMP awards to be net of these services and benefits then it would have specifically provided for such a deduction in clear and unambiguous terms in the legislation.

RULING

131. Having regard to the nature and extent of the evidence tendered and to the overall statutory intention of Subsection 148.1(1) of the Regulations, I do not find the Hospital Insurance Program payments to be an applicable deductible amount pursuant to paragraph (i). As stated above, had the Legislature intended such potentially considerable deductions to come into play it would most certainly have specifically stated so.

132. If I am wrong about the above, I still find having regard to the wording of subsection (i), that such amounts would not be payable to the insured as a benefit or right and claim to indemnity. They do not represent pecuniary payments of a like nature for which the Claimant is claiming compensation pursuant to the tortuous conduct of the underinsured motorist and which would have been recovered thus resulting in double indemnity.

US Compromised Hospital Account

133. Counsel for the Respondent submits that because counsel for the Claimant negotiated a compromised settlement (a payment of $174,000.00 USD out of $450,223.39 USD) of the US hospital account rendered to the Claimant for her treatment while in Nevada that the balance waived is a "benefit" to the Claimant despite the fact that no amounts were actually payable to her.

134. Counsel for the Claimant submits that the difference between the amount spent and the settlement achieved is not deductible as it does not represent an amount "payable to the insured under any benefit or right or claim to indemnity".

135. At this hearing Counsel for the Claimant also submitted that the compromised settlement achieved may now be in jeopardy because the US hospital provider had become alerted to the existence of the Claimant's UMP claim when documents were sought from them by the Respondent in preparation for this hearing. No evidence was tendered setting out the particulars of any compromise, settlement or final resolution of the Claimant's US hospital accounts (set out in the Agreed Statement of Facts).

136. The UMP Legislation is silent when it comes to amounts that are waived by third party sources. I go back to the comments made by Arbitrator Wallace in *Vezer* where he found that **unless the receipt of the amount claimed would result in double recovery for a specific loss sustained by the insured for which a claim is advanced in the action** that there can be no deduction pursuant to subsection (i).

137. In the Claimant's situation the US hospital account, which would form part of her special damage claim or pecuniary claim as against the tortfeasor, and/or a special damage in the assessment of her damages in any UMP proceeding, has been allegedly satisfied for a compromised amount. That amount was paid in part with the Part 7 payment advanced to the Claimant by the Respondent and, in part, by her tort settlement, both of which are applicable deductible amounts.

138. Any balance, which is not payable to the insured or to any third party, does not represent double indemnity for any specific loss sustained by the Claimant as the balance has been allegedly waived.

139. As with the Hospital Insurance Program payments, I think had the Legislature intended for such amounts, be they by way of direct payment or resulting from the forbearance of a third party with respect to an amount owing, to be an applicable deductible amount then

such payments would be specified to be deductible in unambiguous terms. Again, as with the Hospital Insurance Program payments, amounts of a like nature would arise in the majority of underinsured motorist claims and given the extraordinary cost of healthcare in jurisdictions outside of this province (especially in the USA) requiring the deduction of the amounts waived towards these accounts, could render UMP coverage to be illusory.

140. Accordingly, I find the alleged compromised settlement of the US hospital accounts is not an applicable deductible amount pursuant to section 148.1(1)(i).

Determination of the Issues

A. The portion of the tortfeasor's payment to the Estate of A.S., that was allocated to the Claimant **($69,812.50 Cdn)** is an applicable deductible amount as a benefit pursuant to Section 148.1(1)(i)..

B. Item 1: The **$22,580.00** paid by ICBC as death benefits, which falls under Part 7 of the Regulations, is a deduction specifically provided for (these benefits being paid from the deceased's Part 7 benefits to the Claimant). If that finding is incorrect, then such payments would be deductible pursuant to Regulation Section 148.1(1)(i).

Item 2: The **$2,500.00** death benefit paid by CPP to the Claimant, much like the Part 7 death benefit payment, was payable directly to the Claimant as a result of the death of her husband in the accident and, in this regard, is deductible pursuant to Section 148.1(1)(f.). If I am wrong about these findings, then such payment would still be deductible, as submitted by the Respondent, pursuant to Regulation Section 148.1(1)(i).

Item 3: The CPP and private survivor's pension benefits being received by the Claimant are applicable deductible amounts pursuant to Regulation 148.1(1)(i) with the limitation that these deductions should be calculated on the basis of the natural life expectancy of A.S., absent the accident and not for the life expectancy of the Claimant.

The parties are to recalculate these amounts based on the natural life expectancy of A.S., which may require additional expert evidence, and if they are unable to do so then they are at liberty to come back before me subject to the provisions outlined at paragraph 97 herein.

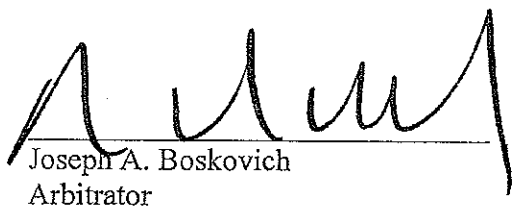
Item 4: The $197,263.00 paid by the BC Hospital Insurance Program for the care, services and treatment rendered to the Claimant following the accident **is not** an applicable deductible amount pursuant to Regulation Section 148.1(i).

Item 5: The $276,223.39 USD which is the shortfall of US hospital/medical expenses incurred as a result of the Claimant's treatment following the accident and the alleged compromised settlement reached between the Claimant and the US carrier, **is not** an applicable deducible amount pursuant to Regulation Section 148.1(i).

With respect to the cost of this Arbitration, having regard to the relative success of the parties, the Respondent is to pay 75% and the Claimant 25%.

It is so awarded

Dated this 27th day of February, 2009.



Joseph A. Boskovich
Arbitrator