

**KD IN THE MATTER OF AN ARBITRATION PURSUANT TO
Section 148.2(1) of the Revised Regulations to the Insurance (Vehicle) Act**

AND

The Commercial Arbitration Act, SBC 2020, c. 55

BETWEEN:

KD

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

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Dates of Hearing

May 25, 27, and 31, June 1, 2,
and 3, 2021

Place of Hearing

Vancouver, BC

Date of Submissions

June 4, 2021

Date of Award

July 14, 2021

1. INTRODUCTION

1. This is a claim for compensation for injuries sustained by the claimant, pursuant to underinsured motorist coverage afforded by the *Insurance (Vehicle) Regulation* (the "Regulation").

2. The motor vehicle accident which gives rise to this proceeding occurred on August 30, 2015. The claimant, Mr. D was a front seated passenger in a motor vehicle being driven by Ms. M, his then spouse. The motor vehicle was rear ended by an uninsured driver. Mr. KD commenced proceedings pursuant to what was then section 20 of the Regulation.

3. The claimant and the respondent settled that action for the available proceeds. The respondent then consented to this proceeding being brought.

4. At issue in this proceeding are the quantum of damages, and the statutory deductions which must be made.

2. EVIDENCE OF THE CLAIMANT

(a) Background, schooling, and employment prior to 2004

5. Mr. D is 46 years old. He was born in Vancouver, BC, and raised in the lower mainland. He was 40 at the time of the collision.

6. Mr. D attended elementary school in Vancouver, and Surrey, BC. He attended junior high school in Port Moody, and Surrey, BC

7. Mr. D did reasonably well in elementary school. That did not continue in junior high school. He had some authority issues. He was in fact expelled from grade nine. He returned to school on a "work and learn" program, and trained as a welder. He eventually quit that program. He never graduated from high school.

8. Mr. D has a long and varied work history, dating back to when he was 14 or 15 years old. He has worked as a moving "swamper", a stockperson at a Superstore, a general labourer in an autobody shop, a bartender, a sales person at a Home Depot, a driver for Dick's Lumber, and an Air Care technician.

(b) Mr. D's pre-accident health, social life, and recreational activities

9. Mr. D had no chronic medical problems prior to the accident. He said that his mental health prior to the accident was "really good".

10. Mr. D met Ms. M in 2010. He thinks they moved in together about a year later. They were in a common law relationship until 2019. They have two daughters, C, now seven, and N, who is almost three.

11. At the time of the accident, Mr. D said that his relationship with Ms. M was doing quite well, although they had previously had some relationship issues.

12. Mr. D enjoyed hiking, weekend long canoe and camping trips with his friends, bike trips, softball, motorcycling, golf, fishing, and mountain biking. By all accounts, he was very physically active. He also engaged regularly with a variety of social and recreational activities with Ms. M, and their extended families.

(c) Mr. D's employment as a longshoreman

13. Mr. D first worked as a longshoreman in 2004, after he was lucky enough to obtain an application in an open draw. He submitted his application, passed the required tests, and was then eligible for employment. Getting work on the docks was at first slow. He enjoyed the work, and the camaraderie. He said that longshoring was his "forever job". He said that he misses work every day. Having heard his evidence, I have no doubt that longshoring was, and still is, Mr. D's dream job.

14. Mr. D gave evidence as to the board system, which determines who gets what job on the docks on any given day. A person who want to work shows up at the dispatch hall ahead of shift start time and physically turns a metal plate with their name on it, located on a board. The dispatcher takes the turned plates off the board and puts them in a pile from which he then assigns workers to various jobs. Not everyone who turned their plate gets work.

15. There are a series of boards, from "A Board" to "T Board". The higher the letter, that is the closer to A, the better the jobs, and the greater the likelihood of getting them. Workers progress through the boards. Moving up a board requires having the same or more hours as the board average, and space on the board above.

16. Mr. D started on the T Board in 2004. He was on the A Board at the time of the accident in 2015. He had moved from the B Board to the A Board in 2014. He became a member of the International Longshore & Warehouse Union ("ILWU") in 2020.

17. Certain jobs on the waterfront are "rated", meaning that they require special training, and passing an exam. Rated jobs are more desirable, and pay more than jobs that are not rated. As well, it is possible to earn more at certain rated jobs than others.

18. At the time of the accident, Mr. D had ratings for working log ships, operating a reach stacker (a wheeled vehicle used to pick up containers), and operating a lift truck (forklift). Because he has been off work since 2015, save an effort to return in 2018, he no longer has any of these ratings. In order to once again have those ratings, he would have to retrain for each position, and pass the requisite exams.

19. Mr. D was principally working the reach stacker position at the time of the accident. It paid one extra hour of overtime pay, at time and a half, for each shift worked.

20. Mr. D worked 1454.50 hours in 2014, 896 hours in 2015, no hours in 2016 and 2017, and 82 hours in 2018. The 2018 hours represented a brief return to work which commenced in March 2018.

21. Mr. D's daughter C was born in 2013. He said that this affected the number of hours he worked in 2014. He said that he tried to balance work with family as well as he could. His evidence was that he could have worked more hours in 2014 if he had chosen to.

22. Mr.'s evidence was that prior to the accident he had never really thought of retirement. He had certainly never thought of retiring before 65. In fact, he said that he would likely have worked beyond 65 for the camaraderie, and the money. He said that there are lots of "older guys", which in Mr. Ds view meant being over 65, working at the docks. He thought that were maybe 50 to 100 older guys still so employed.

(d) The accident

23. Mr. D and Ms. M were coming from a softball practice the night of the accident. The car they were in was stopped at a light at 102 Avenue and King George Boulevard in Surrey, BC. They were hit from behind. Mr. D said he saw a flash of light, and felt like he had been hit by a two by four. He checked on their baby in the back seat. He went up to the other driver's window. The other driver opened the door and "bolted".

24. The police and the firefighter paramedics arrived. The firefighters physically examined Mr. D, Ms. M and C. They were told that they could wait for an ambulance, but that the wait could be a lengthy one. Mr. D decided it was best not to wait. He phoned a friend, Mr. S, and asked him to come to the accident scene. Mr. S drove Mr. D and his family to Surrey Memorial Hospital.

(e) Mr. D's injuries injuries

25. Dr. Ron Collette, Mr. D's general practitioner, diagnosed Mr. D with the following injuries as a result of the August 30, 2015 motor vehicle accident:

- a. Neck and upper back soft tissue injuries;
- b. Contusions to his sternum and ribs bilaterally;
- c. Moderate to severe lower back soft tissue injuries as well as spinal segment unit disruption, consisting of a disc/hernia/sequestration of L5, S1 and resultant instability of L4-L5 requiring stabilization;
- d. As a result of the above surgery, and lack of improvement and lack of success in treatment, persistent chronic low back syndrome and chronic pain;

- e. Due to the above chronic pain and the negative effects of his interpersonal, social, recreational, and vocational life, the development of a resultant adjustment disorder, progressing to a major affective depressive disorder and chronic anxiety and ongoing fears for the future;
- f. Mild concussion, and
- g. Gastric pain due to medications.

(f) Mr. D's condition from the collision until his return to work in 2018

26. Mr. D did not have a regular family physician at the time of the accident. Dr. Collette became his family doctor in September 2015.

27. In the month or two following the accident, Mr. D had pain in his hips, tailbone, shooting pains in his leg, a "super tight" upper back, low back pain, and headaches almost daily.

28. In late 2015 or early 2016, Mr. D started physiotherapy. He had previously gone for massage and chiropractic treatments. His evidence was that he "could not shake" the "electric shock pains" in his right leg, although there was some improvement in the left leg. Nothing in particular seemed to bring these pains on. The pain was such that he buckled at the knees. However, his neck and shoulders began to feel stronger, and his headaches decreased.

29. Mr. D has had daily low back pain since the accident, although the electric shock pains in his legs have become far less frequent.

30. Mr. D first had symptoms of anxiety soon after the accident. Being in a car was what started them, but over time the anxiety became more generalised, and got progressively worse.

31. Mr. D's sleep was impacted in the year following the accident. He had a hard time getting comfortable, and falling asleep. He was then up every few hours. His sleep has never gone back to the way it was prior to the accident, although it has improved.

32. Mr. D first suffered from depression about six months after the accident. This was when he realised that he might require back surgery. He said that his stress, anxiety, and depression all came together at that point. His depression worsened after his attempted return to work in 2018, and then again after Dr. Heran, the neurosurgeon, told him in 2019 that his condition had plateaued. He again struggled with depression following Ms. M moving out in 2019. In addition to depression, Mr. D said that he also struggled with feelings of worthlessness.

33. Mr. D had difficulty going out and socialising, for fear of being in pain. He found himself "grumpy", and becoming more introverted.

34. Mr. D elected to have back surgery because he was in a lot of pain, and had not seen any improvement in his condition. He said that the decision to have the surgery was a very stressful one. He thought he had “nothing to lose”, and had faith in Dr. Heran. The surgery was performed in February 2017.

35. Mr. D said that recovery from the surgery was one of the most difficult things he has done. It was extremely painful. He couldn't do anything without assistance.

36. Mr. D did some active rehab with Karp Rehabilitation in late 2017, until early 2018. He enrolled in this to strengthen himself as part of a planned return to work. This was a little more intensive than physiotherapy.

37. Mr. D returned to work in March 2018. He worked one shift a month in March, April, and May 2018. There were a number of days when he had to turn down work because he could not physically do it.

38. Mr. D said that his return to work in 2018 was “intimidating”. He was very anxious about it, from both a physical, and social point of view. He tried it because he wanted nothing more than to return to longshoring. He thought he could do some lighter jobs, but he knew he had lost his ratings.

39. On Mr. D's first shift back, he worked “agri cleanup”, which is the cleaning up of agricultural product. This involved sweeping or hosing agricultural product that had fallen off a conveyor belt. It also involved watching a bin so it did not overflow. This involved using a rake. On other occasions, he drove cars on and off ships, which involved no heavy lifting. However, there was some labour involved in the strapping of vehicles, which required bending over, and walking up and down stairs to different levels in the car ships. He also did a “bomb cart” shift even though he did not have that rating. This was a mistake, as the bouncing around in a truck aggravated his back symptoms.

40. After his efforts in March through May 2018, Mr. D decided that he could not work as a longshoreman.

(h) Mr. D's current condition

41. Mr. D has continual chronic pain, and has had every day since the accident. If he is careful, he can manage it. However, he occasionally has flareups. These can be brought on by running, jumping, sudden movements, bending over, or sitting or driving for too long. The pain emanates from the site of the surgery, and Mr. D described them as tree branches of pain. They compromise his range of motion. They also result in “very scary” leg pains. The flareups last from a couple days to three weeks.

42. Mr. D also has anxiety or panic attacks. Two or three times a week these necessitate him taking medication. If he goes out of his “comfort zone” (for example his house, or his yard) they can come on very quickly. He said that the panic attacks are completely

incapacitating. He must take time to sit, and gather himself. For example, he had a panic attack before seeing Dr. Paquette, a neurosurgeon retained by the respondent. He had to take his medication and wait in the car until it passed. Mr. D said that Lorazepam, if taken promptly, can avoid a full-fledged panic attack.

43. Mr. D also said that thinking about his future, in particular, brings on these kinds of attacks. He said that he hears the sounds of the dock from where he lives. He feels like a prisoner with this anxiety and pain. He feels like he is not contributing to society. These feelings have been devastating for him

44. Mr. D said that his relationship with his family deteriorated subsequent to the accident. He became short tempered and mean. He was spending lots of time alone in his room. He was not giving Ms. M the support that she needed.

45. Mr. D has found it frustrating being on a fixed income, as he could not give his family what he previously could.

46. Mr. D's chronic pain has impacted his ability to be with his children. For example, he is unable to pick up or chase his daughters. He gave evidence that he has yelled at his children, which never happened before the accident. He worries all the time that his behaviours might permanently damage his girls.

47. Mr. D said that there has been very little change in his pain since his attempt to return to work in 2018, save he has fewer flareups because he has been better at managing them. When he has a flareup he increases his intake of Tramacet from four pills a day to eight pills a day. In addition, he uses a hot water bottle, cold applications, and rest. Flareups also affect his self-care, including grooming, preparing meals, and the like.

48. Mr. D still takes Tramacet and Lorazepam. He also takes Dexilant to combat the gastrointestinal issues caused by Tramacet. He no longer takes anti-depressants. He believes they did help to some extent. He would consider going back on them if his condition deteriorated.

49. Mr. D says that the Tramacet causes him to feel tired, lightheaded, lacking in energy, confused, lightheaded, dizzy, and forgetful. It also causes him to have trouble concentrating, dulls his senses, slows down his reaction times, and causes tunnel vision. But if Mr. D does not take Tramacet, he said that his pain increases, and his ability to walk is affected.

50. Post-accident, Mr. D has tried various recreational activities including pitch and putt, and cycling. He has been unable to do any of them. Any activity now has to be very low impact, and low adrenalin.

51. Mr. D had an in-ground garden before the accident. He does not have one now. He said that he has lost the passion for it. He does mow his own lawn, which is difficult because that work requires pushing, pulling, and bending over.

52. Mr. D still does most of his own housework. He said that swiffering, and vacuuming, are “tough on him”, because he is bending over. Bathing his daughters in the bathtub is difficult for the same reason. Washing dishes is at times difficult, again because of the need to bend.

(i) Mr. D’s plans for the future

53. Mr. D has no plans to return to work as a longshoreman. His return to work jobs were lighter jobs, but were still too difficult to do. This resulted in more pain, and more effects on his family. He was also concerned about the physical toll on him, and was fearful of that.

54. Going forward he would like to have a regular scheduled, safe job that he could enjoy. It would give him peace of mind as he would not be risking injury every day. He does not really know what that job might be. It was not until recently that he has seen the expert reports produced in this proceeding that outline what he might be good at.

55. At the beginning of 2020, Mr. D enrolled in Invergarry Adult Education Center, Surrey, BC, to complete high school. He expects to complete that course of study this year. The school has job counsellors that can assist him with determining what it is he can do. He said that he has learned that he has strong language skills. He is, for example, doing a grade 11 literature course. His math skills are not as strong. He completed Level 5 math, which is the equivalent of grade 8 math. It included Pythagorean theory, divisors, and geometry.

56. Mr. D’s chronic pain has impacted his ability to read, and to hold knowledge. He frequently has to reread material. As well, it has impacted his ability to sit in his seat during class. Regardless, he said school was going “okay”.

(j) Canada Pension Plan Disability Payments

57. Mr. D receives Canada Pension Plan disability payments. To date he has received \$64,201 in payments. He continues to receive \$1,016 per month. These payments will cease when he returns to work.

(k) Payments from ILWU-Employer Association Health and Benefit Plan (the “Plan”)

58. Mr. D has received payments totalling \$179,329 from the Plan. I will say more about the arrangements surrounding those payments below. Mr. D’s evidence was that he would not have accepted payments from the Plan if he had known that the amount he accepted would be deducted from any award that might be made in this proceeding.

3. LAY WITNESSES

(a) Ms. M

59. Ms. M is the former spouse of Mr. D, and the mother of his children.

60. Ms. M first met Mr. D through a friend in 2010. They began dating not long after first meeting, and started living together three to six months after that.

61. Ms. M could not recall whether she was living with Mr. D at the time of the accident. She recalled a period of time when she was living with her sister, as she and Mr. D were “not agreeing on things” regarding the shared responsibilities of parenthood. She recalled perhaps one session of couple’s counselling with Mr. D, which perhaps took place prior to the accident.

62. Ms. M confirmed that Mr. D was very active and healthy prior to the accident. He “pulled his weight” with respect to chores around their home, and was also a very involved dad to C, acting as her primary care giver when Ms. Matthews was at work. Ms. Matthews said that Mr. D’s work as a longshoreman was his “pride and joy”. She said that he was proud, happy, and enthusiastic, about his job.

63. Ms. M was also injured in the accident. She said that both her and Mr. D were very sore, and took time off work to see doctors, attend physiotherapy, and rest in the first few months following the accident. She described these months as being difficult.

64. After a few months off due to her injuries, Ms. M returned to work. Mr. D did not. He told her that he was in too much pain to do so.

65. Over time, Mr. D stopped doing things around the home, stopped playing with C, and stopped all forms of physical activity. Ms. M also observed the deterioration of Mr. D’s mental health. Along with this, his temper got worse, and he was “not pleasant to be around”. She recalled that anti-depressants assisted Mr. D with his mood.

66. Ms. M recalls Mr. D’s attempt to return to work in 2018. She cannot recall any specific complaints by him regarding that, but does recall Mr. D saying “flat out” that he could not do the work.

67. As a consequence of the foregoing, the relationship between Ms. M and Mr. D deteriorated. In October 2019, Ms. M moved out with the children. There have been no attempts at reconciliation.

68. Ms. M still sees Mr. D several times a week. The children spend their weekends with him. She has observed that his physical limitations make it difficult for him to play with his daughters.

(b) Ms. L

69. Ms. L is Mr. D’s mother. She is 65 years old, and retired. She said that she had, and continues to have, a very close relationship with Mr. D. They speak almost daily. He tells

her everything, whether happy or sad. At the time of the accident, Ms. L saw Mr. D pretty much weekly.

70. Ms. L's evidence was that Mr. D was an active, lively, child and teenager. He had always engaged in lots of outdoor activities. She confirmed that Mr. D had not been a good student.

71. Ms. L said that Mr. D had always worked at physical jobs. She recalled when he was first hired as a longshoreman he was very excited. She confirmed that he genuinely loved his job. He worked hard, and was proud of that. He often spoke to her about the camaraderie on the docks.

72. Ms. L observed Mr. D have a good relationship with Ms. M and their daughter C, prior to the accident.

73. Following the accident, Ms. L observed a severe decline in Mr. D's level of activity. This was because of his pain. He became morose and depressed because he could not do what he had done prior to the accident. He told her that he felt inadequate because he was not working, and bringing in an income.

74. Ms. L said that Mr. D's injuries and limitations took "a toll" on his relationship with Ms. M, and his family. She observed that it was very difficult for him to interact with his family. She said the demise of his relationship with Ms. M has been devastating for him.

74. Ms. L said that Mr. D had, on several occasions, attempted to take the children on a 50/50 basis with Ms. M, but realised that he could not do that because of his physical limitations. She said that this has been devastating for him as well.

75. Ms. L recalled that she picked up Mr. D after his functional capacity evaluation with Mr. Gary Worthington-White, who was retained by the respondent. She observed him grimace when he got in the car. A few days after the evaluation, she went out to run errands with him. She said that they went to one store, and that he could not do anything further because of his pain. They had been out for an hour at best.

76. Ms. L said that it is very hard to see Mr. D going through what he is going through. It has been very sad and hard for her as his mother. As well, she is very worried about what might happen to Mr. D in the future.

(c) Mr. W

77. Mr. W is a 47 year old HVAC technician. He has known Mr. D for about 30 years. They met in junior high school, and have been good friends ever since. He speaks to Mr. D about every two weeks or so, but is hit or miss as to whether he actually sees him.

78. Mr. W confirmed that Mr. D was always very fit and active, and was in excellent shape prior to the accident. Over the years, they had together engaged in a variety of outdoor and sporting activities.

79. Mr. W first saw Mr. D about a month after the accident. He observed Mr. D to be stiff, in pain, and slow moving.

80. Mr. W said that the accident has “messed up K’s back”, and that he has never returned to his previous active lifestyle. They no longer do the things they did prior to the accident. Mr. D has “kind of disappeared”. His phone calls to Mr. D are to check on him, and not to organise activities.

81. Mr. W also said that Mr. D appears anxious and depressed since the accident. He is just “down all the time”. He has watched him try to pick up his daughter, and not be able to do this.

82. Mr. W attempted to go on a walk with Mr. D earlier this year. Mr. D made it about 900 feet, but then had to return to the car because of pain.

(d) Mr. E

83. Mr. E is a 45 year old painter. He has known Mr. D for 18 to 20 years. They were twice roommates.

84. Mr. E said that Mr. D was a “super active” and a “super fit” guy prior to the accident. They had participated in numerous athletic and outdoor activities together.

85. Mr. E said that prior to the accident, Mr. D was a “very confident guy” who “lit up a room”.

86. Mr. E had observed Mr. D to be a “hands on dad”. For example, if he was at a playground with his daughter, he would be playing with her, and not simply watching.

87. Mr. E now sees Mr. D a couple times a month. He recalled all of Mr. D’s activities ceasing after the accident. He would invite him to come along, but he would decline, and say his back was too sore. He has stopped playing with his children.

88. Mr. E now only sees Mr. D at social functions. He has observed Mr. D to be withdrawn, and to move quietly and cautiously. He cannot pick up his children, or chase them around. He does not seem to have improved since the accident. He looks like he is in pain, is frail, has gained weight, and has lost muscle.

89. Mr. E thought that Mr. D’s mental health has deteriorated since the accident. His mood has been up and down.

(e) Mr. H

90. Mr. H has been a longshoreman for about 16 years. He became a union member in September 2020. He currently works as a multi-vehicle operator at Delta Port.

91. Mr. H attended junior high school with Mr. D in the 1990s. They were part of the same group of friends. They became closer friends after high school. He described the group of friends they both belonged to as being very physically active, doing things like hiking, playing football, mountain biking, and softball. He said that prior to the accident Mr. D never had any issues doing these activities, and that he was in excellent shape and very physically fit.

92. At one time Mr. H saw Mr. D frequently at work. This changed when Mr. H got his multi-vehicle rating, and Mr. D got his reach stacker rating. They would however still run into each other on the docks from time to time.

93. Mr. H saw Mr. D at a mutual friend's place shortly after the accident. He said that Mr. D did not look good. He did not seem happy, and in fact appeared to be down. He has also seen Mr. D on a number of other occasions since. He described a real change, and Mr. D looked worn out, out of shape and tired.

94. Mr. H was asked to comment on the possibility of Mr. D returning to work as a checker, a multi driver or a crane operator. He first noted that Mr. D is not rated for any of those jobs. He would have to pass a course for each position, and then demonstrate that he was mentally and physically capable of doing the required work.

95. Mr. H described numerous physical challenges with respect to being a multi operator. He doubted whether someone with a badly injured back could meet the physical requirements.

96. Mr. H's evidence was that crane operators were required to spend their entire shift "hunched over", and looking down.

97. Mr. H's evidence was that checkers were required to do a lot of looking overhead.

98. Mr. H's evidence was that he could not think of a longshore job which was consistently easy on the back, or of any jobs on the docks which provide long term, accommodated duties.

99. Mr. H has seen his income increase steadily by \$10,000 to \$15,000 annually. He earned \$149,000 in 2020, working five to seven day per week, or 1500-1600 hours per year, and taking an average amount of time for holidays. Because he is in the union, he said that it is "fairly easy" for him to work full time hours.

100. Mr. H said that he planned on continuing to work as long as he could, at least to age 65 and maybe to age 71. He said that lots of longshoreman work beyond age 65.

(f) Mr. SD

101. Mr. SD has been a longshoreman for over 10 years. He is currently on the A Board, and hopes to get into the union soon. Mr. SD works mostly as a reach stacker, but sometimes works as a lift truck operator.

102. Mr. SD has known Mr. D for about 10 years. They first met at work, and became friends. They worked together on log ships, which is dangerous and very physically demanding work, and which Mr. D handled well.

105. Mr. D said that prior to the accident, Mr. D was “fit, charismatic, and a great storyteller”.

106. Mr. SD has seen major changes in Mr. D since the accident. He appears to be in pain, he seems depressed, and does not have the same energy and charisma. He has stopped participating in various outdoor activities. Mr. SD said that the accident had had a “massive impact” on Mr. D. He said that Mr. D’s deterioration had been painful for him to watch.

107. Mr. SD said that if Mr. D needed painkillers to get through the workday, that would be a problem for his job.

108. Mr. SD gave evidence as to what he knew about being a checker. He noted that it was a rated job, and that in fact there a number of different checker positions. Not all positions are available on any given shift. The physical demands for each checker position varied. He said however that to become rated, a person had to be capable of doing all of them. Many of the positions involve a lot of movement, and that the steel checker position involves a lot of climbing. In addition, checkers usually drove around in single cab pickup trucks that had no tilt seats, that he described as “super uncomfortable”. As well, checkers require Transport Safety Board clearance, which in Mr. SD’s experience takes about a year to get.

109. Mr. SD was not aware of any checker positions at Annacis Island, where cars are unloaded.

110. Mr. SD’s evidence was that he could not think of a job on the docks which was easy on the back. He was also not aware of any jobs with consistently modified, ongoing light duties available. An exception to this would be that of a stores person, whose job it was to hand out coveralls. This job would, however, only go to a “white hair”, that is a union member with more than 25 years in the union.

111. Mr. SD was not aware of anyone who had been off for more than two years, and then returned to work on the docks.

112. Like Mr. H, Mr. SD had experienced earnings increases of \$10,000 to \$15,000 per year.

113. Mr. SD's evidence was that there is no forced retirement, and that most longshore workers continue working beyond age 65.

(g) Mr. RH

114. Mr. RH began working as a longshoreman in 1989. He became a union member in 2004. He has been the business agent of the IWU Local 502 since 2019. This is an elected position. As a union representative, Mr. RH is involved in a host of matters, including scope of work, and safety issues.

115. Prior to becoming the business agent, Mr. RH worked as a trainer for workers wanting to be rated and prior to that, on several different jobs on the docks. While working as a trainer, he failed several people who were incapable of doing the job safely, either because of physical or cognitive issues.

116. Mr. RH knew Mr. D from working with him prior to the accident. He said that Mr. D was always eager, ready to go, physically fit, and capable of doing the work required of him. He has seen Mr. D socially several times since the accident. He said that he was often on the couch, with an icepack, and not moving much.

117. Mr. RH's evidence was that the term "checker" did not mean one specific job or set of duties. He said that to be rated as a checker, you had to be able to do all the duties required of all the jobs. For example, a steel checker is required to check pipes and coils. This requires climbing up and down pipes, and crawling into coils. By contrast, a container gate checker would sit in a chair, or stand and write down truck numbers. But one cannot be rated unless one could do all the work required for all positions. What job a checker is assigned to do on any given day is unpredictable.

118. Mr. RH's evidence was that the checker job can be very hard on the neck and back. He in fact tried working as a checker after a back injury, and could not do it. He said that in his position as business agent he gets lots of sore neck and back reports from checkers.

119. Mr. RH described the docks as a "safety sensitive work environment". This means that any medications would have to be approved for use by a doctor.

120. Mr. RH is familiar with the Plan. He said that if a worker is injured by a third party, the worker is not entitled to benefits, but might be loaned monies so long as they agree to repay them in full.

121. Mr. RH had some familiarity with the return to work process set out in the "Black Book", which forms part of the ILWU Collective Agreement, and purportedly contains a require to accommodate. However, he was not aware of any situation where an employee was in fact accommodated. He differentiated between accommodation arising out of a workplace injury, versus an injury otherwise occurring. The reason he made that distinction was unclear.

122. Mr. RH was referred to the report of Mr. Worthington-White. Mr. Worthington-White suggested that a union business agent could assist Mr. D in finding a suitable job on the docks so that he could return to work. Mr. RH disagreed with that proposition. He said that he is the dispatcher, not the employer. He said that in his experience, the employer will only accommodate a worker if their injury has arisen on the job. He has not seen an accommodation made when the injury has arisen because of a motor vehicle accident. He was most adamant about this.

THE CLAIMANT'S EXPERT MEDICAL AND VOCATIONAL EVIDENCE

(a) Dr. Richard Collette

123. Dr. Collette was qualified as an expert in family medicine. He prepared a report dated April 25, 2021. He has been a medical doctor since 1989. He has been Mr. D's treating general physician since September 22, 2015. Mr. D first attended on Mr. D as a result of injuries sustained in the accident.

124. Dr. Collette has seen Mr. D approximately once a month since September 2015. The frequency of the visits was because Dr. Collette was prescribing a narcotic (Tramadol), and Mr. D's level of pain. Most of the sessions were of a normal 10 minute length, but many extended up to 45 minutes when Dr. Collette was acting as a counsellor.

125. Dr. Collette referred Mr. D to Dr. Heran, and Dr. Owen James, a psychologist.

126. Dr. Collette has substantial experience treating longshore workers. His opinion was that Mr. D working as a checker was "unsustainable and unreasonable". He specifically disagreed with Mr. Worthington-White that Mr. D ought to try and retrain as a checker. He was of the view that Mr. D was physically unable to fulfill the duties required of a checker. He also disagreed with the suggestion that Mr. D could work part time as a checker. He further opined that it was "not in the cards" that Mr. D could return to work as a longshoreman.

127. Dr. Collette's report set forth the following diagnoses:

"It is my professional opinion that Mr. D incurred the following as a result of the subject accident on August 30, 2015:

1. Neck and upper back soft tissue injuries.
2. Contusions to his sternum and ribs bilaterally.
3. Moderate to severe lower back soft tissue injuries as well as spinal segment unit disruption (disc/hernia/sequestration of L5, S1, and resultant instability of L4-L5 requiring stabilization.
4. As a result of the above surgery and lack of improved [sic]

and lack of success resulting severe persistent chronic lower back syndrome and chronic pain.

5. Due to the above chronic pain and the negative effects on his interpersonal, social, recreational and vocational life the development of a resultant Adjustment Disorder progressing to a Major Affective Depressive Disorder and Chronic Anxiety and ongoing fears for the future.

6. Mild concussion.

7. Gastric upset due to pain medications.”

128. Dr. Collette’s prognoses for Mr. D are guarded. With respect to his physical recovery, he stated:

“PROGNOSIS

With regard to the neck and upper back soft tissue injuries as well as the contusions to the sternum and rib region, his prognosis is good. He has completely recovered from these injuries.

With regard to his chronic back pain (as a result of the injuries and incurred failed result of his surgery), my prognosis is VERY guarded. The patient experiences extreme frustration and dissatisfaction with his current quality of life. He has incurred many psychological stressors including the breakdown of his marriage, and his inability to engage in most physical activities and the loss of his job. The patient reports significant difficulties dealing with the above understandably.

It is my opinion that all of this had been a reaction to the events and sequelae of the injuries incurred as a result of his chronic pain. Given the time that has progressed from the time of the subject accident to present which would be over six years and his lack of improvement physically it has been my experience that by now, this patient's pain would be regarded as permanent and chronic.

129. With respect to Mr. D’s mental and emotional recovery Dr. Collette stated:

“With regard to his emotional issues and depression my prognosis is also linked to his chronic pain. As we have seen he has certainly recovered to a certain degree psychologically and learning to cope better with his losses due to his injury. I would defer to my psychology colleagues to further comment on this but would say that he remains at risk of future episodes of depression and anxiety.”

130. Dr. Collette agreed during cross-examination that Mr. D had experienced some improvement with respect to the injuries to his neck, upper back, and sternum, but that

his lower back, chronic pain, gastric upset from medication, and psychological issues were ongoing.

131. Dr. Collette's evidence was that Mr. D is currently taking Tramacet for pain, and Ativan for relationship issues. The side effects of Tramacet include euphoria, mild dizziness, nausea, and a confused state. The side effects of Ativan include dizziness, balance issues, confusion, blurred vision, and sedation.

(b) Dr. Navraj Heran

132. Dr. Heran was qualified as an expert in neurosurgery. He prepared a report dated May 10, 2019. He obtained his MD degree in 1998. He has been practicing as a neurosurgeon since 2007. He performs about 700 to 800 surgeries a year, of which approximately two thirds are back surgeries. In particular, he has performed five to seven spinal surgeries per week since 2007.

133. Dr. Heran confirmed that Mr. D had been referred to him by Dr. Collette, and that he was Mr. D's treating neurosurgeon.

134. After reviewing the imaging, and performing a physical examination, Dr. Heran recommended that Mr. D undergo a bilateral discectomy at L5-S1, which involves removal of the hard part of protruding disc, and perhaps the insertion of an interspinous device, a Medtronic DIAM, essentially a cage, at L4-5 to stabilise that area. Dr. Heran said in cross examination that the goal of this type of surgery is to have 70% of the patients who improve by 70%.

135. Dr. Heran performed surgery on Mr. D on February 24, 2017. He performed the discectomy as planned, and inserted the Medtronic DIAM as had been contemplated.

136. Mr. D was next seen by Dr. Heran on March 31, 2017. He said his back felt "50% better". He said that he was standing up straighter, but complained of cramping in his left leg. He said the right leg was "quite good".

137. Mr. D was next seen by Dr. Heran on May 10, 2019. At that time, Mr. D said that his back was 50 to 60% better.

138. Dr. Heran noted that although the surgery had improved Mr. D's condition, it did not result in "marked improvement or resolution of his symptoms." Further, he stated that "I am unable to convince myself that, at this point in time, his symptoms are remediable through any further surgical interventions."

139. In Dr. Heran's opinion, Mr. D was relegated to "sedentary to intermittent, and at most, medium level duties, so long as he is able to take breaks, adjust his postures and positions and ask for help when required". He believes that Mr. D is employable, with these provisions being established.

140. Dr. Heran's opinion was that Mr. D is at increased risk for exacerbations and aggravations of his condition, and noted that he had three major events since the surgery. As well, he opined that Mr. D was at increased risk for accelerated degeneration of his spine, although none had been noted at the date of his report.

141. Dr. Heran was of the opinion that provision should be made for Mr. D to receive "active modality therapies" in the future "inclusive of acupuncture, massage, physiotherapy, chiropractics, and a swimming program".

142. Dr. Heran was cross examined as to Mr. D's remaining capacity to work. He said in cross examination that sedentary to light duties would be ideal. He categorically disagreed with the suggestion that Mr. D could become a checker. He said that such a position would be "untenable" for Mr. D.

143. Dr. Heran was shown a job description of a checker, with photos showing a checker at work, contained in the report of Ms. Louise Craig. Ms. Craig conducted a functional capacity evaluation of Mr. D at the request of his counsel. He said that Mr. D would "fail miserably" if employed in such a capacity. He said that he found the photos "scary", and that the activities depicted were not compatible with Mr. D being employable. He agreed, however, that there was no harm in an attempt to see if Mr. D could in fact do that work.

144. Dr. Scott Paquette, a neurosurgeon retained by the respondent, was critical of Dr. Heran's decision to operate, and to install the Medtronic DIAM. He opined that Mr. D's chronic low back pain was likely due to that surgery, and the installation of the DIAM device. Dr. Heran vigorously defended his decisions. He noted that he had substantially more surgical experience than Dr. Paquette and further, that Dr. Paquette appeared not to have reviewed the consent form signed by Mr. D which indicated that installation of the DIAM device was always contemplated, depending on what was observed during the surgery.

145. Regardless, counsel advised at the outset of this proceeding that Dr. Heran's surgery was agreed not to have broken the chain of causation. Accordingly, the difference of opinion between Drs. Heran and Paquette is moot.

146. Dr. Heran's opinion regarding Mr. D's prognosis is as follows:

Prognosis and Recommendations

Mr. D presents with persisting pain in his mid and low back as the dominant source of problems. Any symptoms in his neck and upper torso as well as secondary headaches have resolved. He has had appropriate treatments over the course of his care, inclusive of now maintaining with self-directed exercises and intermittently through practitioners. There is nothing to support that any further interventions are required at this point in time in a definitive manner. Notably, the surgery that he had did improve him. It did not, however, result in marked improvement or resolution of his symptoms.

...

In the future, Mr. D is at increased risk for exacerbations and aggravations, much like he has already had with the three major ones since the surgery. He is at increased risk for accelerated degeneration in his spine, albeit a recent MRI scan did not show any progressive changes as of yet. His course will probably be more protracted. He is also at a small risk of fracture of the DIAM device which could increase his pain. This happens rarely. He is unlikely to have any accelerated arthritis in his mid-back or any other sites or symptoms that he has had in the past.

(c) Ms. Louise Craig

147. Ms. Craig was qualified as an expert in physiotherapy, functional capacity evaluations, and future care. Ms. Craig prepared two reports, the first dated June 19, 2019, and the second dated April 29, 2021.

148. Ms. Craig said in her first report:

“A functional capacity evaluation (FCE) or work capacity evaluation is a systematic process of developing and measuring an individual’s capacity to dependably sustain performance in response to broadly defined work demands. The evaluation includes a wide range of test activities utilizing standardized, research based and peer-accepted test procedures in addition to work simulation activities when required. The evaluation is typically completed over a one day period in order to simulate a full workday and to assess the individual’s durable work capacity.”

149. In Ms. Craig’s opinion, “Mr. D does not demonstrate the capacity to meet the physical demand of his pre-collision occupation as Longshore Worker (National Occupational Classification Number 7451.0.” This is because he has a reduced capacity for sitting or standing for longer periods, has reduced balance, has reduced capacity to assume and hold low-level and stooped body positions, and has reduced strength capacity. Because of Mr. D’s physical limitations, Ms. Craig said that the scope of once viable occupations available to him were reduced, leaving him with reduced competitive employability.

150. In her second report, Ms. Craig offered the same opinion regarding Mr. D’s capacity to work as a longshoreman, and the same reasons for why he lacked that capacity.

151. Ms. Craig opined that Mr. D was not capable of working as a checker. She reviewed, and appended to her report, a detailed job description for that position, prepared by the BC Maritime Employers Association, with photographs. I previously referred to this material when discussing Dr. Heran’s evidence. Ms. Craig said in cross-examination that her biggest concern with Mr. D working as a checker would be his positional capacity, that is, his ability to work in the required variety of physical conditions.

152. Ms. Craig noted that in his email to Mr. Gary Worthington-White following his functional capacity evaluation, Mr. D stated that he had not fully recovered nine days later. He complained of pain for a number of days well outside his normal complaints. Ms. Craig

said that this was not how a functional capacity evaluation was supposed to end. She said being sore for three to five days would be more the norm.

153. Ms. Craig was of the view that Mr. D's self-reporting of his pain were generally consistent across tests, but that he had difficulty understanding the functional pain scale she utilised, and mostly used a straight numeric scale. The functional pain scale, as the name suggests, rates pain based on its effect on functionality. This was the subject of cross-examination. Ms. Craig's opinion regarding Mr. D's self-reporting pain differs from that of Mr. Worthington-White's. I will say more about that when I discuss Mr. D's credibility.

(d) Dr. John Pullyblank

154. Dr. Pullyblank was qualified as an expert in psychology, rehabilitation psychology, vocational rehabilitation, vocational rehabilitation, and residual employability. He prepared a report dated April 7, 2020. He saw Mr. D for approximately 10 hours of interviews and psychological testing in September 2019. In addition, he spoke to Mr. D for about one hour in March 2020.

155. Dr. Pullyblank was of the opinion that Mr. D's barriers to employment include:

- pain and physical limitations;
- cognitive problems;
- emotional problems;
- reduced stamina and activity tolerance;
- requirements for accommodations in the workplace;
- limited credentials.
-

156. Dr. Pullyblank opined that Mr. D did not meet the physical requirements for a longshore worker, but that he was capable of lighter work, but he had limited formal education or other credentials to apply for that work. However, in Dr. Pullyblank's opinion, "he [Mr. D] had good tested abilities and is a reasonable candidate for education/training, within the confines of his physical capacity and emotional functioning".

157. Dr. Pullyblank diagnosed Mr. D with a Major Depressive Disorder in 2019. He noted some improvement in 2020, at which time he diagnosed a Major Depressive Disorder, in partial remission. This means that he continued to be affected by some residual symptoms, but that these symptoms were insufficient for a full diagnosis. He agreed in cross-examination that grief was "in the mix", but thought the bigger issue was the "existential crisis" brought on by Mr. D's physical limitations, and inability to work.

158. Dr. Pullyblank also diagnosed Mr. D with a Generalized Anxiety Disorder in 2019, and again in 2020.

159. Dr. Pullyblank's opinion was that a "significant source" of Mr. D's depression and anxiety were his accident injuries and associated pain, as well as his inability to work in his physically demanding field. He was also of the opinion that these issues were a "major

stressor” on Mr. D’s relationship with Ms. M, and “more likely than not contributed to the decline of his functioning as a partner and parent”.

160. Dr. Pullyblank noted that Mr. D’s pain and emotional distress will continue to set a limit on advancement and earnings.

161. In Dr. Pullyblank’s opinion, Mr. D could benefit from the following services going forward:

- occupational therapy;
- psychology;
- pain management;
- vocational rehabilitation.

162. Dr. Pullyblank had the following to say in his report regarding Mr. D’s post-accident vocational functioning:

Post-accident vocational functioning. Employability is often discussed as having 3 levels; competitively employable, employable, and unemployable. Competitively employable refers to someone who is capable of entering the job market on their own and obtaining and retaining employment without

assistance or accommodations. Employable is generally described as someone who can work at some level if the right accommodations and assistance is provided. Unemployable is generally used to refer to someone whose barriers to employment are so severe that it is not realistic, or may even be harmful, for them to work. In my opinion, Mr. D falls in the employable category, but with increased risk of periods of unemployment due to his employment barriers.

In my opinion, Mr. D is a candidate for vocational rehabilitation to establish a new post-accident career. Post-accident career options are unlikely in my opinion to achieve the same level of working hours and earnings that Mr. D achieved pre-accident.

...

In terms of Mr. D's pre-accident [sic] employment, it is my opinion that he could consider working in selected positions as a Sales Clerk. Issues that will need to be considered in such a job include not having to do a lot of material handling with stock, and being able to change positions. Pay information is shown above.

In my opinion, Mr. D is a candidate for education and retraining to broaden his career choices and earnings. It should be noted that individuals with chronic pain such as Mr. D tend to have difficulty with prolonged sitting. This in turn

tends to complicate their educational and training efforts as studying is inherently sedentary and requires prolonged sitting. In my experience, the result can be the need to take a reduced course load and/or part-time studies, which in turn prolongs the educational/training period. My suggestion is to allow for education/training to take about twice as long as is normally the case, which, of course, further delays future earnings.

Prior to training, it is my opinion that Mr. D will need to upgrade his formal education from Grade 8 to Grade 12, which will also allow him to set up his study space and routine before formal training. I would estimate the need for 6 months to a year for this training, which is provided free in BC.

163. After completing Grade 12, Dr. Pullyblank was of the view that Mr. D could consider various retraining programs such as bookkeeping/payroll management, accounting certificate, general business certificate program, accounting diploma, and financial services management diploma.

164. Various other potential jobs for Mr. D were reviewed with Dr. Pullyblank in cross examination, including power engineer, drafting technologist, construction safety officer, and bylaw enforcement officer. These potential occupations were recommended by Ms. Colleen Quee Newell, a vocational consultant retained by the respondent. The only one that Dr. Pullyblank thought might be "on the table" given Mr. D's limitations was that of construction safety officer. However, he would defer to an occupational therapist as to whether Mr. D had the actual capacity to do that job.

(e) Dr. Trent Faraday

165. Dr. Faraday was qualified as a general medical practitioner, with a special interest in the treatment of musculoskeletal injuries, and occupational medicine. Approximately 90% of Dr. Faraday's practice is devoted to the treatment and management of musculoskeletal injuries. Dr. Faraday was a medical adviser to WorkSafeBC for approximately 16 years. In that role, he provided advice on more than 5000 cases regarding the management of disabilities.

166. Dr. Faraday offered the following opinion regarding Mr. D's prognosis for work:

"Mr. D has not demonstrated the capacity to return to his pre-accident work as a Longshore Worker on a durable basis, even when attempting to return to lighter duty work. I would consider his attempt to return to light duty work in 2018 to be a failed gradual return to work. Given that he is not likely to have any further significant improvement in his accident-related injuries and pain symptoms, it is unlikely that he will develop the tolerance to resume work as a Longshore Worker in any capacity on a durable basis (consistent, regular basis). Specifically, even the lighter duties longshore duties that have been suggested for him, such as "checking", require him to get in and out of trucks, drive around on bumpy surfaces,

and strain his neck and back to look up at containers, all of which aggravate his neck and back pain.

An additional stressor with respect to returning to work as a Longshore Worker involves the uncertainty of whether he will get work on any given day. From his mental health perspective, this uncertainty will likely cause more depressive and anxiety symptoms, as opposed to having a regular predictable work schedule. Going forward, it would be more appropriate for him to retrain for a light duty position that he can physically manage without aggravating his pain symptoms, and with consistent/predictable hours. Work in sales has been identified as an area that he would be capable of performing, and for which he has an aptitude.

I am concerned about Mr. D's ability to perform work as he gets older. In my experience, individuals with chronic pain have a reduced ability to tolerate work demands as they age, including issues such as decreased efficiency, decreased competitiveness, and early retirement."

167. One of Dr. Faraday's recommendations was that Mr. D participate in a pain management program. This was in part because he was of the view that continued use of Tramacet was not a viable long term strategy, due to the addictive quality of that drug, which he thought should be used on an intermittent, and not a regular basis.

168. Another of Dr. Faraday's recommendations was that Mr. D participate in a regular exercise program. He was of the view that Mr. D was deconditioned.

169. Dr. Faraday was referred to the apparent improvements in Mr. D functionality noted by Dr. Quee Newell, a vocational consultant retained by the respondent. He agreed that Mr. D had shown signs of improvement. However, he said that some were not significant. Some, such as an improved ability to crouch, however were. He agreed that Mr. D had the potential for further improvement in the future, but said that he probably did not have the potential for any future significant improvement.

THE RESPONDENT'S EXPERT MEDICAL AND VOCATIONAL EVIDENCE

(a) Dr. Scott Paquette

170. Dr. Paquette was qualified as an expert in neurosurgery. He provided a report dated December 4, 2019.

171. Dr. Paquette's opinion was that Mr. D "incurred a soft tissue injury to his lower back at the time of the motor vehicle accident". As previously discussed, he was critical of Dr. Heran's decision to perform surgery on Mr. D. As previously discussed, however, that disagreement is moot.

172. Dr. Paquette gave the following opinion regarding Mr. D's physical and occupational prognosis:

“Mr. D’s pain has become chronic, and is unlikely to improve his functional status at this stage. Given the chronicity of his symptoms, I think it is highly unlikely that even if a source of his pain was identified, that it could be reversed to allow him to return to his previous job as a longshoreman. It is possible that Mr. D could retrain to work in a more sedentary position. However, his limited education would make this a challenge without retraining.”

(b) Mr. Gary Worthington-White

173. Mr. Worthington-White was qualified as expert in occupational therapy, work capacity evaluation, and cost of future care assessment. He prepared two reports, dated June 30, 2020, and October 16, 2020. The latter report is a responsive report to the report of Ms. Craig.

174. Mr. Worthington-White saw Mr. D on June 7, 2020 from 900AM until 330PM. Much of this time was taken up with physical work capacity testing.

175. Mr. Worthington-White is of the opinion that Mr. D is “capable of LIMITED, and LIGHT, and some MEDIUM strength work, provided the physical demands are in keeping with the limitations noted in his report.”

176. Mr. Worthington-White’s opinion was that although Mr. D was not physically able to return to working as a longshoreman, he did have residual functional capacity, and that he could likely perform the job of checker. He stated in his first report the following:

“If there are checking jobs that would be available to Mr. D, such work is typically has lighter strength demands and involve sitting, standing and walking and possibly some driving. Mr. D would likely be capable of typical job tasks and if available to him, this may be one possible position for him to attempt.”

177. In cross-examination, Mr. Worthington-White repeatedly agreed that first, the tasks performed by checkers were numerous and varied, and second, that he could not say whether, given his functional limitations, Mr. D could perform any particular task that needed to be performed by a checker any given day. This was because he was either unaware of Mr. Ds tolerances for particular tasks, or because he was unaware of the physical tasks that the checker position demanded, although he refused to concede the latter. He ultimately agreed with the suggestion that Mr. D working as a checker was “maybe a possibility”, which he agreed is different that “likely” as he stated in his report.

178. Mr. Worthington-White was of the view that Mr. D perceives himself as more physically disabled than was observed during functional testing. He also said that at the end of the testing day that “reported high levels of pain did not appear regularly consistent with pain presentation”.

179. Mr. Worthington-White was of the opinion that it was likely that there was a psycho-emotional component to Mr. D’s presentation. He deferred further comment to the

appropriate experts. He did think, however, that Mr. D would benefit from intervention for pain management, in addition to improving his general physical conditioning, aerobic capacity, and overall activity tolerances.

180. Included as part of Mr. Worthington-White's report was an email to him from Mr. D following the day of testing on June 7, 2020. Mr. D detailed a litany of physical complaints, and said that he was still not fully recovered nine days later. Mr. Worthington-White agreed that he was unable to say what tests or physical activities caused these complaints. He disagreed that these complaints should have been more fully discussed in his report.

(e) Dr. Colleen Quee Newell

181. Dr. Quee Newell was qualified as an expert in vocational assessment rehabilitation. She prepared a report dated September 1, 2020.

182. Ms. Quee Newell outlined several specific jobs that she thought were suitable for Mr. D, including that of checker. She stated:

“Based on Mr. D's self-report at the time of this assessment as well as the reviewed medical and functional capacity information, assuming Mr. D benefits from the rehabilitation recommendations as they pertain to addressing his chronic pain symptoms, it is my opinion that Mr. D retains the capacity to retrain with a longshore union to work as a checker.”

183. Significantly, however, she agreed in cross-examination that her opinion as to Mr. D's vocational prospects were subject to the “frailties” of the functional capacity evaluation she relied upon, that of Mr. Worthington-White.

184. Ms. Quee Newell said that the checker position was sought after by those who could not or did not want to do heavier work. However, in order to work at that job, she agreed that Mr. D's physical abilities would have to improve. She agreed with the proposition put to her in cross-examination that “he [Mr. D] can do it, if he gets good enough to do it”.

(f) Dr. Olli Sovio

185. Dr. Sovio was qualified as an expert in orthopaedic surgery, and the treatment of orthopaedic injuries. He prepared a report dated October 9, 2019.

186. Dr. Sovio agreed that the motor vehicle accident caused Mr. D's back injury.

CREDIBILITY

187. The respondent puts the credibility of the claimant in issue as regards, in particular, his reporting of his self-assessed levels of pain and function. The respondent says the following:

“3. The respondent submits that the email from Mr. D to Gary Worthington White following the June 7, 2020 assessment should be treated with some caution in light of evidence heard from both Mr. Worthington White and Ms. Craig related to the plaintiff’s self-assessments of function not being in line with observed function as well as his reports of pain being inaccurate with reference to the scale used by the assessor.

4. The respondent submits that level of pain following the assessment is not a basis for concluding that a further graduated return to work in the role of a checker would be inappropriate, particularly if it occurs after the recommended further treatments namely resuming venlafaxine and attending a pain program.”

188. Madam Justice Dillon summarized some of the factors to be considered by me in assessing credibility in *Bradshaw v. Stenner*, 2010 BCSC 1398. She said:

[186] Credibility involves an assessment of the trustworthiness of a witness’ testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness’ evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness’ testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

189. The email which detailed Mr. D’s physical condition following the assessment by Mr. Worthington-White does not stand on its own. It is supported by Mr. D’s evidence at the hearing, and the evidence of his mother, Ms. L, who picked him up from the assessment. Her evidence as to what she observed at that time, and when running errands several days later, fully supports the tenor and content of Mr. D’s email to Mr. Worthington-White.

190. I also had the opportunity to listen to and observe Mr. D during several hours of testimony. He is not a complainer. He gave his evidence in a forthright manner. He also exhibited no overt pain behaviours, such as wincing or moaning, although he was at times clearly physically uncomfortable.

CAUSATION

191. No issue is taken by the respondent that Mr. D's physical and psychological injuries were caused by the accident, and I find that to be so.

NON-PECUNIARY DAMAGES

192. *Stapley v. Hesjet*, 2006 BCAA 34 is a useful starting point in an analysis of what an appropriate award of non-pecuniary damages should be. The Court of Appeal said:

45 Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, supra, at 637 is a helpful reminder: Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (Thornton at p. 284 of S.C.R.).

46 The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and

- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54).

193. Claimant's counsel made the following submissions:

"The consequences to Mr. D resulting from the Collision have been severe and the prognosis given by all the experts who have assessed him is that he will likely never be pain free, nor will he ever be free of his psychological symptoms. There has been a significant alteration in Mr. D's lifestyle including a termination of nearly all of his recreational activities, loss of a career which he loved and took immense pride in doing, and the loss of his family unit. A shadow has been visited upon Mr. D's life which will never be removed. No aspect of Mr. D's life has gone unblemished from his Collision injuries."

194. I agree with this summary. While the respondent does take issue as to what the future holds for Mr. D, it does not seriously challenge the notion that the consequences of the accident upon Mr. D have been profound. I also note that the respondent called no evidence to rebut the evidence as to Mr. D's psychological injuries testified to by all of the lay witnesses, and any number of experts, including in particular Drs. Collette and Pullyblank.

195. Claimant's counsel referred to cases which they say establish a range of non-pecuniary damages of \$180,000 to approximately \$310,000, and argue for an award of \$250,000. Respondent's counsel referred to cases which he says establish a range of \$110,000 to \$165,000, and argues for an award of \$150,000.

196. Having heard all the evidence, both expert and lay, and considering all the factors set out by the Court of Appeal in *Stapley*, I assess the claimant's non-pecuniary damages at \$210,000.

PAST AND FUTURE LOSS OF INCOME

197. The test for whether Mr. D should be awarded damages for past and future income losses is the same: whether there is a real and substantial possibility of loss. See, for example, *Morlan v. Barrett*, 2012 BCCA 66, *Reilly v. Lynn*, 2003 BCCA 49, and *Brundidge v. Bolton*, 2018 BCSC 343. Assessing the claimant's damages is not a matter of calculation. Rather, it is a matter of judgement.

(a) Past loss of income

199. The parties are agreed that Mr. D missed a substantial amount of work following the accident because of the injuries he sustained. The issue is the amount of his loss.

200. Mr. Benning, an economist retained by the claimant, gave evidence as to Mr. D's past and future income losses. With respect to the losses to the date of the hearing, Mr. Benning based his opinion on the average earnings of a longshoreman who was a union

member. After deducting income tax and Employment Insurance premiums, Mr. Benning calculated a net loss of \$490,733.

201. Ms. Ren, an economist retained by the respondent, also gave evidence as to Mr. D's past and future income losses. With respect to the losses to the date of the hearing, Ms. Ren took a different approach than did Mr. Benning. Ms. Ren used as a basis for her calculations Mr. D's earnings in the three years prior to the accident, and then compared those to the earnings of an average BC longshore worker. Ms. Ren calculated a net loss of \$388,400, allowing for Mr. D to earn 75% of the average.

202. In my view, Mr. Benning fails to take into account the fact that Mr. D would not have been a union member for the entire period in issue. There was in fact no evidence before me as to when that would likely have occurred but for the accident.

203. In my view, Ms. Ren's approach fails to take into account the fact that Mr. D's income would in all likelihood have continued to increase, as he moved up the boards, eventually becoming a union member.

204. After considering all of the evidence, both lay and expert, I assess Mr. D's net past loss of income at \$450,000.

(b) Future loss of income

(i) Introduction

205. In *Rosvold v. Dunlop*, 2001 BCCA 1, [2001] B.C.J. No. 4, the Court of Appeal summarized the approach that a trier of fact should take in assessing damages for loss of income earning capacity:

[8] The most basic of those principles is that a Claimant is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a Claimant's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a Claimant's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

[9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonetti* [1996] 3

S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

...

[11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995) 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a Claimant's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the Claimant if the accident had not happened with the Claimant's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.); *Parypa v. Wickware supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

206. My task in assessing the claimant's future losses has been described as "gazing into a crystal ball". Above all else, I must strive to be fair. The process is more art than science. See, for example, *Shapiro v. Dailey*, 2012 BCCA 128.

207. The parties are in agreement that the two most important issues in assessing Mr. D's future losses are determining the present value of what he would have earned but for the accident, including his pension loss, and determining his residual earning capacity. I will deal with each issue in turn.

(ii) What would Mr. D have earned but for the accident

208. Mr. Benning provided an opinion regarding Mr. D's future losses, addressing both the loss of earnings and benefits, and the loss of pension benefits. The key assumption relied upon by Mr. Benning was that Mr. D would have earned what the average unionised longshore worker would have earned. Based on that assumption, and further assuming that Mr. D would have worked to the age of 65, Mr. Benning is of the opinion that the present value of Mr. D's future income and benefit losses total \$2,113,445.

209. Mr. Benning opines, based upon retirement at age 65, that the present value of Mr. D's lost pension benefits, including a "Retiring Allowance" is \$429,833.

210. An alternate calculation by Mr. Benning assumed Mr. D working full time to age 65 as a reach stacker. Based on that assumption, Mr. Benning opines that Mr. D would have earned \$2,378,637. This calculation appears to have been for illustrative purposes only, as it was not referred to in submissions.

211. Ms. Ren also provided an opinion regarding the present value of Mr. D's future losses, again addressing both the loss of earning and benefits, and the loss of pension

benefits. The key assumption relied upon by Ms. Ren was Mr. D would have earned 75% of the average earnings of an average BC longshore worker. This is the same assumption she made when assessing Mr. D's income losses to the date of the hearing, and is based on his earnings three years prior to the accident. Based on that assumption, and further assuming that Mr. D would have worked to the age of 65, Ms. Ren is of the opinion that the present value of Mr. D's future income and benefit losses total \$1,585,085.

212. Ms. Ren calculates the present value of the lost pension benefits, including the retirement allowance, assuming retirement at the age of 64 to be \$445,251. Counsel advised me that the amount would be slightly less to the age of 65.

213. The claimant urges me to consider, and take into account when assessing Mr. D's losses, whether Mr. D would have retired at the age of 70, which would have the effect of increasing the present value of Mr. D's earnings without the accident by approximately \$300,000.

214. Mr. D's evidence was that prior to the accident he had not given any thought to when he might retire. However, he also said that he would likely have worked beyond the age of 65 for both the camaraderie and the money, and that there were perhaps 50 to 100 longshore workers actively working past the age of 65. Both Mr. H and Mr. SD's evidence supported the claimant's position that working beyond the age of 65 was common amongst longshoreworkers.

215. The respondent urges me to find that Mr. D would have retired at the age of 62, which would have the effect of reducing the present value of Mr. D's earnings without the accident by approximately \$170,000. The argument for assuming a retirement age of 62 is based upon Ms. Ren's evidence regarding the retirement age of males employed in the public sector with a pension. I reject Ms. Ren's assumption. Simply put, as noted by Mr. Benning, Mr. D is not a "public sector" employee, and the categorisation is not of assistance. Regardless, in light of the evidence of Mr. D, I do not accept the proposition that he would have retired at the age of 62.

216. There is insufficient evidence before me to determine at precisely what age Mr. D would have retired. I do think it likely, however, that he would have worked beyond the age of 65.

217. It is common ground that the longer Mr. D worked, the smaller his pension benefit would be.

218. In summary, the claimant says that Mr. D would have earned, but for the accident, and including the pension loss, approximately \$2.54 million had he worked to the age of 65, and approximately \$2.75 million, including the pension loss, had he worked to the age of 70.

219. In summary, the respondent says that Mr. D would have earned, but for the accident, and including the pension loss, approximately \$2 million had he worked to the age of 65, and approximately \$1.75 million if her worked to the age of 62.

220. As I said earlier, I had some difficulties with the assumptions used by each of the economists. After taking those concerns into account, and considering all of the evidence, I am of the view that Mr. D would have earned \$2.3 million but for the accident, and that the value of his lost pension is \$425,000.

(iii) What is Mr. D's residual earning capacity

221. Assessing Mr. D's residual earning capacity is perhaps the most difficult issue in this case. Much of the evidence, both expert and lay, bears on that issue. I reviewed the evidence previously in this award, and do not intend to do so again. Based on the evidence, my general findings with respect to Mr. D's vocational capabilities and limitations are as follows:

- (a) Mr. D is incapable of returning to his former employment as a longshoreman. This is due to both his physical and psychological injuries, and his physical and psychological limitations;
- (b) Mr. D is incapable of returning to any work on the docks without accommodations being made;
- (c) Because of Mr. D's education and experience, alternative career options are limited;
- (d) Although Mr. D could possibly retrain for a new career, it would take longer to do that given his physical and psychological limitations;
- (e) Mr. D's career options are limited to sedentary, at most, medium level duties. However, work accommodations would still have to be made;
- (f) Mr. D is likely limited to part time work, whatever career he might embark on.

222. Various alternative jobs were suggested by the various experts as being suitable for Mr. D going forward. None were explored in the evidence and submissions more thoroughly than of the position of checker. As previously noted, the checker position is actually several positions, requiring different physical abilities. A checker has to be able to do all the tasks associated with the job.

223. The only two witnesses who gave any weight to the possibility of Mr. D becoming a checker were Mr. Worthington-White, and Ms. Quee Newell. However, the opinions they expressed in their reports were seriously undermined on cross examination. In short, and as previously noted, Mr. Worthington-White did not, in my opinion, have sufficient evidence before him as to what was actually required to be a checker. Ms. Quee Newell

said that she relied on Mr. Worthington-White's opinion that Mr. D would in fact be capable of doing the job.

224. I do not think that Mr. D can return to work as a checker. I prefer the evidence of Dr. Collette, Dr. Heran, Dr. Pullyblank, Dr. Faraday, and Ms. Craig, to the evidence of Mr. Worthington-White, and Ms. Quee Newell. I also note the evidence of Messrs. H, SD and RH, none of whom thought Mr. D could work as a checker. The question remains, however, as to whether he might return to work as a checker if he was accommodated in the workplace.

225. Mr. H made it clear that Mr. D would not be accommodated for a condition arising from a non-workplace injury. The respondent says that this is discriminatory. The respondent submits that it is open to Mr. D to seek assistance from the Canadian Human Rights Tribunal so that he is not discriminated against. The respondent further submits as follows:

“17. The Supreme Court of Canada described a union and employer's duty to accommodate in *Central Okanagan School District No. 23 v. Renaud* 1992 2 SCR 970 as requiring more than minor inconvenience but not requiring undue interference with their business or undue expense.

18. The respondent submits that Mr. D's employer and union are legally obligated and can take steps to allow Mr. D to return to work in a specific checker position which meets his functional profile namely no back or neck bending or stooping, no walking on slippery surfaces and variation between sitting and standing.”

226. The respondent then says that Mr. D's with accident income should be calculated on the basis of, inter alia, a 30% reduction on the basis that Mr. D's employers will not discriminate against him and will accommodate him.

227. There is no evidence before me on the issue of whether as to in fact Mr. D's employers indeed have a duty to accommodate him, the prospects of success of an application to the Canadian Human Rights Tribunal, and in particular whether accommodating Mr. D would result in undue interference with the employers' business, or undue expense. In the circumstances, I decline to give any weight to the prospect of Mr. D being accommodated when assessing his residual earning capacity.

228. Various other potential occupations were suggested by the experts as being appropriate for Mr. D. Some would require retraining, and others not. Dr. Pullyblank specifically opined that, without retraining Mr. D might work as a salesclerk, the median income for which is \$13.85 per hour. Dr. Pullyblank also thought that with retraining, Mr. D might become an accounting clerk, a bookkeeper, a marketing assistant or a financial planner. I once again note Mr. D's evidence regarding his difficulties with mathematics, which militate against those occupations being suitable for Mr. D.

229. Ms. Quee Newell suggested that, without retraining, Mr. D could work as a cashier, parts clerk, security guard, or storage facility attendant. The median wage for a parts clerk is \$21.76 per hour. The median wage for the other three positions is about \$15.00.

230. Ms. Quee Newell also suggested that, with retraining, Mr. D could work as a power engineer, drafting technologist, construction safety officer, or bylaw enforcement officer. On cross-examination, she was not able to provide the exact functional requirements for each job, and it is therefore very difficult for me to consider whether indeed these occupations are open to Mr. D.

231. Quite apart from the occupations which might be open to Mr. D, and what they might pay, are the likelihoods that he would be restricted to working part time, and would require accommodation in the workplace.

232. The claimant submits that I should take a mathematical approach to determining Mr. D's residual earning capacity. The suggested calculation is based on prospective employment at \$17.50 per hour, the median of the likely jobs opined by Dr. Pullyblank, plus benefits at 10%, and then adjusting Ms. Ren's suggested multiplier of 7.917 to 6.00, to correctly account for the likely date of this award, part time work, and extended absences. This would result in Mr. D's residual earning capacity being valued at \$240,240.

233. The respondent submits that I should take a broader view of the matter, and that I discount without accident income by 50% to account for the possibility that Mr. D upgrades his education, and obtains other employment to the age of 64. Respondent's counsel further submits that without accident income should be discounted by a further 20% to account for the possibility that Mr. D obtain a direct entry position, and work at it to the age of 64.

234. It is my view that Mr. D's residual earning capacity is not capable of being mathematically calculated. I say this because of his limited education, the various employment barriers that he has, the likely need to be accommodated no matter what he does, the likelihood of part time employment, and the uncertainty that even if he is retrained, he will be successful in whatever new endeavour he pursues. That said, Mr. D has shown determination in returning to school, had a long history of working hard, and struck me as motivated to work in some capacity in the future. I assess Mr. D's residual earning capacity at \$460,000, or 20% of his income but for the accident.

235. I therefore assess Mr. D's future loss of income at \$1,840,000, being my assessment of his earnings but for the accident of \$2.3 million, less \$460,000.

COST OF FUTURE CARE

236. The test for recoverability of future care costs was set out by Madam Justice Garson in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Writing for the Court she stated:

I do not consider it necessary, in order for a Claimant to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43, 63.

237. I must assess, and not calculate, future care costs. See *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at paragraph 21.

238. Ms. Craig provided two opinions regarding future care costs, one dated June 19, 2019, and a second dated April 29, 2021. In the first report, the cost of one time care recommendations ranged from \$15,409.57 to \$18,437.97, and the annual cost of ongoing recommendations ranged from \$7151.64 to \$7580.82. Using Mr. Benning's cost of care multiplier of 25.252, the present value of the ongoing recommendations is \$161,054 to \$170,720, The total of the costs of future care items in the first report are therefore \$176,463 to \$189,157.

239. In her second report, Ms. Craig opined that the cost of the one-time care recommendations was \$11,701.27 to \$57,650.76. The annual cost of the ongoing recommendations was \$5113.75 to \$5779.14. Using once again Mr. Benning's multiplier, the present value of those costs is \$113,791 to \$128,597. The total of the cost of care items in the second report are therefore \$125,498 to \$186,427.

240. Mr. Worthington-White provided an opinion in response to the first report, but did not himself provide a comprehensive set of recommendations, nor did he respond to the second report. The claimant submits that the differences between the two experts are de minimis. I agree with that submission. The claimant also submits that Ms. Craig's second opinion incorporates the most recent recommendations of the medical experts and thus provides a more "full summary" of Mr. D's needs. I also agree with that submission.

241. Based upon Mr. Worthington-White's opinion, the respondent takes particular issue with the following future ongoing care cost items. The figures set out are the annual cost of each item, and its present value, based on Mr. Benning's multiplier:

(a) yard and home care assistance (\$1432/\$31,864)

(b) handyman services (\$1125/\$25,033).

242. The respondent says that these items may not be required if Mr. Ds housing situation changes. I agree that this is a possibility, particularly as Mr. D's children get older, but by no means a certainty.

243. The respondent also takes particular issue with the nursing contingency, which has a one-time cost of \$8820. Mr. Worthington-White did not provide an opinion responsive to Ms. Craig's regarding the need for nursing care.

244. The claimant submits that an appropriate award for cost of future care is \$170,000. The respondent submits that an appropriate award for future care is \$84,896. I assess future care costs at \$140,000, based on the claimant's claim of \$170,000, less \$30,000, being roughly half of the yard, home care, and handyman services.

SPECIAL DAMAGES

245. The parties have agreed upon special damages in the sum of \$17,000.

STATUTORY DEDUCTIONS

(a) Introduction

246. Mr. D's total award is to be reduced by various deductible amounts which are defined in 148.1 (1) of the Regulation which provides:

(a) paid or 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) paid or payable under section 148,

(c) paid or payable under Part 7 or under legislation of another jurisdiction that provides compensation similar to benefits,

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

(e) paid or 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, unless

(i) the insured elects not to claim compensation under section 10

(2) of the *Workers Compensation Act* and the insured is not entitled to compensation under section 10 (5) of that Act, or

(ii) the Workers' Compensation Board pursues its right of subrogation under section 10 (6) of the *Workers Compensation Act*,

(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) paid or payable to the insured under a certificate, policy or plan of insurance providing third party legal liability indemnity to the underinsured motorist,

(h) paid or payable under vehicle insurance, wherever issued and in effect, providing underinsured motorist protection for the same occurrence for which underinsured motorist protection is provided under this section,

(i) paid or payable to the insured under any benefit or right or claim to indemnity, or

(j) paid or able to be paid by any other person who is legally liable for the insured's damages.

247. The underlying purpose of the statutory deductions is to prevent double recovery. See, for example, *Gurniak v. Nordquist*, 2003 SCC 59.

248. The burden is on the respondent to prove the deductible amounts, and further, to prove that benefits that are ongoing will continue into the future. See, for example, *SPW v. ICBC*, a 2007 UMP decision by Arbitrator Boskovich.

(b) Agreed deductible amounts

249. It was agreed by the parties that the following payments previously made to Mr. D are deductible:

(a) \$160,621-the amount paid pursuant to section 20 of the Regulation;

(b) \$8055-employment insurance payments;

(c) \$64,196-Canada Pension Plan disability payments;

(d) \$26,756.83-benefits paid pursuant to Part 7 of the Regulation ("Part 7 Benefits"), net of MSP payments;

(e) \$527.04-Great West Life extended health benefits;

250. These amounts total \$260,155.87

(b) Disputed deductible amounts

247. The following deductions are claimed by the respondent, and are disputed by the claimant:

- (i) \$84,896.56-future Part 7 Benefits;
- (ii) \$1016 per month-future CPP disability benefits until a return to work.
- (ii) \$37,642-advanced from the Plan, characterized by the respondent as “short term disability benefits”, and by the claimant as “loans”;
- (iv) \$141,687-advanced from the Plan, characterized by the respondent as “long term disability benefits”, and by the claimant as “loans”.

(i) Future Part 7 Benefits

248. No evidence was called by the respondent to prove the \$84,896.56 amount claimed as a deduction for future Part 7 Benefits will in fact be paid.

249. The claimant takes the position, regardless, that discretionary benefits are not deductible, relying upon *Tench v. Van Bugnum*, 2021 BCSC 501. Using Ms. Craig’s recommendations as a framework for analysis, the claimant submits that the only deductible future amounts are for non-discretionary items, being occupational therapy, and two medications. These total \$3136.68. I accept that these are the amounts properly deducted regarding future Part 7 Benefits.

(ii) Future CPP disability benefits

250. Mr. D concedes that he will receive CPP disability benefits until he finishes school, and once again starts work, in another year from now. This would amount to further payments of \$12,198.36 (12 X \$1016). The respondent did not take issue with this calculation, and I accept that this is the proper amount to be deducted.

(iii) and (iv) Payments from the Plan

251. Mr. D was, at the time of the accident, an eligible member of the Plan. It provided a variety of benefits to injured members. However, “SECTION 5-WAGE LOSS BENEFITS” provided as follows:

“Where a Plan Member... suffers a Disability as a result of a... an injury or sickness for which a third party is, or may be, directly or indirectly, either in whole or in part legally, liable, no Extended Health benefits, Weekly Indemnity Benefits, [or] Long Term Disability benefits (“Benefits”) are payable under the ILWU-Employer Association Health and Benefit Plan.

252. Section 5 goes on to provide that a member who is entitled to compensation from a third party may apply for an “advance payment of any Benefit”, and that the advance is to be repaid in full.

253. On September 3, 2015 Mr. D entered into a “Reimbursement Agreement” with the Waterfront Employers of BC. It provided, inter alia, that in consideration of the Plan advancing to him weekly indemnity and long term disability benefits, he would pursue any reasonable claim against a third party, and repay any monies that he received.

254. “Third party” is defined in neither the Plan, nor in the “Reimbursement Agreement”.

255. Pursuant to Section 5 of Plan, and the Reimbursement Agreement, Mr. D received a total of \$179,239.

256. The respondent’s position is as follows:

“The respondent submits that Mr. D is under no obligation to repay monies to ILWU Employer Association Health and Benefit Plan as the assignment and agreement relate to monies paid on behalf of a third party. Any money awarded herein is received on account of a first party insurance contract.”

257. The claimant disagrees. He says that he was not entitled to receive benefits from the Plan, and chose to borrow funds in the manner prescribed.

258. I disagree with the position taken by the respondent for three reasons.

259. First, the respondent is a third party to both the Plan and the Reimbursement Agreement. There is no language to qualify that.

260. Second, quite apart from the respondent in this proceeding, there were two third parties that were or may have been liable for Mr. D’s injuries, namely, the driver and owner of the other vehicle in the accident. That Mr. D did not recover anything from them does not alter their liability.

261. Third, section 148.1 (1) (i) of the Regulation provide that the payment must be “paid or payable to the insured under any benefit or right or claim to indemnity”. In my opinion, Section 5 of the Plan does not establish that Mr. D was entitled to any of those things.

262. The claimant’s position is supported by the language of the Plan, and the language of the Reimbursement Agreement. It is also supported by the evidence of Mr. D, and Mr. RH.

263. In the result, I am of the view that the amounts paid by the Plan to Mr. D are not deductible pursuant to the s.148.1 (1) of the Regulation.

264. Accordingly, I find that the sum of \$275,490.91 is deductible from Mr. D's award.

SUMMARY

265. In summary, I make the following assessments:

- (a) non-pecuniary damages-\$210,000
- (b) loss of income to the date of the hearing-\$450,000
- (c) pension loss-\$425,000
- (d) residual earning capacity-\$1,840,000
- (e) cost of future care-\$140,000
- (c) special damages-\$17,000

266. These total \$3,082,000.

267. From that must be deducted the statutory deductions of \$275,490.91

268. The net award to the claimant is therefore \$2,806,509.09

OTHER MATTERS

269. If the claimant wishes to make further submissions regarding tax gross up, management fees, and costs and disbursements, those should be made in writing within 14 days. The respondent will then have 14 days to respond, and the claimant will have 7 days to reply.

270. I wish to thank counsel for their assistance with this matter.

Mark Tweedy

Mark Tweedy, C. Med, C. Arb.
Arbitrator

